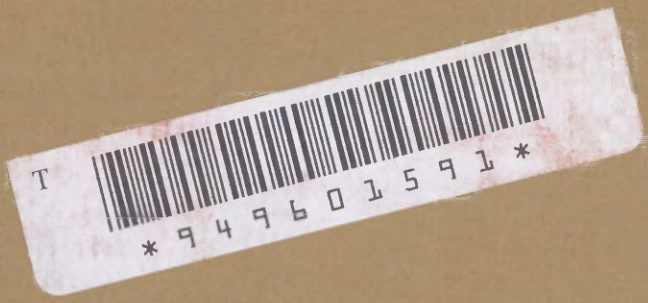

UNITED STATES REPORTS

VOLUME 455

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1981

JANUARY 13 THROUGH MARCH 24, 1982

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
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Errata

382 U. S. IV, n. 2, line 4: "1966" should be "1965".
444 U. S. 944, line 7: Add "and 199 U. S. App. D. C. 359, 624 F. 2d 196".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., 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.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, 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, effective *nunc pro tunc* October 1, 1981, *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, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, 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.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

WASHINGTON *v.* CHRISMAN

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 80–1349. Argued November 3, 1981—Decided January 13, 1982

An officer of the Washington State University police department observed a student (Overdahl) leave a dormitory carrying a bottle of gin; because Overdahl appeared to be under 21 (the minimum age allowable under Washington law for possession of alcoholic beverages), the officer stopped him and asked for identification. After Overdahl requested to retrieve his identification from his dormitory room, the officer accompanied him there and, while remaining in the open doorway watching Overdahl and his roommate (respondent), noticed what he believed to be marihuana seeds and a pipe lying on a desk in the room. The officer then entered the room, confirmed that the seeds were marihuana and determined that the pipe smelled of marihuana, and informed Overdahl and respondent of their rights under *Miranda* v. *Arizona*, 384 U. S. 436. The students indicated their willingness to waive such rights, and after the officer asked if there were any other drugs in the room, respondent gave him a box which contained more marihuana and cash. After a second officer arrived, the students voluntarily consented, orally and in writing, to a search of the room, which yielded more marihuana and another controlled substance. Respondent was later charged with two counts of possessing the controlled substances and, after denial of his pretrial motion to suppress the evidence seized in the room, was convicted. The Washington Court of Appeals affirmed, but the Washington Supreme Court reversed. It held that, although Overdahl had been placed under lawful arrest, the officer had no right to enter the room and

seize contraband without a warrant, and that because the students' consent to the subsequent search of the room was the fruit of the officer's initial entry, the contraband found during that search should also have been suppressed.

Held:

1. It is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested. Once the officer had placed Overdahl under lawful arrest, he was authorized to accompany him to his room for the purpose of obtaining identification. The officer had a right to remain literally at Overdahl's elbow at all times, and thus a showing of "exigent circumstances" was not necessary to warrant the officer's accompanying Overdahl from the public corridor of the dormitory into his room. Pp. 5–7.

2. The Fourth Amendment did not prohibit the seizure of the contraband discovered in plain view in the room. Regardless of where the officer was positioned with respect to the room's threshold when he observed the contraband, and regardless of whether he may have hesitated briefly at the doorway before entering the room, he did not abandon his right to be in the room with Overdahl whenever he considered it essential. Accordingly, he had the right to act as soon as he observed the seeds and pipe. Pp. 8–9.

3. The seizure of other contraband taken from respondent's room pursuant to his valid consent did not violate the Fourth Amendment. He voluntarily produced marihuana after being informed of his *Miranda* rights, and he then consented to the search of the room. Thus, all of the seized contraband was properly admitted at his trial. Pp. 9–10.

94 Wash. 2d 711, 619 P. 2d 971, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined., *post*, p. 10.

Ronald R. Carpenter argued the cause and filed briefs for petitioner.

Robert F. Patrick argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed by *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak* for Americans for Effective Law

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether a police officer may, consistent with the Fourth Amendment, accompany an arrested person into his residence and seize contraband discovered there in plain view.

I

On the evening of January 21, 1978, Officer Daugherty of the Washington State University police department observed Carl Overdahl, a student at the University, leave a student dormitory carrying a half-gallon bottle of gin. Because Washington law forbids possession of alcoholic beverages by persons under 21, Wash. Rev. Code § 66.44.270 (1981), and Overdahl appeared to be under age,[1] the officer stopped him and asked for identification. Overdahl said that his identification was in his dormitory room and asked if the officer would wait while he went to retrieve it. The officer answered that under the circumstances he would have to accompany Overdahl, to which Overdahl replied "OK."

Overdahl's room was approximately 11 by 17 feet and located on the 11th floor of the dormitory. Respondent Chrisman, Overdahl's roommate, was in the room when the officer and Overdahl entered. The officer remained in the open doorway, leaning against the doorjamb while watching Chrisman and Overdahl. He observed that Chrisman, who was in the process of placing a small box in the room's medicine cabinet, became nervous at the sight of an officer.

Enforcement, Inc.; and by *David Crump* and *Michael C. Kuhn* for the Legal Foundation of America et al.

Timothy K. Ford filed a brief for the American Civil Liberties Union of Washington as *amicus curiae* urging affirmance.

[1] In addition, University regulations prohibit possession of alcoholic beverages on University property. Tr. 4, 34. At the suppression hearing, Officer Daugherty testified that, because of these regulations, he would have stopped Overdahl without regard to his age. *Id.*, at 6–7.

Within 30 to 45 seconds after Overdahl entered the room, the officer noticed seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing. From his training and experience, the officer believed the seeds were marihuana and the pipe was of a type used to smoke marihuana. He entered the room and examined the pipe and seeds, confirming that the seeds were marihuana and observing that the pipe smelled of marihuana.

The officer informed Overdahl and Chrisman of their rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966); each acknowledged that he understood his rights and indicated that he was willing to waive them. Officer Daugherty then asked whether the students had any other drugs in the room. The respondent handed Daugherty the box he had been carrying earlier, which contained three small plastic bags filled with marihuana and $112 in cash. At that point, Officer Daugherty called by radio for a second officer; on his arrival, the two students were told that a search of the room would be necessary. The officers explained to Overdahl and Chrisman that they had an absolute right to insist that the officers first obtain a search warrant, but that they could voluntarily consent to the search. Following this explanation, which was given in considerable detail, the two students conferred in whispers for several minutes before announcing their consent; they also signed written forms consenting to the search of the room. The search yielded more marihuana and a quantity of lysergic acid diethylamide (LSD), both controlled substances.

Respondent was charged with one count of possessing more than 40 grams of marihuana and one count of possessing LSD, both felonies under Wash. Rev. Code § 69.50.401(c) (1976) (current version at Wash. Rev. Code § 69.50.401(d) (1981)). A pretrial motion to suppress the evidence seized in the room was denied; respondent was convicted of both counts. On appeal, the Washington Court of Appeals affirmed the convictions, upholding the validity of the search. 24 Wash. App. 385, 600 P. 2d 1316 (1979).

The Supreme Court of Washington reversed. 94 Wash. 2d 711, 619 P. 2d 971 (1980). It held that, although Overdahl had been placed under lawful arrest and "there was nothing to prevent Officer Daugherty from accompanying Overdahl to his room," the officer had no right to enter the room and either examine or seize contraband without a warrant. The court reasoned there was no indication that Overdahl might obtain a weapon or destroy evidence, and, with the officer blocking the only exit from the room, his presence inside the room was not necessary to prevent escape. Because the officer's entry into the room and his observations of its interior were not justified by "exigent circumstances," the seizure of the seeds and pipe were held not to fall within the plain-view exception to the Fourth Amendment's warrant requirement. The court went on to hold that because the students' consent to the subsequent search of the room was the fruit of the officer's initial entry, the contraband found during that search should also have been suppressed.[2]

Three justices dissented. They concluded it was reasonable for a police officer to keep an arrested person in sight at all times; accordingly, the officer had a legitimate reason for being in the place where he discovered the contraband, and was entitled, under the plain-view doctrine, to seize it.

We granted certiorari, 452 U. S. 959 (1981), and reverse.

II

A

The "plain view" exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize

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[2] The opinion of the Supreme Court of Washington repeatedly refers to the Fourth Amendment and our cases construing it. The court did not, however, cite Art. I, § 7, of the Washington Constitution, which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." While respondent, relying on this latter provision, urges that we "treat the case as having been decided under the Washington State Constitution," it is clear that the court did not rest its decision on an independent state ground.

what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *Harris* v. *United States*, 390 U. S. 234 (1968). Here, the officer had placed Overdahl under lawful arrest, and therefore was authorized to accompany him to his room for the purpose of obtaining identification.[3] The officer had a right to remain literally at Overdahl's elbow at all times; nothing in the Fourth Amendment is to the contrary.

The central premise of the opinion of the Supreme Court of Washington is that Officer Daugherty was not entitled to accompany Overdahl from the public corridor of the dormitory into his room, absent a showing that such "intervention" was required by "exigent circumstances." We disagree with this novel reading of the Fourth Amendment. The absence of an affirmative indication that an arrested person might have a weapon available or might attempt to escape does not diminish the arresting officer's authority to maintain custody over the arrested person. See *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109–110 (1977); *United States* v. *Robinson*, 414

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[3] The trial court found that it was Overdahl who proposed to retrieve the identification, and, after being informed that Officer Daugherty would have to accompany him, agreed to the officer's presence. Respondent nevertheless claims that Overdahl was "coerced" to return to the room in violation of the Fifth Amendment, because he was in custody and had not yet been advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). He argues that since identification would serve as proof of Overdahl's age—an element of the offense for which he had been arrested—the officer could not ask him for this "incriminating" evidence without first advising him of his rights to counsel and to remain silent.

Assuming, *arguendo*, that Overdahl's Fifth Amendment rights were violated in some fashion, this does not vitiate the legality of his arrest, nor does it undercut the officer's right to maintain custody over an arrested person. The failure to give "*Miranda* warnings" might preclude introduction of incriminating statements made by Overdahl while in custody; but no such statements are even peripherally involved in this case. The act of going to the room was neither "incriminating" nor a "testimonial communication." Cf. *Fisher* v. *United States*, 425 U. S. 391, 408–414 (1976).

U. S. 218, 234–236 (1973). Nor is that authority altered by the nature of the offense for which the arrest was made.

Every arrest must be presumed to present a risk of danger to the arresting officer. Cf. *United States* v. *Robinson*, *supra*, at 234, n. 5. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious. Although the Supreme Court of Washington found little likelihood that Overdahl could escape from his dormitory room, an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation. Cf. *New York* v. *Belton*, 453 U. S. 454, 458–460 (1981); *United States* v. *Robinson*, *supra*, at 235.

We hold, therefore, that it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested.[4]

It follows that Officer Daugherty properly accompanied Overdahl into his room, and that his presence in the room was lawful. With restraint, the officer remained in the doorway momentarily, entering no farther than was necessary to keep the arrested person in his view. It was only by chance that, while in the doorway, the officer observed in plain view what he recognized to be contraband. Had he exercised his undoubted right to remain at Overdahl's side, he might well have observed the contraband sooner.

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[4] Indeed, were the rule otherwise, it is doubtful that an arrested person would ever be permitted to return to his residence, no matter how legitimate the reason for doing so. Such a rule would impose far greater restrictions on the personal liberty of arrested individuals than those occasioned here.

B

Respondent nevertheless contends that the officer lacked authority to *seize* the contraband, even though in plain view, because he was "outside" the room at the time he made his observations. The Supreme Court of Washington noted that "[t]he record is in conflict as to whether Officer Daugherty stood in the doorway and then entered the room or whether, while in the doorway, he was in fact in the room." 94 Wash. 2d, at 716, 619 P. 2d, at 974. It concluded, however, that it "need not . . . let the result be determined by such niceties," and assumed for purposes of its decision that the officer "was in the room at the time he observed the seeds and pipe." *Ibid.* We agree that on this record "such niceties" are not relevant. It is of no legal significance whether the officer was in the room, on the threshold, or in the hallway, since he had a right to be in any of these places as an incident of a valid arrest.

Respondent's argument appears to be that, even if the officer could have stationed himself "inside" the room had he done so immediately upon Overdahl's entry, his 30- to 45-second hesitation was fatal; and that having chosen to remain in the doorway, the officer was precluded from proceeding further to seize the contraband. We reject this contention. Respondent's argument, if accepted, would have the perverse effect of penalizing the officer for exercising more restraint than was required under the circumstances. Moreover, it ignores the fundamental premise that the Fourth Amendment protects only against unreasonable intrusions into an individual's privacy. See *Katz* v. *United States*, 389 U. S. 347 (1967).

The "intrusion" in this case occurred when the officer, quite properly, followed Overdahl into a private area to a point from which he had unimpeded view of and access to the area's contents and its occupants. His right to custodial control did not evaporate with his choice to hesitate briefly in the doorway rather than at some other vantage point inside the

room. It cannot be gainsaid that the officer would have had unrestricted access to the room at the first indication that he was in danger, or that evidence might be destroyed—or even upon reassessment of the wisdom of permitting a distance between himself and Overdahl.

We therefore conclude that, regardless of where the officer was positioned with respect to the threshold, he did not abandon his right to be in the room whenever he considered it essential. Accordingly, he had the right to act as soon as he observed the seeds and pipe.[5] This is a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy. The Fourth Amendment does not prohibit seizure of evidence of criminal conduct found in these circumstances.[6]

III

Since the seizure of the marihuana and pipe was lawful, we have no difficulty concluding that this evidence and the contraband subsequently taken from respondent's room were properly admitted at his trial. Respondent voluntarily produced three bags of marihuana after being informed of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). He then consented, in writing, to a search of the room, after being advised that his consent must be voluntary and that he had an absolute right to refuse consent and demand procurement of a search warrant. The seizure of the drugs pursuant

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[5] The circumstances of this case distinguish it significantly from one in which an officer, who happens to pass by chance an open doorway to a residence, observes what he believes to be contraband inside. See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 585–589 (1980); *Johnson* v. *United States*, 333 U. S. 10, 14–15 (1948).

[6] In light of our disposition, we need not decide whether, as the Washington Court of Appeals held, the likelihood that the contraband would be destroyed constituted an "exigent circumstance" independently justifying the officer's entry into the room.

to respondent's valid consent did not violate the Fourth Amendment.[7]

The judgment of the Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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

The arrest in this case was made on the street. It gave Officer Daugherty no authority to enter Overdahl's quarters without his consent. But Overdahl wanted to retrieve his identification from his room; if Daugherty was willing for Overdahl to do so, he could properly condition his consent on accompanying Overdahl and keeping him under close surveillance. Accordingly, when Overdahl entered his room, Daugherty could stay as close to Overdahl as he deemed necessary to protect himself and maintain control over his arrestee. If it had been reasonably necessary for Daugherty to enter the room in pursuit of these purposes, he would not have violated any of Overdahl's Fourth Amendment rights. It is also plain enough that he was entitled to stand in the doorway and keep Overdahl in sight.

The record in this case is clear, however, that Daugherty did not leave the doorway and enter the room in order to protect himself or maintain control over Overdahl. Daugherty's uncontradicted testimony was that he entered the room solely to confirm his suspicion that the seeds and the seashell he had observed from the doorway were marihuana seeds and a seashell pipe that had been used to smoke marihuana.[1]

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[7] We reject as frivolous the respondent's contention that, on the facts presented here, Officer Daugherty was required to knock and announce his presence at the doorway prior to entering the room.

[1] The officer testified at the suppression hearing that he had entered the room for just one purpose—"to affirm my beliefs and to seize the articles, if they were [contraband]." Tr. 44.

Daugherty made no claim that he entered the room as a necessary incident to the permission given Overdahl to secure his identification. Rather, he claimed that the entry was justified because of what was in plain view on the desk inside the room.

The plain-view doctrine, however, does not authorize an officer to enter a dwelling without a warrant to seize contraband merely because the contraband is visible from outside the dwelling. This is settled law. As the Court said in *Coolidge* v. *New Hampshire*, 403 U. S. 443, 468 (1971):

> "[P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has re-

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The officer also testified:

"I stood in the doorway without entering, actually physically entering the room. . . . I was standing against the doorjamb. . . . I was not in the room. I was in the doorway." *Id.*, at 7, 9, 21.

The trial court stated in its memorandum opinion that "[t]he officer stood in the doorway, and watched [Overdahl]," observed the seashell pipe and the seeds from the doorway, and "*then entered* the room and examined the pipe and seeds closely." App. 47 (emphasis added). Similarly, the Court of Appeals stated: "*Prior to entering the room*, the officer saw from his vantage point in the doorway what he believed to be contraband. *Only at that time, did he cross the threshold* and seize the pipe and marijuana seeds." 24 Wash. App. 385, 389, 600 P. 2d 1316, 1318 (1979) (emphasis added).

As I read the Supreme Court of Washington's opinion, the court held that whether or not the officer had physically entered the room by standing in the doorway, his presence in the doorway was sufficiently intrusive that his observations were unlawful unless he could justify his presence. The court concluded that the officer should have remained outside the room, since there was no indication that Overdahl was likely to escape, destroy evidence, or seize a weapon.

> peatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor* v. *United States*, 286 U. S. 1; *Johnson* v. *United States*, 333 U. S. 10; *McDonald* v. *United States*, 335 U. S. 451; *Jones* v. *United States*, 357 U. S. 493, 497–498; *Chapman* v. *United States*, 365 U. S. 610; *Trupiano* v. *United States*, 334 U. S. 699."[2]

Coolidge emphasized that the plain-view doctrine applies only after a lawful search is in progress or the officer was otherwise legally present at the place of the seizure. The initial intrusion must be justified by a warrant, by an exception to the warrant requirement, or by other circumstances authorizing his presence.

If a police officer passing by an open door of a home sees incriminating evidence within the house, his observation may provide probable cause for the issuance of a search warrant. Yet the officer may not enter the home without a warrant unless an exception to the warrant requirement applies.[3] This rule is fully supported by *Coolidge* v. *New Hampshire*, *supra*, and the cases cited in the Court's opinion in that case.[4]

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[2] One of the many cases cited in *Coolidge* to illustrate this point was *Taylor* v. *United States*, 286 U. S. 1 (1932). The police officers in *Taylor* had looked through a small opening in a garage and had seen cardboard cases inside the garage that they believed contained contraband liquor. The officers could smell the odor of whiskey coming from the garage. Yet this Court held that they had violated the Fourth Amendment by entering the garage and seizing the whiskey without obtaining a warrant.

[3] There is no contention in this case that by entering the dormitory building the officer had already entered respondent's dwelling. The officer himself testified at trial that a dormitory room is considered a "private area" but that the public has access to the hallway. Tr. 37.

[4] *Harris* v. *United States*, 390 U. S. 234 (1968), is not to the contrary. There, an automobile had been impounded and towed to a police station. The windows of the car were open, the doors were unlocked, and it had begun to rain. The Court held that the Fourth Amendment did not require the police officer to obtain a warrant before opening the door of the car to roll up the car window, for this was simply "a measure taken to protect the car while it was in police custody." *Id.*, at 236. *Harris* did not rely on the plain-view doctrine to justify the warrantless intrusion into the

Any contrary rule would severely undercut the protection afforded by the Fourth Amendment, for it is the physical entry of the home that is the chief evil against which the Amend-

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automobile. The Court emphasized that the police officer had already lawfully entered the car when he saw incriminating evidence in plain view inside the car and seized it:

"*Once the door had lawfully been opened*, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Ibid.* (emphasis added).

The broad wording of the second sentence quoted above has apparently created some confusion regarding the plain-view doctrine. One commentator remarked:

"The hardest conceptual problem attending the plain view doctrine is to grasp that it is not a universal statement of the right of a policeman to seize after seeing something in open view; it is rather a limited statement of that right in one of its several instances—following a valid intrusion. . . . The source of difficulty is that the harbinger case, *Harris* v. *United States*, spoke carelessly in universal terms: 'It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure. . . .'

"Seeing something in open view does not, of course, dispose . . . of the problem of crossing constitutionally protected thresholds." Moylan, The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle, 26 Mercer L. Rev. 1047, 1096 (1975).

See also 1 W. LaFave, Search and Seizure § 2.2(a) (1978).

This problem of "crossing constitutionally protected thresholds" without a warrant is easily resolved if the so-called "automobile exception" to the warrant requirement applies, for that exception justifies a warrantless entry into the automobile to seize contraband in plain view inside the car. In *Colorado* v. *Bannister*, 449 U. S. 1 (1980), for example, we held that an officer's observation of items in plain view inside a car did not violate the occupant's Fourth Amendment rights. *Id.*, at 4, n. 4. The officer's observations could therefore be used to establish probable cause to search the car. Yet it was also necessary to justify the warrantless intrusion into the car. We did not seek to justify that intrusion by relying on the plain-view doctrine. Rather, we held that the warrantless entry was justified under the "automobile exception" to the warrant requirement. See *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Carroll* v. *United States*, 267 U. S. 132 (1925).

ment is directed. *Payton* v. *New York*, 445 U. S. 573, 585–586 (1980); *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972).

The Court does not purport to hold otherwise. There is apparent agreement that the seizure in this case is consistent with the Fourth Amendment only if the officer was legally where he was when he made the seizure. Neither does the Court purport to find that Daugherty's presence in the room was in fact necessary to effectuate the arrest or to protect the officer. To do so would require contradicting Daugherty's own testimony. Rather, the Court asserts that Daugherty *could* have remained at Overdahl's elbow, that he *could* have entered the room wholly apart from his observation of the seeds, and that the case should be judged as though Daugherty had found it necessary to enter the room for the purpose of guarding Overdahl. Under this approach, the officer's presence at the desk where he made the seizure should be deemed lawful.

The difficulty with this is not merely that the officer himself did not suggest that he entered the room to maintain control over Overdahl or to protect himself. The more basic issue is whether the Court is justified in concluding as a matter of law that the circumstances would have warranted an entry for those reasons. The trial court did not sustain the entry on this basis, and the Washington Supreme Court expressly held that there were no exigent circumstances connected with Overdahl's arrest and custody that gave Daugherty sufficient reason to enter the room. I am unwilling on this record to decide as a matter of law what is more properly to be resolved as a matter of fact; and I would not differ with the state court on the record we now have before us.

I perceive no justification for what is in effect a *per se* rule that an officer in Daugherty's circumstances could always enter the room and stay at the arrestee's elbow. This would be true only if there were no limits to the conditions which

the officer could attach when he permits his charge to return to his room. I doubt, for example, that he could insist that he be permitted to search desks, closets, drawers, or cabinets. Likewise, he should not be permitted to invade living quarters any more than is necessary to maintain control and protect himself. Bright-line rules are indeed useful and sometimes necessary, cf. *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109–110 (1977); *United States* v. *Robinson*, 414 U. S. 218, 234–236 (1973), but the Court should move with some care where the home or living quarters are involved.

This is not a case, therefore, involving punishing an officer for entering a room for the wrong reason when there was a perfectly legal basis for his doing so. See *Scott* v. *United States*, 436 U. S. 128, 138 (1978); *Massachusetts* v. *Painten*, 389 U. S. 560, 564–565 (1968) (WHITE, J., dissenting). This is a case where the record before us does not demonstrate that it was necessary for the officer to enter the room as an incident to his custodial arrest. He thus had no legal basis for being in the room unless his sighting of the seeds permitted him to be there. The Court agrees that the plain-view doctrine does not provide that justification.

For me, the case comes down to whether the trial court properly found that the officer's observation from the doorway furnished exigent circumstances for the entry and seizure. The Washington Supreme Court did not review this finding of the trial court, but it should have before setting the conviction aside. I would therefore vacate and remand for this purpose.

UNITED STATES *v.* VOGEL FERTILIZER CO.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 80–1251. Argued November 3, 1981—Decided January 13, 1982

Section 1561(a) of the Internal Revenue Code of 1954 limits a "controlled group of corporations" to a single surtax exemption. Section 1563(a)(2) provides that a "controlled group of corporations" includes a "brother-sister controlled group," defined as "[t]wo or more corporations if 5 or fewer persons . . . own . . . stock possessing (A) at least 80 percent of the total combined voting power . . . or at least 80 percent of the total value . . . of each corporation, and (B) more than 50 percent of the total combined voting power . . . or more than 50 percent of the total value . . . of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation." An implementing Treasury Regulation interprets the statutory term "brother-sister controlled group" to mean two or more corporations if the same five or fewer persons own "*singly or in combination*" the two prescribed percentages of voting power or total value. One shareholder, Vogel, owned 77.49 percent of the outstanding stock of respondent Vogel Fertilizer Co. Another shareholder, Crain, owned the remaining 22.51 percent. Vogel also owned 87.5 percent of the voting power in Vogel Popcorn Co. and 90.66–93.42 percent of the value of its stock. Crain owned no stock in Vogel Popcorn. Respondent claimed refunds for taxes paid in certain tax years for which it did not claim a full surtax exemption, asserting that respondent and Vogel Popcorn were not members of a controlled group and respondent was therefore entitled to a full surtax exemption for each taxable year. When the Internal Revenue Service disallowed the refund claims, respondent filed suit for a refund in the Court of Claims, which held that respondent was entitled to a refund.

Held: The implementing Treasury Regulation is invalid as not being a reasonable interpretation of the statute, which, as indicated by its language, structure, and legislative history, was intended to apply only where each person whose stock is taken into account for purposes of the 80-percent requirement owns stock in each corporation of the group. Pp. 22–35.

(a) Since the Regulation was promulgated only under the Commissioner of Internal Revenue's general authority to prescribe all needful rules and regulations, it is owed less deference than a regulation issued under a specific grant of authority to define a statutory term. Moreover, the Regulation purports to do no more than add a clarifying gloss on a term already specifically defined by Congress. Pp. 24–25.

(b) The statutory language is in closer harmony with respondent's interpretation than with the Regulation in question. The term the statute defines—"brother-sister controlled group"—connotes a close horizontal relationship *between* two or more corporations, suggesting that the same indivisible group of five or fewer persons must represent 80 percent of the ownership of each corporation. This interpretation is strengthened by the structure of the statute, which suggests that precisely the same shareholders must satisfy both the 80-percent and 50-percent requirements. Since under Part (B)'s 50-percent requirement, stock ownership is taken into account only to the extent it is "identical," that part of the statutory test clearly includes a common ownership requirement. And the mere fact that there are no words in Part (A) explicitly requiring each shareholder to own stock in each corporation does not mean that the Regulation's interpretation, "singly or in combination," must be accepted as reasonable. Pp. 25–26.

(c) The statute's legislative history makes it plain that the Regulation is not a reasonable statutory interpretation, where it appears that the intended targets of § 1563(a)(2) were groups of *interrelated* corporations—corporations characterized by *common* control and ownership—and that Congress intended the *80-percent* requirement, as an expanded version of the former statute, to be the primary requirement for defining the interrelationship between two or more corporations, the 50-percent requirement being an additional proviso necessary in light of the expanded number of shareholders whose overlapping interests were to be considered. The "singly or in combination" provision of the Regulation is clearly incompatible with this intent. Pp. 26–32.

225 Ct. Cl. 15, 634 F. 2d 497, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 35.

Stuart A. Smith argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, *Acting Assistant Attorney General Murray*, *Ernest J. Brown*, and *William A. Friedlander*.

Ronald C. Jensen argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging affirmance were filed by *David Elliot Weisman* and *W. G. Dinning, Jr.*, for Dixie Realty Co., Inc., et al.; and by *Michael A. Williams* for the Minnequa Bank of Pueblo et al.

JUSTICE BRENNAN delivered the opinion of the Court.

Section 1561(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 1561(a), limits a "controlled group of corporations" to a single corporate surtax exemption.[1] Section 1563(a)(2) provides that a "controlled group of corporations" includes a "brother-sister controlled group," defined as "[t]wo or more corporations if 5 or fewer persons . . . own . . . stock possessing (A) at least 80 percent of the total combined voting power . . . or at least 80 percent of the total value . . . of each corporation, and (B) more than 50 percent of the total combined voting power . . . or more than 50 percent of the total value . . . of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation."[2]

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[1] For two of the tax years in question in this case—the years ending November 30, 1973 and 1974—the Code exempted the first $25,000 of corporate earnings from the federal surtax on corporate income, 26 U. S. C. § 11(d) (1970 ed.), and for the third year—ending November 30, 1975—the Code exempted the first $50,000. 26 U. S. C. § 11(d). For each of these tax years, however, § 1561 of the Code limited the members of a "controlled group" of corporations to a single shared surtax exemption. Amendments to the Code in 1978 replaced the surtax exemption with a graduated five-step tax rate structure on taxable corporate income. 26 U. S. C. § 11 (1976 ed., Supp. III). Now members of a controlled group must share a single rate schedule. 26 U. S. C. § 1561(a) (1976 ed., and Supp. III).

[2] The full text of § 1563(a)(2) is:

"Brother-sister controlled group

"Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing—

"(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

"(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation."

The interpretation of the statutory provision by Treas. Reg. § 1.1563–1(a)(3), 26 CFR § 1.1563–1(a)(3) (1981), is that the "term 'brother-sister controlled group' means two or more corporations if the same five or fewer persons . . . own . . . *singly or in combination*" the two prescribed percentages of voting power or total value.[3] The question presented is whether the regulatory interpretation—that the statutory definition is met by the ownership of the prescribed stock by five or fewer persons "singly or in combination"—is a reasonable implementation of the statute or whether Congress intended the statute to apply only where each person whose stock is taken into account owns stock in each corporation of the group.

I

Respondent Vogel Fertilizer Co. (Vogel Fertilizer), an Iowa corporation, sells farm fertilizer products. During the tax years in question—1973, 1974, and 1975—Vogel Fertil-

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[3] The full text of the Treasury Regulation is:

"*Brother-sister controlled group.*

"(i) The term 'brother-sister controlled group' means two or more corporations if the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of the rules contained in paragraph (b) of § 1.1563–3), singly or in combination, stock possessing—

"*(a)* At least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock in each corporation; and

"*(b)* More than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

"(ii) The principles of this subparagraph may be illustrated by the following examples:

"*Example (1).* The outstanding stock of corporations P, Q, R, S, and T, which have only one class of stock outstanding, is owned by the following unrelated individuals:

[Footnote 3 is continued on p. 20]

izer had only common stock issued and outstanding and Arthur Vogel (Vogel) owned 77.49 percent of that stock. Richard Crain (Crain), who is unrelated to Arthur Vogel, owned the remaining 22.51 percent. Vogel Popcorn Co. (Vogel Popcorn), another Iowa corporation, sells popcorn in both

Individuals	Corporations					Identical ownership
	P	Q	R	S	T	
A	60%	60%	60%	60%	100%	60%
B	40%	.....	.....	.....	.....	.....
C	.....	40%	.....	.....	.....	.....
D	.....	.....	40%	.....	.....	.....
E	.....	.....	.....	40%	.....	.....
Total	100%	100%	100%	100%	100%	60%

Corporations P, Q, R, S, and T are members of a brother-sister controlled group.

"*Example (2).* The outstanding stock of corporations U and V, which have only one class of stock outstanding, is owned by the following unrelated individuals:

Individuals	Corporations		Identical ownership
	U	V	
F	5%	.....	.....
G	10%	.....	.....
H	10%	.....	.....
I	20%	.....	.....
J	55%	55%	55%
K	.....	10%	.....
L	.....	10%	.....
M	.....	10%	.....
N	.....	10%	.....
O	.....	5%	.....
Total	100%	100%	55%

Corporations U and V are not members of a brother-sister controlled group because at least 80 percent of the stock of each corporation is not owned by the same five or fewer persons."

the wholesale and retail markets. For the tax years in question Crain owned no stock in Vogel Popcorn. Vogel, however, held 87.5 percent of the voting power, and between 90.66 percent and 93.42 percent of the value of Vogel Popcorn's stock.[4]

Vogel Fertilizer did not claim a full surtax exemption on its tax returns for the years in question,[5] believing that Treas. Reg. § 1.1563–1(a)(3) barred such a claim. But when the United States Tax Court, in 1976, held that Treas. Reg. § 1.1563–1(a)(3) was invalid because the statute did not permit the Commissioner to take a person's stock ownership into account for purposes of the 80-percent requirement unless that person owned stock in each corporation within the brother-sister controlled group, *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T. C. 798 (1976), rev'd, 548 F. 2d 501 (CA4 1977), Vogel Fertilizer filed timely claims for refunds, asserting that Vogel Fertilizer and Vogel Popcorn were not members of a controlled group and that Vogel Fertilizer was therefore entitled to a full surtax exemption for each taxable year. The Internal Revenue Service disallowed the claims and respondent brought this suit for a refund in the United States Court of Claims. The Court of Claims held that Vogel Fertilizer and Vogel Popcorn did not

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[4] The remainder of the Vogel Popcorn stock—voting preferred stock—was owned by Vogel as trustee of the Alex Vogel Family Trust. Under the attribution rules of 26 U. S. C. §§ 1563(d)(2), (e), Vogel is not deemed to own this stock for tax purposes. See 225 Ct. Cl. 15, 18, 634 F. 2d 497, 499 (1980).

[5] In the original version of §§ 1561–1563, controlled groups retained the option of taking multiple surtax exemptions and paying a penalty. See 26 U. S. C. § 1562 (1964 ed.). During the tax years in question this option was being gradually phased out. 26 U. S. C. § 1564. For 1973 and 1974 respondent utilized the multiple surtax exemption under 26 U. S. C. § 1564(a), and paid the penalty imposed by § 1562(b) (1970 ed.). For the tax year ending November 30, 1975, respondent elected to allocate entirely to Vogel Popcorn the single surtax exemption then allowed to members of a controlled group of corporations.

constitute a brother-sister controlled group within the meaning of § 1563(a)(2)(A); that Treas. Reg. § 1.1563–1(a)(3) is invalid to the extent that it takes into account, with respect to the 80-percent requirement, stock held by a shareholder who owns stock in only one corporation of the controlled group; and that respondent was, accordingly, entitled to a refund. 225 Ct. Cl. 15, 634 F. 2d 497 (1980). We granted certiorari to resolve a conflict among the Circuits on this issue, 450 U. S. 994 (1981),[6] and now affirm.

II

Vogel's ownership of more than 50 percent of both Vogel Fertilizer and Vogel Popcorn satisfies Part (B) of the statutory test—the 50-percent identical-ownership requirement. The controversy centers on Part (A) of the test—the 80-percent requirement.

Respondent argues that the statute must be construed as including a common-ownership requirement—Congress was attempting to identify interrelated corporations that are in reality subdivided portions of a larger entity. In the taxpayer's view, Congress thus did not intend that a person's stock ownership be taken into account for purposes of the 80-percent requirement unless that shareholder owned stock in *all*

[6] The Court of Appeals for the Fifth Circuit is in agreement with the Court of Claims and the Tax Court that Treas. Reg. § 1.1563–1(a)(3), 26 CFR § 1.1563–1(a)(3) (1981), is invalid insofar as it permits the 80-percent requirement to be satisfied without common ownership. *Delta Metalforming Co.* v. *Commissioner*, 632 F. 2d 442 (1980). The Tax Court has adhered to its view that the Regulation is invalid. See, *e. g.*, *Charles Baloian Co.* v. *Commissioner*, 68 T. C. 620, 629–631 (1977); *Davidson Chevrolet Co.* v. *Commissioner*, 39 TCM 299 (1979), [¶ 79,414] P-H Memo TC; *Allen Oil Co.* v. *Commissioner*, 38 TCM 355 (1979), [¶ 79,088] P-H Memo TC; *Delta Metalforming Co.* v. *Commissioner*, 37 TCM 1485 (1978), [¶ 78,354] P-H Memo TC; *T. L. Hunt, Inc.* v. *Commissioner*, 35 TCM 966 (1976), [¶ 76,221] P-H Memo TC. This adherence has persisted in the face of reversals by the Courts of Appeals for the Second, Fourth, and Eighth Circuits. *Allen Oil Co.* v. *Commissioner*, 614 F. 2d 336 (CA2 1980); *Fairfax Auto Parts of Northern Virginia* v. *Commissioner*, 548 F. 2d 501 (CA4 1977) *(per curiam)*; *T. L. Hunt, Inc.* v. *Commissioner*, 562 F. 2d 532 (CA8 1977).

of the corporations within the controlled group. The same "5 or fewer" individuals cannot be said to control 80 percent of both Vogel Fertilizer and Vogel Popcorn because Crain owns no stock in Vogel Popcorn and therefore his 22.51 percent of Vogel Fertilizer cannot be added to Vogel's 77.49 percent of that corporation to satisfy § 1563(a)(2)(A). The Commissioner takes the position, however, reflected in his addition of the words "singly or in combination" in Treas. Reg. § 1.1563–1(a)(3) to the statutory language, that there is no common-ownership requirement—various subgroups of "5 or fewer persons" can own the requisite 80 percent of the different corporations within the controlled group. The Commissioner acknowledges that under this interpretation, Part (A)'s 80-percent requirement in no respect measures the interrelationship between two corporations. The Commissioner's view is that only the 50-percent requirement measures this interrelationship. He contends the 80-percent requirement "continues to have independent significance" in that it "insures that all the members of the corporate group will be closely held," so that "the more-than-50-percent shareholder control group can obtain additional control in those instances where a greater interest is needed without the necessity of dealing with a large number of other shareholders." Brief for United States 35.[7]

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[7] The difference between the Commissioner's and the taxpayer's positions is illustrated by the following example:

Individuals	Corporations					Identical ownership
	U	V	W	X	Y	
A	55%	51%	55%	55%	55%	51%
B	45%	49%	.....	.....	.....	..... (45% in U & V)
C	.....	.....	45%	.....	.....	.....
D	.....	.....	.....	45%	.....	.....
E	.....	.....	.....	.....	45%	.....

[Footnote 7 is continued on p. 24]

A

Our role is limited to determining the validity of Treas. Reg. § 1.1563–1(a)(3). Deference is ordinarily owing to the agency construction if we can conclude that the regulation "implement[s] the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S 299, 307 (1967). But this general principle of deference, while fundamental, only sets "the framework for judicial analysis; it does not displace it." *United States* v. *Cartwright*, 411 U. S. 546, 550 (1973).

The framework for analysis is refined by consideration of the source of the authority to promulgate the regulation at issue. The Commissioner has promulgated Treas. Reg. § 1.1563–1(a)(3) interpreting this statute only under his general authority to "prescribe all needful rules and regulations." 26 U. S. C. § 7805(a). Accordingly, "we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." *Rowan Cos.* v. *United States*, 452 U. S. 247, 253 (1981). In addition, Treas. Reg. § 1.1563–1(a)(3) purports to do no more than add a clarifying gloss on a term—"brother-sister controlled group"—that has already been defined with considerable specificity by Congress. The Commissioner's authority is consequently more circumscribed than would be the case if Congress had used a term "'so general . . . as to render an interpretive regulation appropriate.'" *National Muffler Dealers Assn.*,

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The parties would agree that the 50-percent identical-ownership requirement in Part (B) is met for all corporations by shareholder A's identical ownership of 51 percent of all of the corporations. The Commissioner would find the 80-percent requirement met as well, and would therefore define all five corporations as part of a controlled group, because various subgroups of the five or fewer shareholders can account for 80 percent of each corporation. The taxpayer's position is that only corporations U and V are part of a brother-sister controlled group, because they are the only two corporations in which precisely the same five or fewer persons account for 80 percent of the stock of the putative "brother-sister controlled" corporations.

Inc. v. *United States*, 440 U. S. 472, 476 (1979), quoting *Helvering* v. *R. J. Reynolds Co.*, 306 U. S. 110, 114 (1939). See also *Rowan Cos.* v. *United States*, *supra*.

B

We consider first whether the Regulation harmonizes with the statutory language. *National Muffler Dealers Assn., Inc.* v. *United States*, *supra*, at 477. That language, set forth *supra*, at 18, and n. 2, while not completely unambiguous, is in closer harmony with the taxpayer's interpretation than with the Commissioner's Regulation. The term that the statute defines—"brother-sister controlled group"—connotes a close horizontal relationship *between* two or more corporations, suggesting that the same indivisible group of five or fewer persons must represent 80 percent of the ownership of each corporation.

This interpretation is strengthened by the structure of the statute. Section 1563(a)(2) defines the controlling group of shareholders ("5 or fewer"), and then sets forth the two ownership requirements (80 percent and 50 percent). This structure suggests that precisely the same shareholders must satisfy both the 80-percent and 50-percent requirements. As the Tax Court stated it, "5 or fewer persons" is the "conjunctive subject" of *both* requirements. *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T. C., at 803. Since under Part (B)'s 50-percent requirement, stock ownership is taken into account only to the extent it is "identical," that part of the statutory test clearly includes a common-ownership requirement. If, as the statutory structure suggests, the shareholders whose holdings are considered for purposes of Part (A) must be precisely the same shareholders as those whose holdings are considered for purposes of Part (B), the former also requires common ownership.[8]

[8] This interpretation of the statutory language is also strengthened by the presence of the phrase "each such person" in Part (B). The Tax Court pointed out:

"The words 'each such person' appearing therein refer to the 'five or fewer

Of course, a Treasury Regulation is not invalid simply because the statutory language will support a contrary interpretation. But the mere fact that there are no words in Part (A) explicitly requiring that each shareholder own stock in each corporation does not mean that the Regulation's interpretation, "singly or in combination," must be accepted as reasonable. This Court has firmly rejected the suggestion that a regulation is to be sustained simply because it is not "technically inconsistent" with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design. *United States* v. *Cartwright*, *supra*, at 557. The challenged Regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's "origin and purpose." *National Muffler Dealers Assn., Inc.* v. *United States*, *supra*, at 477.

C

The legislative history of § 1563(a)(2) resolves any ambiguity in the statutory language and makes it plain that Treas. Reg. § 1.1563–1(a)(3) is not a reasonable statutory interpretation. Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation—large organizations subdividing into smaller corporations and receiving un-

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persons' constituting the ownership group for purposes of both the 80-percent and 50-percent tests. The import of such usage is that each person—and not just some of the persons—counted for purposes of the 80-percent test must be also counted for purposes of the 50-percent test." *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T. C., at 803.

The Government argues that there is no justification for singling out the phrase "each such person" in Part (B) of the test and transporting it for application in the context of Part (A). This argument, however, mischaracterizes the reasoning of the Tax Court. The court merely intended to show that the term "each such person" refers back to the antecedent "5 or fewer persons," which precedes the 80-percent requirement, thereby strengthening the suggestion that there is one fixed, indivisible group of shareholders whose holdings are to be considered throughout application of both the 80-percent requirement in Part (A) and the 50-percent requirement in Part (B).

intended tax benefits from the multiple use of surtax exemptions, accumulated earnings credits, and various other tax provisions designed to aid small businesses. S. Rep. No. 91–552, p. 134 (1969). The House Ways and Means Committee Report noted: "[L]arge organizations have been able to obtain substantial benefits . . . by dividing the organization's income among a number of related corporations. Your committee does not believe that large organizations which operate through multiple corporations should be allowed to receive the substantial and unintended tax benefits resulting from the multiple use of the surtax exemption and the other provisions of present law." H. R. Rep. No. 91–413, pt. 1, p. 98 (1969). The intended targets of § 1563(a)(2) were groups of *interrelated* corporations—corporations characterized by *common* control and ownership. Although the 50-percent requirement measures, to a lesser degree, the overlap between two corporations, the history of the enactment of § 1563(a)(2) illustrates that Congress intended that the *80-percent* requirement be the primary requirement for defining the interrelationship between two or more corporations.

Until 1964, the method prescribed by the Code to curb the abuse of multiple incorporation was subjective: Multiple exemptions or benefits were allowed or disallowed depending on the reasons for the taxpayer's actions.[9] The Revenue Act of 1964 changed this approach, adding §§ 1561–1563 to the Code. Pub. L. 88–272, § 235(a), 78 Stat. 116–125. These sections prescribed the application of mechanical, objective

[9] Before 1964, the Code provisions designed to prevent taxpayers from using the multiple form of corporate organization in order to avoid taxes were §§ 269, 482, and 1551. H. R. Rep. No. 749, 88th Cong., 1st Sess., 117 (1963). Section 269 gives the Secretary the authority to disallow a tax deduction, credit, or other allowance when an acquisition was made to avoid income tax. Section 482 gives the Secretary the authority to allocate income, deductions, credits, or allowances between or among taxpayers if he determines that such an allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of the taxpayers. Section 1551 permits the Secretary to disallow a surtax exemption or accumulated

tests for determining whether two corporations were a "controlled group" and thereby restricted to one surtax exemption. The original, 1964, definition of a "brother-sister controlled group" was:

> "Two or more corporations if stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations is owned . . . by one person who is an individual, estate, or trust." 26 U. S. C. § 1563(a)(2) (1964 ed.).

Because corporations were not part of a controlled group unless the same person owned 80 percent of all corporations within the group, the 1964 provision clearly included a common-ownership requirement.

In 1969 Congress adopted the present two-part percentage test codified in § 1563(a)(2). Pub. L. 91–172, § 401(c), 83 Stat. 602. This change was proposed by the Treasury Department as part of an extensive package of tax reform proposals. See Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, pp. 5050–5478 (1969) (hereinafter Hearings). The Treasury Department proposed, *inter alia*, that the definition of a brother-sister controlled group "be broadened to include groups of corporations owned and controlled by five or fewer persons, rather than only those owned and controlled by one person," as was the case under then existing law. *Id.*, at 5166. In setting forth the "Technical Explana-

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earnings credit when a transfer of property between two "controlled" corporations occurs, unless the taxpayer can show that the "major purpose" of the transfer was not the securing of such benefits. All of these sections are still in effect, but they are no longer the primary weapons employed against the abuse of multiple incorporation. Rather, the purely objective tests of §§ 1561–1563 have proved to be more effective. See Thomas, Brother-Sister Multiple Corporations—The Tax Reform Act of 1969 Reformed by Regulation, 28 Tax L. Rev. 65, 66–67 (1972).

tion" for this new definition of brother-sister controlled groups, the Treasury Department was most explicit that the 80-percent requirement, like the 50-percent requirement, included common ownership: "[T]he *same five* or fewer persons [must] own at least 80 percent of the voting stock or value of shares of *each* corporation and . . . *these* five or fewer individuals" must satisfy the 50-percent requirement in Part (B). *Id.*, at 5168 (emphasis added except for "*five*").

The Treasury Department's "General Explanation" of the amendment to § 1563(a)(2) defined a brother-sister controlled group as one "in which five or fewer persons own, to a large extent in identical proportions, at least 80 percent of the stock of each of the corporations." Hearings, at 5394 (footnote omitted). The General Explanation then set forth the respective roles of the expanded 80-percent requirement and the new 50-percent requirement:

> "This provision expands present law by considering the combined stock ownership of five individuals, rather than one individual, in applying the 80-percent test. . . .
>
> "However, in order to insure that this expanded definition of brother-sister controlled group applies only to those cases where the five or fewer individuals hold their 80 percent in a way which allows them to operate the corporations as one economic entity, the proposal would add an additional rule that the ownership of the five or fewer individuals must constitute more than 50 percent of the stock of each corporation considering, in this test of ownership, stock of a particular person only to the extent that it is owned identically with respect to each corporation." *Ibid.*

The General Explanation made it clear that, under the 1969 amendment to § 1563(a)(2), the 80-percent requirement would remain the primary basis for determining whether two or more corporations represent the *same* financial interests. Part (A) of the 1969 test was simply an expansion of the 1964 test, which considered the two or more corporations to be a

brother-sister controlled group only when one person owned 80 percent of all of the corporations. This "expansion" was necessary to "close the present opportunity for easy avoidance" of the 80-percent test. Hearings, at 5396. Because five persons now played the role previously played by one, this expanded version of the test required a new safeguard—the 50-percent requirement—to "insure that the new expanded definition is limited to cases where the brother-sister corporations are, in fact, *controlled* by the group of stockholders as one economic enterprise." *Ibid.* (emphasis added).[10]

The "singly or in combination" provision of Treas. Reg. § 1.1563–1(a)(3) is clearly incompatible with the explanation offered by the Treasury Department when it proposed the statute. In addition to the explicit statement that the members of the controlling group must own stock in "each" corporation, the Treasury Department presented a test in which the 80-percent requirement remained the primary indicia of interrelationship. But under the challenged Regulation, the 80-percent requirement measures *only* whether or not the brother-sister corporations are closely held. The fact that a corporation is closely held, absent common ownership, is irrelevant to the congressional purpose of identifying interrelationship: "It is not the *smallness* of the number of persons in each company that triggers § 1563; it is the *sameness* of that small number." *T. L. Hunt, Inc.* v. *Commissioner*, 562 F. 2d 532, 537 (CA8 1977) (Webster, J. dissenting).[11]

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[10] The Treasury Department's explanations included several examples applying the new definition of a brother-sister controlled group. In these examples, all shareholders whose stock was taken into account for purposes of the 80-percent requirement owned stock in each of the other corporations within the controlled group. See Hearings, at 5169, 5170, 5395–5396.

[11] The Commissioner strains to find some ambiguity in the Treasury Department's explanations. He points to the statement in the General Explanation that a brother-sister controlled group is a "group of corporations in which five or fewer persons own, *to a large extent in identical propor-*

The Treasury Department's explanations of the proposed statute are not, as the dissent in the Court of Claims suggested, a mere "admission against interest" by the Commissioner. 225 Ct. Cl., at 44, 634 F. 2d, at 514. The expanded definition of "brother-sister controlled group" was proposed by the Treasury Department and adopted in the same form in which it was presented. Of course, it is Congress' understanding of what it was enacting that ultimately controls. But we necessarily attach "great weight" to agency representations to Congress when the administrators "participated in drafting and directly made known their views to Congress in committee hearings." *Zuber* v. *Allen*, 396 U. S. 168, 192 (1969). The subsequent legislative history of § 1563(a)(2) confirms that Congress adopted not only the proposal of the Treasury Department, but also the Department's explana-

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tions, at least 80 percent of the stock of each of the corporations." *Id.*, at 5394 (footnote omitted, emphasis added). The Commissioner contends that the italicized phrase suggests that there need not be common ownership among all those persons taken into account for purposes of the 80-percent requirement. But the words the Commissioner relies on only further support the taxpayer's position. If the shareholders own stock "to a large extent in identical proportions" they certainly own the stock *to some extent* in identical proportions—there is some overlap among *each* shareholder's holdings in *each* brother-sister corporation.

The dissent makes a similar effort, relying on the statement in the Technical Explanation that the 80-percent requirement "is satisfied if the *group* of five or more persons *as a whole* owns at least 80 percent of the voting stock or value of shares of each corporation, *regardless of the size of the individual holdings of each person.*" *Post*, at 38–39 (emphasis in opinion). This language, however, also supports the taxpayer's interpretation since it appears to assume that "each person" *has* holdings in each corporation. This assumption is demonstrated by the three examples which directly follow this language and are used to illustrate it: The 80-percent requirement "is met whether one person owns 80 percent of the voting stock of each corporation, four persons each own 20 percent of the voting stock of each corporation, or one person owns 60 percent of the voting stock of one corporation and 40 percent of another, and another person owns 40 percent of the voting stock of the first and 60 percent of the second." Hearings, at 5169.

tion and interpretation which are wholly incompatible with the "singly or in combination" interpretation of the Regulation. The Ways and Means Committee Report stated:

> "This bill expands the definition [of a brother-sister controlled group] to include two or more corporations which are owned 80 percent or more (by voting power or value) by five or fewer persons (individuals, estates, or trusts) provided that these five or fewer persons own more than 50 percent of each corporation when the stock of each person is considered only to the extent it is owned identically with respect to each corporation." H. R. Rep. No. 91–413, pt. 1, p. 99 (1969).

The House Committee Report thus reflects the Treasury Department's explanations—the 80-percent requirement is an expanded version of the 1964 statute and measures overlapping interests, while the 50-percent requirement is an additional proviso necessary in light of the expanded number of shareholders whose overlapping interests were to be considered.[12]

D

The Commissioner's further reasons for sustaining his interpretation are unpersuasive.

The Commissioner relies on the fact that, in expanding the coverage of § 1563(a)(2), Congress expressly adopted part of the language used in § 1551(b)(2) of the Code to describe a transfer from one corporation to another "controlled" by the same "five or fewer" individuals. The Commissioner contends that Congress thereby approved the interpretation the Commissioner had placed on § 1551(b)(2). Even if we could assume that Congress was aware of Treasury Regulations in-

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[12] The Senate Committee Reports describe the amendment in language almost identical to that employed by the House Report. See S. Rep. No. 91–552, p. 135 (1969); Senate Committee on Finance, Summary of H. R. 13270, Tax Reform Act of 1969, 91st Cong., 1st Sess., 49 (Comm. Print 1969).

terpreting § 1551, promulgated only two years before § 1563 was enacted, see 32 Fed. Reg. 3214–3216 (1967), the promulgated regulations do not support the Commissioner's present interpretation of the statutory language in § 1563(a)(2). The Regulations defining control under § 1551 contain no language similar to the words "singly or in combination" found in Treas. Reg. § 1.1563–1(a)(3) and they contain no suggestion that the Treasury Department had interpreted § 1551(b)(2) as *not* having a common-ownership requirement. See Treas. Reg. § 1.1551–1(e), 26 CFR § 1.1551–1(e) (1981).[13]

Also unpersuasive is the Commissioner's reliance on the fact that § 1563(a)(2) is referred to in § 1015 of the Employee Retirement Income Security Act of 1974, 26 U. S. C. § 414.[14]

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[13] The Commissioner relies on one of the examples used to define a "transfer" for purposes of § 1551—a concept that obviously has no application under § 1563(a)(2). See Treas. Reg. § 1.1551–1(g)(4), 26 CFR § 1.1551–1(g)(4) (1981). The example the Commissioner relies on provides: "Individual A owns 55 percent of the stock of corporation X. Another 25 percent of corporation X's stock is owned in the aggregate by individuals B, C, D, and E. On June 15, 1963, individual A tranfers property to corporation Y (newly created for the purpose of acquiring such property) in exchange for 60 percent of the stock of Y, and B, C, and D acquire all of the remaining stock of Y. The transfer is within the scope of section 1551(a)(3)." Treas. Reg. § 1.1551–1(g)(4), Example (4), 26 CFR § 1.1551–1(g)(4), Example (4) (1981).

Even if this example were read to suggest that a transferor "controls," within the meaning of § 1551(b)(2), a transferee although the persons owning 80 percent of the transferor do not each own stock in the transferee, the example would be inapplicable to § 1563(a)(2) because, as the Tax Court has pointed out, there is no method for determining which brother-sister corporation is to be regarded as the transferor and which as the transferee. See *Fairfax Auto Parts of Northern Virginia, Inc.*, 65 T. C., at 807. See also Bonovitz, Brother-Sister Controlled Groups under Section 1563: The 80 Percent Ownership Test, 28 Tax Lawyer 511, 524, 528–530 (1975).

[14] Section 414(b) provides in relevant part that "all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer."

From this the Commissioner infers congressional approval of all the Regulations promulgated under § 1563(a)(2), including the Regulation at issue in this case. But it is the intent of the Congress that amended § 1563(a), not the views of the subsequent Congress that enacted § 414, that are controlling. See *Teamsters* v. *United States*, 431 U. S. 324, 354, n. 39 (1977). In any event, this passing reference in 26 U. S. C. § 414(b), enacted only two years after Treas. Reg. § 1.1563–1(a)(3) was promulgated, 37 Fed. Reg. 8068–8070 (1972), hardly constitutes legislative approval of a longstanding administrative interpretation, from which we could infer any congressional acceptance. Cf. *United States* v. *Correll*, 389 U. S., at 305–306.

Finally, the Commissioner seeks to uphold the Regulation on the ground that a common-ownership requirement leads to the assertedly nonsensical result that ownership of only one share could be determinative. For example, if Crain owned but one share of Vogel Popcorn, then the 80-percent requirement would be met and the taxpayer corporation would be part of a controlled group even under the taxpayer's interpretation of the statute. This argument is without merit, for several reasons. First, Congress purposefully substituted the mechanical formula of § 1563(a)(2) for the subjective, case-by-case analysis that had previously prevailed. Inherent in such an objective test is a sharp dividing line that is crossed by incremental changes in ownership. Moreover, it is obvious that a shareholder would not buy a small amount of stock in order to *create* a controlled group, since it is to the taxpayer's advantage not to be part of such a group. Finally, a person's "mere" ownership of one share of stock plays an important role in the operation of the test. It insures that each of the "5 or fewer" shareholders representing the bulk of the financial interest of the corporations actually knows of the other corporations within the putative brother-sister controlled group. Under this construction of the statute, controlled-group membership cannot

catch such a shareholder by surprise, as it could under the Commissioner's construction.

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE WHITE joins, dissenting.

I cannot deny that the Court's opinion persuasively defends a possible interpretation of 26 U. S. C. § 1563(a)(2). In my view, however, the Court has totally failed to establish that the *Commissioner's* interpretation is incorrect. Because I believe that the only certainty about the language and history of § 1563(a)(2) is that both are ambiguous, I would defer to the Commissioner's judgment.

The Court begins by declaring that the statutory language, "while not completely unambiguous, is in closer harmony with the taxpayer's interpretation than with the Commissioner's Regulation" because the term "'brother-sister controlled group'—connotes a close horizontal relationship *between* two or more corporations." *Ante*, at 25 (emphasis in original). In taking this approach, however, the Court simply assumes its conclusion. The 50-percent test of Part (B) already ensures a horizontal relationship between the corporations that constitute the controlled group; nothing in the language of the statute suggests that Part (A) was designed directly to serve the same purpose. At most, § 1563(a)(2) can be read to require that the same *set* of five or fewer persons must satisfy the 50- and 80-percent tests; the statute is entirely silent as to whether each *member* of the set must own stock in each corporation. And, unlike the Court, I have difficulty inferring this conclusion from the term "brother-sister controlled group," a phrase that appears only in the heading of the subsection and that is hardly a household term with an intuitively obvious meaning.

Similar problems attend the Court's analysis of the statute's structure. In the Court's view, the fact that the controlling group of shareholders is defined as "5 or fewer" for both the 50- and 80-percent tests "suggests that precisely the

same shareholders must satisfy both the 80-percent and 50-percent requirements." *Ante*, at 25. Even if this were true, however, it would not mean that *each member* of the set of five or fewer shareholders must own stock in each corporation; it suggests only that the total number of shareholders considered in relation to both tests may not exceed five. In any event, the common-ownership requirement—which takes "into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation," § 1563(a)(2)(B)—is embedded in Part (B), and the simpler and normal reading of the statute therefore would apply the common-ownership restriction only to Part (B)'s 50-percent test.[1] It is the Court's reading, then, that seemingly runs counter to the structure of the statute, for under its approach the 80-percent test would "tend to overlap or swallow the 50% identical ownership requirement." *Allen Oil Co.* v. *Commissioner*, 614 F. 2d 336, 339 (CA2 1980).

The confusing nature of the statutory text leads the Court to rely principally on § 1563(a)(2)'s legislative history, which it cheerfully reads as "resolv[ing] any ambiguity in the statutory language." *Ante*, at 26. It seems to me that this conclusion is substantially overstated. It is undoubtedly true, as the Court observes, that § 1563(a)(2) was aimed at curbing the abuses of multiple incorporation. But this is beside the

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[1] The Court concludes that the phrase "each such person" in Part (B) refers back to the "5 or fewer persons," which precedes Part (A), "strengthening the suggestion that there is one fixed, indivisible group of shareholders whose holdings are to be considered throughout application of both the 80-percent requirement in Part (A) and the 50-percent requirement in Part (B)." *Ante*, at 26, n. 8. But this language proves only that the total number of shareholders considered may not exceed five; it need not be read to require that each 80-percent shareholder own stock in each corporation. Indeed, the presence of an explicit common-ownership requirement in Part (B), along with the absence of analogous language in Part (A), suggests that Congress did not intend to write such a requirement into the 80-percent test.

point, for—as the Court notes—the 50-percent test of Part (B) itself serves to "measur[e] . . . the overlap between two corporations." *Ante*, at 27. The Court's further conclusion "that Congress intended that the *80-percent* requirement be the primary requirement for defining the interrelationship between two or more corporations," *ibid.* (emphasis in original), is entirely without support in the legislative history.[2] Certainly, such a view appears nowhere in the congressional Reports. These simply echo the statutory definition, declaring that a controlled group includes "two or more corporations which are owned 80 percent or more . . . by five or fewer persons . . . provided that these five or fewer persons own more than 50 percent of each corporation when the stock of each person is considered only to the extent it is owned identically with respect to each corporation." H. R. Rep. No. 91–413, pt. 1, p. 99 (1969). Accord, S. Rep. No. 91–552, p. 135 (1969). Again, however, the legislative documents prove only that the same *set* must satisfy the 80- and 50-per-

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[2] The Court apparently derives this conclusion from the nature of the pre-1969 statutory scheme, under which corporations were considered to be part of a controlled group only if the same person owned 80 percent of the stock in each controlled corporation. *Ante*, at 28. In the Court's view, § 1563(a)(2) simply expanded the ownership group to five, retaining the 80-percent requirement as the primary test for interrelatedness. The problem with this approach is that it is entirely speculative. Congress nowhere stated that it had any such intention with regard to the 80-percent test. And the Treasury Department, when it proposed § 1563(a)(2), simply stated the obvious: it declared that the new statute "expand[ed] present law" by considering the ownership interests of five individuals, while adding a 50-percent test "to insure" that controlled corporations operate as one economic entity. Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, p. 5394 (1969). Certainly, the Court can credibly read its conclusion into this history. But the legislative materials are not inconsistent with the Commissioner's contrary view that the newly devised 50-percent test was to serve as the primary indicium of interrelatedness. Because of the absence of any explicit statement on the question in the legislative history, I find the Court's certainty somewhat surprising.

cent tests; they cannot easily be read to require that each *member* of the set own stock in every corporation.

Ironically, then, the Court at bottom is forced to rely on the rationale advanced by the Treasury Department when it proposed the legislation eventually adopted as § 1563(a)(2). The Court's analysis of this proposal, which it explores in some detail, *ante*, at 28–30, is certainly credible. But even this legislative material contains an essential ambiguity.[3] Neither the "General Explanation" nor the "Technical" one addresses whether the 80-percent test requires common ownership, or whether a person excluded from the 50-percent calculation because he owns no stock in one of the controlled corporations may nevertheless be included in the 80-percent test, so long as the total number of relevant shareholders does not exceed five. For example, while the Treasury Department suggested that "the same *five* or fewer persons [must] own at least 80 percent of the voting stock or value of shares of each corporation" to satisfy Part (A), and that "these five or fewer individuals" must satisfy the 50-percent test of Part (B), Hearings Before the House Committee on Ways and Means on the Subject of Tax Reform, 91st Cong., 1st Sess., pt. 14, p. 5168 (1969) (emphasis in original), the Department's explanation—despite the Court's suggestion to the contrary—need not be read as requiring that *each* of the five own stock in every controlled corporation. To the contrary, the Technical Explanation declares that the 80-percent test "is satisfied if the *group* of five or fewer persons *as a whole* owns at least 80 percent of the voting stock or value of shares of each corporation, *regardless of the size of the indi-*

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[3] Indeed, throughout the course of litigation over § 1563(a)(2), both the Commissioner and the various taxpayers involved have drawn support from precisely the same portions of the Treasury Department proposals. Compare *Fairfax Auto Parts of Northern Virginia, Inc.* v. *Commissioner*, 65 T. C. 798, 803–804 (1976), rev'd, 548 F. 2d 501 (CA4), cert. denied, 434 U. S. 904 (1977), with 65 T. C., at 809–810 (dissenting opinion). See also *Allen Oil Co.* v. *Commissioner*, 614 F. 2d 336, 340, n. 4 (CA2 1980).

vidual holdings of each person." *Id.*, at 5169 (emphasis added). This obviously suggests that the crucial inquiry is whether a given set of five satisfies both tests, not whether each individual owns stock in each corporation.

Certainly, I do not suggest that the Commissioner's interpretation is compelled by the legislative materials. But the Court, by putting so much effort into reading between the lines, has lost sight of the fact that certain statutory ambiguities cannot be neatly and finally resolved. Here, the Commissioner's interpretation is not "unreasonable or meaningless," for "it insures that the stock is closely held." *Allen Oil Co.* v. *Commissioner*, 614 F. 2d, at 340. In such a situation, "[t]he choice among reasonable interpretations is for the Commissioner, not the courts." *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 488 (1979). See *United States* v. *Correll*, 389 U. S. 299, 307 (1967). For that reason, I respectfully dissent.

COMMUNITY COMMUNICATIONS CO., INC. v. CITY OF BOULDER, COLORADO, ET AL.

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

No. 80–1350. Argued October 13, 1981—Decided January 13, 1982

Respondent city of Boulder is a "home rule" municipality, granted by the Colorado Constitution extensive powers of self-government in local and municipal matters. Petitioner is the assignee of a permit granted by a city ordinance to conduct a cable television business within the city limits. Originally, only limited service within a certain area of the city could be provided by petitioner, but improved technology offered petitioner an opportunity to expand its business into other areas, and also offered opportunities to potential competitors, one of whom expressed interest in obtaining a permit to provide competing service. The City Council then enacted an "emergency" ordinance prohibiting petitioner from expanding its business for three months, during which time the Council was to draft a model cable television ordinance and to invite new businesses to enter the market under the terms of that ordinance. Petitioner filed suit in Federal District Court, alleging that such a restriction would violate § 1 of the Sherman Act, and seeking a preliminary injunction to prevent the city from restricting petitioner's proposed expansion. The city responded that its moratorium ordinance could not be violative of the antitrust laws because, *inter alia*, the city enjoyed antitrust immunity under the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341. The District Court held that the *Parker* exemption was inapplicable and that the city was therefore subject to antitrust liability. Accordingly, the District Court issued a preliminary injunction. The Court of Appeals reversed, holding that the city's action satisfied the criteria for a *Parker* exemption.

Held: Boulder's moratorium ordinance is not exempt from antitrust scrutiny under the *Parker* doctrine. Pp. 48–57.

(a) The ordinance cannot be exempt from such scrutiny unless it constitutes either the action of the State itself in its sovereign capacity or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. Pp. 48–51.

(b) The *Parker* "state action" exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under the Federal Constitution. But this principle is inherently limited: Ours is a "*dual* system of

government," *Parker, supra*, at 351, which has no place for sovereign cities. Here, the direct delegation of powers to the city through the Home Rule Amendment to the Colorado Constitution does not render the cable television moratorium ordinance an "act of government" performed by the city acting as the State in local matters so as to meet *Parker*'s "state action" criterion. Pp. 52–54.

(c) Nor is the requirement of "clear articulation and affirmative expression" of a state policy fulfilled here by the Home Rule Amendment's "guarantee of local autonomy," since the State's position is one of mere neutrality respecting the challenged moratorium ordinance. This case involves city action in the absence of any regulation by the State, and such action cannot be said to further or implement any clearly articulated or affirmatively expressed state policy. Pp. 54–56.

(d) Respondents' argument that denial of the *Parker* exemption in this case will have serious adverse consequences for cities and will unduly burden the federal courts is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws, which laws apply to municipalities not acting in furtherance of clearly articulated and affirmatively expressed state policy. Pp. 56–57.

630 F. 2d 704, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 58. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 60. WHITE, J., took no part in the consideration or decision of the case.

Harold R. Farrow argued the cause for petitioner. With him on the briefs were *Thomas A. Seaton* and *Robert E. Youle*.

Jeffrey H. Howard argued the cause for respondents. With him on the brief were *Kathleen A. McGinn*, *Dale R. Harris*, *Bruce T. Reese*, *Joseph N. de Raismes*, and *Alan E. Boles, Jr.*

Thomas P. McMahon, Assistant Attorney General of Colorado, argued the cause for the State of Colorado et al. as *amici curiae* urging reversal. With him on the brief were *J. D. MacFarlane*, Attorney General of Colorado, *Mary J. Mullarkey*, Solicitor General, and *B. Lawrence Theis*, First Assistant Attorney General; *Wilson L. Condon*, Attorney

General of Alaska, and *Louise E. Ma* and *Mark E. Ashburn*, Assistant Attorneys General; *Steve Clark*, Attorney General of Arkansas, and *David L. Williams*, Deputy Attorney General; *Richard S. Gebelein*, Attorney General of Delaware, and *Robert P. Lobue*, Deputy Attorney General; *Tany S. Hong*, Attorney General of Hawaii, and *Shelton G. W. Jim On*, Deputy Attorney General; *Tyrone C. Fahner*, Attorney General of Illinois, and *Thomas M. Genovese*, Assistant Attorney General; *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Assistant Attorney General; *Robert T. Stephan*, Attorney General of Kansas, and *Wayne E. Hundley*, Deputy Attorney General; *Richard S. Cohen*, Attorney General of Maine; *Stephen H. Sachs*, Attorney General of Maryland, and *Charles O. Monk II*, Assistant Attorney General; *Warren R. Spannaus*, Attorney General of Minnesota, and *Stephen P. Kilgriff*, Special Assistant Attorney General; *John Ashcroft*, Attorney General of Missouri, and *William Newcomb*, Assistant Attorney General; *Mike Greely*, Attorney General of Montana, and *Jerome J. Cate; Paul L. Douglas*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General; *Jeff Bingaman*, Attorney General of New Mexico, and *James A. Wechsler* and *Richard H. Levin*, Assistant Attorneys General; *Robert Abrams*, Attorney General of New York, and *Lloyd Constantine*, Assistant Attorney General; *William J. Brown*, Attorney General of Ohio, and *Eugene F. McShane*, Assistant Attorney General; *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Eugene F. Waye* and *John L. Shearburn*, Deputy Attorneys General; *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Patrick J. Quinlan*, Special Assistant Attorney General; *Mark White*, Attorney General of Texas, and *Linda A. Aaker*, Assistant Attorney General; *John J. Easton, Jr.*, Attorney General of Vermont, and *Jay I. Ashman* and *Glenn A. Jarrett*, Assistant Attorneys General; *Chauncey H. Browning*, Attorney General of West Vir-

ginia, and *Charles G. Brown*, Deputy Attorney General; and *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case, in which the District Court for the District of Colorado granted preliminary injunctive relief, is whether a "home rule" municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the "state action" exemption from Sherman Act liability announced in *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

Respondent city of Boulder is organized as a "home rule" municipality under the Constitution of the State of Colorado.[1] The city is thus entitled to exercise "the full right of self-government in both local and municipal matters," and with respect to such matters the City Charter and ordinances

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**J. D. MacFarlane*, Attorney General of Colorado, *Richard F. Hennessey*, Deputy Attorney General, *Mary J. Mullarkey*, Solicitor General, *B. Lawrence Theis*, First Assistant Attorney General, and *Thomas P. McMahon*, Assistant Attorney General, filed a brief for the State of Colorado as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Bingham Kennedy* and *Howard J. Gan* for the Cable Television Information Center; by *Robert D. Pritt*, *John D. Cummins*, and *Glenn M. Young* for the City of Akron, Ohio, et al.; by *Burt Pines*, *James A. Doherty*, and *John F. Haggerty* for the City of Los Angeles; by *Susan K. Griffiths* for the Colorado Municipal League; by *Roger F. Cutler*, *John Dekker*, *James B. Brennan*, *Henry W. Underhill, Jr.*, and *Benjamin L. Brown* for the National Institute of Municipal Law Officers; and by *Ross D. Davis*, *Howard W. Fogt, Jr.*, *Jay N. Varon*, and *Catherine B. Klarfeld* for the National League of Cities.

[1] The Colorado Home Rule Amendment, Colo. Const., Art. XX, § 6, provides in pertinent part:

"The people of each city or town of this state, having a population of two thousand inhabitants . . . , are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or

supersede the laws of the State. Under that Charter, all municipal legislative powers are exercised by an elected City Council.[2] In 1964 the City Council enacted an ordinance granting to Colorado Televents, Inc., a 20-year, revocable, nonexclusive permit to conduct a cable television business within the city limits. This permit was assigned to petitioner in 1966, and since that time petitioner has provided cable television service to the University Hill area of Boulder, an area where some 20% of the city's population lives, and where, for geographical reasons, broadcast television signals cannot be received.

From 1966 until February 1980, due to the limited service that could be provided with the technology then available, petitioner's service consisted essentially of retransmissions of programming broadcast from Denver and Cheyenne, Wyo. Petitioner's market was therefore confined to the University Hill area. However, markedly improved technology became available in the late 1970's, enabling petitioner to offer many more channels of entertainment than could be provided by local broadcast television.[3] Thus presented with an oppor-

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town, which shall be its organic law and extend to all its local and municipal matters.

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

. . . . . .

"It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters . . . .

"The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

[2] Boulder, Colo., Charter § 11 (1965 rev. ed.).

[3] The District Court below noted:

"Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services

tunity to expand its business into other areas of the city, petitioner in May 1979 informed the City Council that it planned such an expansion. But the new technology offered opportunities to potential competitors, as well, and in July 1979 one of them, the newly formed Boulder Communications Co. (BCC),[4] also wrote to the City Council, expressing its interest in obtaining a permit to provide competing cable television service throughout the city.[5]

The City Council's response, after reviewing its cable television policy,[6] was the enactment of an "emergency" ordi-

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originated by the cable operators. During the late 1970's however, satellite technology impacted the industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and 'Home Box Office' companies developed, the public response to cable television greatly increased the market demand for such expanded services.

"The 'state of the art' presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's, and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as 'blue sky', indicating that virtually unlimited technological improvements are still expected." 485 F. Supp. 1035, 1036–1037 (1980).

[4] BCC was a defendant below, and is a respondent here.

[5] Regarding this letter, the District Court noted that "BCC outlined a proposal for a new system, acknowledging the presence of [petitioner] in Boulder but stating that '(w)hatever action the City takes in regard to [petitioner], it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit.'" *Id.*, at 1037.

[6] "The . . . City Council . . . initiat[ed] a review and reconsideration of cable television in view of the many changes in the industry since . . . 1964 . . . . Accordingly, they hired a consultant, . . . and held a number of study meetings to develop a governmental response to these changes. The primary thrust of [the consultant's] advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly. Much discussion in the City Council centered around a supposed unfair advantage that [petitioner] had because it was already operating in Boulder. Members of the Council, and the City Manager, expressed fears that [petitioner might] not be the best cable operator for Boulder, but would nonetheless be the only operator because of its head start in the area. The Council wanted to create a situation in which other cable

nance prohibiting petitioner from expanding its business into other areas of the city for a period of three months.[7] The City Council announced that during this moratorium it planned to draft a model cable television ordinance and to invite new businesses to enter the Boulder market under its terms, but that the moratorium was necessary because petitioner's continued expansion during the drafting of the model ordinance would discourage potential competitors from entering the market.[8]

Petitioner filed this suit in the United States District Court for the District of Colorado, and sought, *inter alia*, a preliminary injunction to prevent the city from restricting petition-

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companies could make offers and not be hampered by the possibility that [petitioner] would build out the whole area before they even arrived." *Ibid.*

[7] The preamble to this ordinance offered the following declarations as justification for its enactment:

"[C]able television companies have within recent months displayed interest in serving the community and have requested the City Council to grant [them] permission to use the public right-of-way in providing that service; and

" . . . the present permittee, [petitioner], has indicated that it intends to extend its services in the near future . . . ; and

" . . . the City Council finds that such an extension . . . would result in hindering the ability of other companies to compete in the Boulder market; and

" . . . the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits . . . [within] 3 months, and finds that an extension of service by [petitioner] would result in a disruption of this application and evaluation process; and

" . . . the City Council finds that placing temporary geographical limitations upon the operations of [petitioner] would not impair the present services offered by [it] to City of Boulder residents, and would not impair [its] ability . . . to improve those services within the area presently served by it." Boulder, Colo., Ordinance No. 4473 (1979).

[8] The Council reached this conclusion despite BCC's statement to the contrary, see n. 5, *supra*.

er's proposed business expansion, alleging that such a restriction would violate § 1 of the Sherman Act.[9] The city responded that its moratorium ordinance could not be violative of the antitrust laws, either because that ordinance constituted an exercise of the city's police powers, or because Boulder enjoyed antitrust immunity under the *Parker* doctrine. The District Court considered the city's status as a home rule municipality, but determined that that status gave autonomy to the city only in matters of local concern, and that the operations of cable television embrace "wider concerns, including interstate commerce . . . [and] the First Amendment rights of communicators." 485 F. Supp. 1035, 1038–1039 (1980). Then, assuming, *arguendo*, that the ordinance was within the city's authority as a home rule municipality, the District Court considered *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978), and concluded that the *Parker* exemption was "wholly inapplicable," and that the city was therefore subject to antitrust liability. 485 F. Supp., at 1039.[10] Petitioner's motion for a preliminary injunction was accordingly granted.

On appeal, a divided panel of the United States Court of Appeals for the Tenth Circuit reversed. 630 F. 2d 704 (1980). The majority, after examining Colorado law, rejected the District Court's conclusion that regulation of the cable television business was beyond the home rule authority

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[9] 26 Stat. 209, as amended, 15 U. S. C. § 1. Section 1 of the Sherman Act provides in pertinent part that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . , is declared to be illegal."

Petitioner also alleged, *inter alia*, that the city and BCC were engaged in a conspiracy to restrict competition by substituting BCC for petitioner. The District Court noted that although petitioner had gathered some circumstantial evidence that might indicate such a conspiracy, the evidence was insufficient to establish a probability that petitioner would prevail on this claim. 485 F. Supp., at 1038.

[10] The District Court also held that no *per se* antitrust violation appeared on the record before it, and that petitioner was not protected by the First Amendment from all regulation attempted by the city. *Id.*, at 1039–1040.

of the city. *Id.*, at 707. The majority then addressed the question of the city's claimed *Parker* exemption. It distinguished the present case from *City of Lafayette* on the ground that, in contrast to the municipally operated revenue-producing utility companies at issue there, "no proprietary interest of the City is here involved." 630 F. 2d, at 708. After noting that the city's regulation "was the only control or active supervision exercised by state or local government, and . . . represented the only expression of policy as to the subject matter," *id.*, at 707, the majority held that the city's actions therefore satisfied the criteria for a *Parker* exemption, 630 F. 2d, at 708.[11] We granted certiorari, 450 U. S. 1039 (1981). We reverse.

II

A

Parker v. *Brown*, 317 U. S. 341 (1943), addressed the question whether the federal antitrust laws prohibited a State, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints. These took the form of a "marketing program" adopted by the State of California for the 1940 raisin crop; that program prevented appellee from freely marketing his crop in interstate commerce. *Parker* noted that California's program "derived its authority . . .

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[11] The majority cited *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), as support for its reading of *City of Lafayette*, and concluded "that *City of Lafayette* is not applicable to a situation wherein the governmental entity is asserting a governmental rather than proprietary interest, and that instead the *Parker-Midcal* doctrine is applicable to exempt the City from antitrust liability." 630 F. 2d, at 708.

The dissent urged affirmance, agreeing with the District Court's analysis of the antitrust exemption issue. *Id.*, at 715–718 (Markey, C. J., United States Court of Customs and Patent Appeals, sitting by designation, dissenting). The dissent also considered the city's actions to violate "[c]ommon principles of contract law and equity," *id.*, at 715, as well as the First Amendment rights of petitioner and its customers, both actual and potential, *id.*, at 710–714. The petition for certiorari did not present the First Amendment question, and we do not address it in this opinion.

from the legislative command of the state," *id.*, at 350, and went on to hold that the program was therefore exempt, by virtue of the Sherman Act's own limitations, from antitrust attack:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 350–351.

The availability of this exemption to a State's municipalities was the question presented in *City of Lafayette, supra.* In that case, petitioners were Louisiana cities empowered to own and operate electric utility systems both within and beyond their municipal limits. Respondent brought suit against petitioners under the Sherman Act, alleging that they had committed various antitrust offenses in the conduct of their utility systems, to the injury of respondent. Petitioners invoked the *Parker* doctrine as entitling them to dismissal of the suit. The District Court accepted this argument and dismissed. But the Court of Appeals for the Fifth Circuit reversed, holding that a "subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws," *City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (1976) (footnote omitted), and directing the District Court on remand to examine "whether the state legislature contemplated a certain type of anticompetitive restraint," *ibid.*[12]

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[12] The Court of Appeals described the applicable standard as follows: "[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the chal-

This Court affirmed. In doing so, a majority rejected at the outset petitioners' claim that, quite apart from *Parker*, "Congress never intended to subject local governments to the antitrust laws." 435 U. S., at 394. A plurality opinion for four Justices then addressed petitioners' argument that *Parker*, properly construed, extended to "all governmental entities, whether state agencies or subdivisions of a State, . . . simply by reason of their status as such." 435 U. S., at 408. The plurality opinion rejected this argument, after a discussion of *Parker*, *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), and *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977).[13] These precedents were construed as holding that the *Parker* exemption reflects the federalism principle that we are a Nation of *States*, a principle that makes no accommodation for sovereign subdivisions of States. The plurality opinion said:

> "Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have not been treated as

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lenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. . . . A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent." 532 F. 2d, at 434–435 (footnote and citation omitted).

[13] THE CHIEF JUSTICE, in a concurring opinion, focused on the nature of the challenged activity rather than the identity of the parties to the suit. 435 U. S., at 420. He distinguished between "the proprietary enterprises of municipalities," *id.*, at 422 (footnote omitted), and their "traditional government functions," *id.*, at 424, and viewed the *Parker* exemption as extending to municipalities only when they engaged in the latter.

> equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." 435 U. S., at 412–413 (footnote and citations omitted).

The opinion emphasized, however, that the State as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability. Under the plurality's standard, the *Parker* doctrine would shield from antitrust liability municipal conduct engaged in "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U. S., at 413. This was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the "state policy" relied upon would have to be "clearly articulated and affirmatively expressed." *Id.*, at 410. This standard has since been adopted by a majority of the Court. *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980).[14]

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[14] In *Midcal* we held that a California resale price maintenance system, affecting all wine producers and wholesalers within the State, was not entitled to exemption from the antitrust laws. In so holding, we explicitly adopted the principle, expressed in the plurality opinion in *City of Lafayette*, that anticompetitive restraints engaged in by state municipalities or subdivisions must be "clearly articulated and affirmatively expressed as state policy" in order to gain an antitrust exemption. *Midcal*, 445 U. S., at 105. The price maintenance system at issue in *Midcal* was denied such an exemption because it failed to satisfy the "active state supervision" criterion described in *City of Lafayette*, 435 U. S., at 410, as underlying our decision in *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). Because we conclude in the present case that Boulder's moratorium ordinance does

B

Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette*, *Orrin W. Fox Co.*, and *Midcal*. Boulder argues that these criteria are met by the direct delegation of powers to municipalities through the Home Rule Amendment to the Colorado Constitution. It contends that this delegation satisfies both the *Parker* and the *City of Lafayette* standards. We take up these arguments in turn.

(1)

Respondent city's *Parker* argument emphasizes that through the Home Rule Amendment the people of the State of Colorado have vested in the city of Boulder "'*every power* theretofore possessed by the legislature . . . in local and municipal affairs.'"[15] The power thus possessed by Boul-

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not satisfy the "clear articulation and affirmative expression" criterion, we do not reach the question whether that ordinance must or could satisfy the "active state supervision" test focused upon in *Midcal*.

[15] *Denver Urban Renewal Authority* v. *Byrne*, 618 P. 2d 1374, 1381 (1980), quoting *Four-County Metropolitan Capital Improvement District* v. *Board of County Comm'rs*, 149 Colo. 284, 294, 369 P. 2d 67, 72 (1962) (emphasis in original). The *Byrne* court went on to state that "by virtue of Article XX, a home rule city is not inferior to the General Assembly concerning its local and municipal affairs." 618 P. 2d, at 1381. Petitioner strongly disputes respondent city's premise and its construction of *Byrne*, citing *City and County of Denver* v. *Sweet*, 138 Colo. 41, 48, 329 P. 2d 441, 445 (1958), *City and County of Denver* v. *Tihen*, 77 Colo. 212, 219–220, 235 P. 777, 780–781 (1925), and 2 E. McQuillin, Municipal Corporations § 9.08a, p. 638 (1979), as contrary authority. But it is not for us to determine the correct view on this issue as a matter of state law. *Parker* affords an exemption from *federal* antitrust laws, based upon *Congress'* intentions respecting the scope of those laws. Thus the availability of the *Parker* exemption is and must be a matter of federal law.

der's City Council assertedly embraces the regulation of cable television, which is claimed to pose essentially local problems.[16] Thus, it is suggested, the city's cable television moratorium ordinance is an "act of government" performed by the city *acting as the State* in local matters, which meets the "state action" criterion of *Parker*.[17]

We reject this argument: it both misstates the letter of the law and misunderstands its spirit. The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "*dual* system of government," *Parker*, 317 U. S., at 351 (emphasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with

> "the Government of the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legisla-

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[16] Boulder cites the decision of the Colorado Supreme Court in *Manor Vail Condominium Assn.* v. *Vail*, 199 Colo. 62, 66–67, 604 P. 2d 1168, 1171–1172 (1980), as authority for the proposition that the regulation of cable television is a local matter. Petitioner disputes this proposition and Boulder's reading of *Manor Vail*, citing in rebuttal *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 168–169 (1968), holding that cable television systems are engaged in interstate communication. In this contention, petitioner is joined by the State of Colorado, which filed an *amicus* brief in support of petitioner. For the purposes of this decision we will assume, without deciding, that respondent city's enactment of the moratorium ordinance under challenge here did fall within the scope of the power delegated to the city by virtue of the Colorado Home Rule Amendment.

[17] Respondent city urges that the only distinction between the present case and *Parker* is that here the "act of government" is imposed by a home rule city rather than by the state legislature. Under *Parker* and Colorado law, the argument continues, this is a distinction without a difference, since in the sphere of local affairs home rule cities in Colorado possess every power once held by the state legislature.

tive functions, but they are all derived from, or exist in, subordination to one or the other of these." *United States* v. *Kagama*, 118 U. S. 375, 379 (1886) (emphasis added).

The dissent in the Court of Appeals correctly discerned this limitation upon the federalism principle: "We are a nation not of 'city-states' but of States." 630 F. 2d, at 717. *Parker* itself took this view. When *Parker* examined Congress' intentions in enacting the antitrust laws, the opinion, as previously indicated, noted: "[N]othing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature*. . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress." 317 U. S., at 350–351 (emphasis added). Thus *Parker* recognized Congress' intention to limit the state-action exemption based upon the federalism principle of limited state sovereignty. *City of Lafayette*, *Orrin W. Fox Co.*, and *Midcal* reaffirmed both the vitality and the intrinsic limits of the *Parker* state-action doctrine. It was expressly recognized by the plurality opinion in *City of Lafayette* that municipalities "are not themselves sovereign," 435 U. S., at 412, and that accordingly they could partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy, 435 U. S., at 413. The Court adopted this view in *Orrin W. Fox Co.*, 439 U. S., at 109, and *Midcal*, 445 U. S., at 105. We turn then to Boulder's contention that its actions were undertaken pursuant to a clearly articulated and affirmatively expressed state policy.

(2)

Boulder first argues that the requirement of "clear articulation and affirmative expression" is fulfilled by the Colorado Home Rule Amendment's "guarantee of local autonomy." It contends, quoting from *City of Lafayette*, 435 U. S., at 394,

415, that by this means Colorado has "comprehended within the powers granted" to Boulder the power to enact the challenged ordinance, and that Colorado has thereby "contemplated" Boulder's enactment of an anticompetitive regulatory program. Further, Boulder contends that it may be inferred, "from the authority given" to Boulder "to operate in a particular area"—here, the asserted home rule authority to regulate cable television—"that the *legislature* contemplated the kind of action complained of." (Emphasis supplied.) Boulder therefore concludes that the "adequate state mandate" required by *City of Lafayette*, *supra*, at 415, is present here.[18]

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F. 2d, at 707. Indeed, Boulder argues that

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[18] Boulder also contends that its moratorium ordinance qualifies for antitrust immunity under the test set forth by THE CHIEF JUSTICE in his *City of Lafayette* concurrence, see n. 13, *supra*, because the challenged activity is clearly a "traditional government function," rather than a "proprietary enterprise."

as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act. Cf. *City of Lafayette*, *supra*, at 414, and n. 44. Thus in Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

III

Respondents argue that denial of the *Parker* exemption in the present case will have serious adverse consequences for cities, and will unduly burden the federal courts. But this argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws.[19] Those laws, like other federal laws imposing civil or criminal sanctions upon "persons," of course apply to municipalities as well as to other corporate entities.[20] Moreover, judicial en-

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[19] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

[20] See *City of Lafayette*, 435 U. S., at 394–397.

We hold today only that the *Parker* v. *Brown* exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants

forcement of Congress' will regarding the state-action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." *City of Lafayette*, 435 U. S., at 416. As was observed in that case:

> "Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. . . . [A]ssuming that the municipality is authorized to provide a service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs." *Id.*, at 416–417 (footnote omitted).

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

It is so ordered.

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

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against government defendants. As we said in *City of Lafayette*, "[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 U. S., at 417, n. 48. Compare, *e. g.*, *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–692 (1978) (considering the validity of anticompetitive restraint imposed by private agreement), with *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133 (1978) (holding that anticompetitive effect is an insufficient basis for invalidating a state law). Moreover, as in *City of Lafayette*, *supra*, at 401–402, we do not confront the issue of remedies appropriate against municipal officials.

JUSTICE STEVENS, concurring.

The Court's opinion, which I have joined, explains why the city of Boulder is not entitled to an exemption from the antitrust laws. The dissenting opinion seems to assume that the Court's analysis of the exemption issue is tantamount to a holding that the antitrust laws have been violated. The assumption is not valid. The dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism.[1]

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, we held that municipalities' activities as providers of services are not exempt from the Sherman Act. The reasons for denying an exemption to the city of Lafayette are equally applicable to the city of Boulder, even though Colorado is a home-rule State. We did not hold in *City of Lafayette* that the city had violated the antitrust laws. Moreover, that question is quite different from the question whether the city of Boulder violated the Sherman Act because the character of their respective activities differs. In both cases, the violation issue is separate and distinct from the exemption issue.

A brief reference to our decision in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, will identify the invalidity of the dissent's assumption. In that case, the Michigan Public Utility Commission had approved a tariff that required the Detroit Edison Co. to provide its customers free light bulbs. The company contended that its light bulb distribution program was therefore exempt from the antitrust laws on the authority of *Parker* v. *Brown*, 317 U. S. 341. See 428 U. S., at

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[1] Cf. *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 615 (Stewart, J., dissenting) (the Court's holding "will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities' ") (quoting Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N. Y. U. L. Rev. 693, 728 (1974)). See also *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 176, n. 10.

592. The Court rejected the company's interpretation of *Parker* and held that the plaintiff could proceed with his antitrust attack against the company's program. We surely did not suggest that the members of the Michigan Public Utility Commission who had authorized the program under attack had thereby become parties to a violation of the Sherman Act. On the contrary, the plurality opinion reviewed the *Parker* case in great detail to emphasize the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so.[2]

It would be premature at this stage of the litigation to comment on the question whether petitioner will be able to establish that respondents have violated the antitrust laws. The

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[2] See 428 U. S., at 585–592 (opinion of STEVENS, J.). The point was made explicit in two passages of the plurality opinion. In a footnote, the plurality stated:

"The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State), on the other hand." *Id.*, at 591, n. 24.

The point was repeated in the text:

"The federal statute proscribes the conduct of persons, not programs, and the narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made." *Id.*, at 601 (footnote omitted).

The footnote omitted in the above quotation stated:

"Indeed, it did not even occur to the plaintiff that the state officials might have violated the Sherman Act; that question was first raised by this Court." *Id.*, at 601, n. 42.

See *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 361 ("[O]bviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party").

answer to that question may depend on factual and legal issues that must and should be resolved in the first instance by the District Court. In accordance with my belief that "the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies," 428 U. S., at 603 (opinion of STEVENS, J.), I offer no gratuitous advice about the questions I think might be relevant. My only observation is that the violation issue is not nearly as simple as the dissenting opinion implies.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Court's decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 U. S. C. § 1 *et seq.* First, the Court treats the issue in this case as whether a municipality is "exempt" from the Sherman Act under our decision in *Parker* v. *Brown*, 317 U. S. 341 (1943). The question addressed in *Parker* and in this case is not whether state and local governments are *exempt* from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are *pre-empted* by the Sherman Act under the operation of the Supremacy Clause. Second, in holding that a municipality's ordinances can be "exempt" from antitrust scrutiny only if the enactment furthers or implements a "clearly articulated and affirmatively expressed state policy," *ante*, at 52, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to *violate* the antitrust laws by enacting legislation in conflict with the Sherman Act, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated.

I

Pre-emption and exemption are fundamentally distinct concepts. Pre-emption, because it involves the Supremacy Clause, implicates our basic notions of federalism. Pre-emption analysis is invoked whenever the Court is called upon to examine "the interplay between the enactments of two *different* sovereigns—one federal and the other state." Handler, Antitrust—1978, 78 Colum. L. Rev. 1363, 1379 (1978). We are confronted with questions under the Supremacy Clause when we are called upon to resolve a purported conflict between the enactments of the Federal Government and those of a state or local government, or where it is claimed that the Federal Government has occupied a particular field exclusively, so as to foreclose any state regulation. Where pre-emption is found, the state enactment must fall without any effort to accommodate the State's purposes or interests. Because pre-emption treads on the very sensitive area of federal-state relations, this Court is "reluctant to infer pre-emption," *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 132 (1978), and the presumption is that pre-emption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States. *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978).

In contrast, exemption involves the interplay between the enactments of a single sovereign—whether one enactment was intended by Congress to relieve a party from the necessity of complying with a prior enactment. See, *e. g.*, *National Broiler Marketing Assn.* v. *United States*, 436 U. S. 816 (1978) (Sherman Act and Capper-Volstead Act); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–355 (1963) (Clayton Act and Bank Merger Act of 1960); *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357–361 (1963) (Sherman Act and Securities Exchange Act). Since the enactments of only one sovereign are involved, no problems of federalism are present. The court interpreting the

statute must simply attempt to ascertain congressional intent, whether the exemption is claimed to be express or implied. The presumptions utilized in exemption analysis are quite distinct from those applied in the pre-emption context. In examining exemption questions, "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *New York Stock Exchange*, *supra*, at 357.

With this distinction in mind, I think it quite clear that questions involving the so-called "state action" doctrine are more properly framed as being ones of pre-emption rather than exemption. Issues under the doctrine inevitably involve state and local regulation which, it is contended, are in conflict with the Sherman Act.

Our decision in *Parker* v. *Brown*, *supra*, was the genesis of the "state action" doctrine. That case involved a challenge to a program established pursuant to the California Agricultural Prorate Act, which sought to restrict competition in the State's raisin industry by limiting the producer's ability to distribute raisins through private channels. The program thus sought to maintain prices at a level higher than those maintained in an unregulated market. This Court assumed that the program would violate the Sherman Act were it "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," and that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce." 317 U. S., at 350. In this regard, we noted that "[o]ccupation of a legislative field by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." *Ibid.* We then held, however, that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government

in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 350–351.

This is clearly the language of federal pre-emption under the Supremacy Clause. This Court decided in *Parker* that Congress did not intend the Sherman Act to override state legislation designed to regulate the economy. There was no language of "exemption," either express or implied, nor the usual incantation that "repeals by implication are disfavored." Instead, the Court held that state regulation of the economy is not necessarily pre-empted by the antitrust laws even if the same acts by purely private parties would constitute a violation of the Sherman Act. The Court recognized, however, that some state regulation is pre-empted by the Sherman Act, explaining that "a state does got give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." *Id.*, at 351.

Our two most recent *Parker* doctrine cases reveal most clearly that the "state action" doctrine is not an exemption at all, but instead a matter of federal pre-emption.

In *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978), we examined the contention that the California Automobile Franchise Act conflicted with the Sherman Act. That Act required a motor vehicle manufacturer to secure the approval of the California New Motor Vehicle Board before it could open a dealership within an existing franchisee's market area, if the competing franchisee objected. By so delaying the opening of a new dealership whenever a competing dealership protested, the Act arguably gave effect to privately initiated restraints of trade, and thus was invalid under *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951). We held that the Act was outside the purview of the Sherman Act because it con-

templated "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." 439 U. S., at 109. We also held that a state statute is not invalid under the Sherman Act merely because the statute will have an anticompetitive effect. Otherwise, if an adverse effect upon competition were enough to render a statute invalid under the Sherman Act, "'the States' power to engage in economic regulation would be effectively destroyed.'" *Id.*, at 111 (quoting *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 133). In *New Motor Vehicle Bd.*, we held that a state statute could stand in the face of a purported conflict with the Sherman Act.

In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), we invalidated California's wine-pricing system in the face of a challenge under the Sherman Act. We first held that the price-setting program constituted resale price maintenance, which this Court has consistently held to be a "*per se*" violation of the Sherman Act. *Id.*, at 102–103. We then concluded that the program could not fit within the *Parker* doctrine. Although the restraint was imposed pursuant to a clearly articulated and affirmatively expressed state policy, the program was not actively supervised by the State itself. The State merely authorized and enforced price fixing established by private parties, instead of establishing the prices itself or reviewing their reasonableness. In the absence of sufficient state supervision, we held that the pricing system was invalid under the Sherman Act. 445 U. S., at 105–106.

Unlike the instant case, *Parker*, *Midcal*, and *New Motor Vehicle Bd.* involved challenges to a state statute. There was no suggestion that a State *violates* the Sherman Act when it enacts legislation not saved by the *Parker* doctrine from invalidation under the Sherman Act. Instead, the statute is simply unenforceable because it has been pre-empted by the Sherman Act. By contrast, the gist of the Court's

opinion is that a municipality may actually violate the antitrust laws when it merely enacts an ordinance invalid under the Sherman Act, unless the ordinance implements an affirmatively expressed state policy.[1] According to the majority, a municipality may be liable under the Sherman Act for enacting anticompetitive legislation, unless it can show that it is acting simply as the "instrumentality" of the State.

Viewing the *Parker* doctrine in this manner will have troubling consequences for this Court and the lower courts who must now adapt antitrust principles to adjudicate Sherman Act challenges to local regulation of the economy. The majority suggests as much in footnote 20. Among the many problems to be encountered will be whether the "*per se*" rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants. Another is the question of remedies. The Court understandably leaves open the question whether municipalities may be liable for treble damages for enacting anticompetitive ordinances which are not protected by the *Parker* doctrine.[2]

Most troubling, however, will be questions regarding the factors which may be examined by the Court pursuant to the Rule of Reason. In *National Society of Professional Engi-*

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[1] Most challenges to municipal ordinances undoubtedly will be made pursuant to § 1. One of the elements of a § 1 violation is proof of a contract, combination, or conspiracy. It may be argued that municipalities will not face liability under § 1, because it will be difficult to allege that the enactment of an ordinance was the product of such a contract, combination, or conspiracy. The ease with which the ordinance in the instant case has been labeled a "contract" will hardly give municipalities solace in this regard.

[2] It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person "injured in his business or property." Section 4 of the Clayton Act, 15 U. S. C. § 15, is mandatory: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained." See *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 442–443 (1978) (BLACKMUN, J., dissenting).

neers v. *United States*, 435 U. S. 679, 695 (1978), we held that an anticompetitive restraint could not be defended on the basis of a private party's conclusion that competition posed a potential threat to public safety and the ethics of a particular profession. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.*, at 696. *Professional Engineers* holds that the decision to replace competition with regulation is not within the competence of private entities. Instead, private entities may defend restraints only on the basis that the restraint is not unreasonable in its effect on competition or because its procompetitive effects outweigh its anticompetitive effects. See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977).

Applying *Professional Engineers* to municipalities would mean that an ordinance could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects. A local government would be disabled from displacing competition with regulation. Thus, a municipality would violate the Sherman Act by enacting restrictive zoning ordinances, by requiring business and occupational licenses, and by granting exclusive franchises to utility services, even if the city determined that it would be in the best interests of its inhabitants to displace competition with regulation. Competition simply does not and cannot further the interests that lie behind most social welfare legislation. Although state or local enactments are not invalidated by the Sherman Act merely because they may have anticompetitive effects, *Exxon Corp.* v. *Governor of Maryland*, *supra*, at 133, this Court has not hesitated to invalidate such statutes on the basis that such a program would violate the antitrust laws if engaged in by private parties. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, *supra*, at 102–103 (resale price maintenance); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) (same). Cf. *Parker* v. *Brown*, 317 U. S., at 350

(Court assumed the stabilization program would violate the Sherman Act if organized and effected by private persons). Unless the municipality could point to an affirmatively expressed state policy to displace competition in the given area sought to be regulated, the municipality would be held to violate the Sherman Act and the regulatory scheme would be rendered invalid. Surely, the Court does not seek to require a municipality to justify every ordinance it enacts in terms of its procompetitive effects. If municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 133. This country's municipalities will be unable to experiment with innovative social programs. See *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

On the other hand, rejecting the rationale of *Professional Engineers* to accommodate the municipal defendant opens up a different sort of Pandora's Box. If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the *Lochner* (*Lochner* v. *New York*, 198 U. S. 45 (1905)) era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected. Instead of "liberty of contract" and "substantive due process," the procompetitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined.[3] Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate

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[3] During the *Lochner* era, this Court's interpretation of the Due Process Clause complemented its antitrust policies. This Court sought to compel competitive behavior on the part of private enterprise and generally for-

local regulation of the economy simply upon opining that the municipality has acted unwisely. The Sherman Act should not be deemed to authorize federal courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963). The federal courts have not been appointed by the Sherman Act to sit as a "superlegislature to weigh the wisdom of legislation." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 535 (1949).

Before this Court leaps into the abyss and holds that municipalities may *violate* the Sherman Act by enacting economic and social legislation, it ought to think about the consequences of such a decision in terms of its effect both upon the very antitrust principles the Court desires to apply to local governments and upon the role of the federal courts in examining the validity of local regulation of the economy.

Analyzing this problem as one of federal pre-emption rather than exemption will avoid these problems. We will not be confronted with the anomaly of holding a municipality liable for enacting anticompetitive ordinances.[4] The federal courts will not be required to engage in a standardless review of the reasonableness of local legislation. Rather, the question simply will be whether the ordinance enacted is pre-empted by the Sherman Act. I see no reason why a different rule of pre-emption should be applied to testing the validity of municipal ordinances than the standard we presently apply in assessing state statutes. I see no reason why a municipal ordinance should not be upheld if it satisfies the

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bade government interference with competitive forces in the marketplace. See Strong, The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation, 15 Ariz. L. Rev. 419, 435 (1973).

[4] Since a municipality does not violate the antitrust laws when it enacts legislation pre-empted by the Sherman Act, there will be no problems with the remedy. Pre-empted state or local legislation is simply invalid and unenforceable.

Midcal criteria: the ordinance survives if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and if the city actively supervises and implements this policy.[5] As with the case of the State, I agree that a city may not simply authorize private parties to engage in activity that would violate the Sherman Act. See *Parker* v. *Brown*, 317 U. S., at 351. As in the case of a State, a municipality may not become "a participant in a private agreement or combination by others for restraint of trade." *Id.*, at 351–352.

Apart from misconstruing the *Parker* doctrine as a matter of "exemption" rather than pre-emption, the majority comes to the startling conclusion that our federalism is in no way implicated when a municipal ordinance is invalidated by the Sherman Act. I see no principled basis to conclude, as does the Court, that municipal ordinances are more susceptible to invalidation under the Sherman Act than are state statutes. The majority concludes that since municipalities are not States, and hence are not "sovereigns," our notions of federalism are not implicated when federal law is applied to invalidate otherwise constitutionally valid municipal legislation. I find this reasoning remarkable indeed. Our notions of federalism are implicated when it is contended that a municipal ordinance is pre-empted by a federal statute. This Court has made no such distinction between States and their subdivisions with regard to the pre-emptive effects of federal law.

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[5] The *Midcal* standards are not applied until it is either determined or assumed that the regulatory program would violate the Sherman Act if it were conceived and operated by private persons. See *Parker* v. *Brown*, 317 U. S., at 350; *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 102–103 (1980). A statute is not pre-empted simply because some conduct contemplated by the statute might violate the antitrust laws. See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 45–46 (1966). Conversely, reliance on a state statute does not insulate a private party from liability under the antitrust laws unless the statute satisfies the *Midcal* criteria.

The standards applied by this Court are the same regardless of whether the challenged enactment is that of a State or one of its political subdivisions. See, *e. g.*, *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973); *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960). I suspect that the Court has not intended to so dramatically alter established principles of Supremacy Clause analysis. Yet, this is precisely what it appears to have done by holding that a municipality may invoke the *Parker* doctrine only to the same extent as can a private litigant. Since the *Parker* doctrine is a matter of federal pre-emption under the Supremacy Clause, it should apply in challenges to municipal regulation in similar fashion as it applies in a challenge to a state regulatory enactment. The distinction between cities and States created by the majority has no principled basis to support it if the issue is properly framed in terms of pre-emption rather than exemption.

As with the States, the *Parker* doctrine should be employed to determine whether local legislation has been pre-empted by the Sherman Act. Like the State, a municipality should not be haled into federal court in order to justify its decision that competition should be replaced with regulation. The *Parker* doctrine correctly holds that the federal interest in protecting and fostering competition is not infringed so long as the state or local regulation is so structured to ensure that it is truly the government, and not the regulated private entities, which is replacing competition with regulation.

II

By treating the municipal defendant as no different from the private litigant attempting to invoke the *Parker* doctrine, the Court's decision today will radically alter the relationship between the States and their political subdivisions. Municipalities will no longer be able to regulate the local economy without the imprimatur of a clearly expressed state policy

to displace competition.[6] The decision today effectively destroys the "home rule" movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern.[7] The municipalities that stand most to lose by the decision today are those with the most autonomy. Where the State is totally disabled from enacting legislation dealing with matters of local concern, the municipality will be defenseless from challenges to its regulation of the local economy. In such a case, the State is disabled from articulating a policy to displace competition with regulation. Nothing short of altering the relationship between the municipality and the State will enable the local government to legislate on matters important to its inhabitants. In order to defend itself from Sherman Act attacks, the home rule municipality will have to cede its authority back to the State. It is unfortunate enough that the Court today holds that our federalism is not implicated when municipal legislation is invalidated by a federal statute. It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the States and their political subdivisions.

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[6] The Court understandably avoids determining whether local ordinances must satisfy the "active state supervision" prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.

[7] Seeing this opportunity to recapture the power it has lost over local affairs, the State of Colorado, joined by 22 other States, has supported petitioner as *amicus curiae*. It is curious, indeed, that these States now seek to use the Supremacy Clause as a sword, when they so often must defend their own enactments from its invalidating effects.

KAISER STEEL CORP. *v.* MULLINS ET AL.

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

No. 80–1345. Argued November 10, 1981—Decided January 13, 1982

Petitioner coal producer, as a party to a collective-bargaining agreement between the United Mine Workers of America and hundreds of coal producers, agreed to contribute to specified employee health and retirement funds on the basis of each ton of coal it produced and each hour worked by its covered employees. The agreement also required an employer to report its purchases of coal from producers not under contract with the union and to make contributions to the union welfare funds on the basis of such purchases. After petitioner failed to report and make contributions as required by the "purchased-coal" clause, respondents, the trustees of the union trust funds, filed suit in Federal District Court to enforce the collective-bargaining agreement. Petitioner admitted its failure to comply with the purchased-coal clause, but contended that the clause was void and unenforceable as violative of §§ 1 and 2 of the Sherman Act and § 8(e) of the National Labor Relations Act (NLRA), which forbids collective-bargaining agreements whereby the employer agrees to cease doing business with, or to cease handling the products of, another employer (hot-cargo provision). The District Court entered summary judgment for respondents, and the Court of Appeals affirmed. Both courts rejected petitioner's defense without passing on the legality of the purchased-coal clause under either the Sherman Act or the NLRA.

Held: Petitioner was entitled to plead and have adjudicated its defense based on the alleged illegality of the purchased-coal clause. Pp. 77–88.

(a) Illegal promises will not be enforced in cases controlled by federal law. This rule is not rendered inapplicable here on the asserted grounds that employers' contributions to union funds are not, in themselves and standing alone, illegal acts and that ordering petitioner to pay would therefore not command conduct that is inherently contrary to public policy. Petitioner's obligation to pay money to the union funds arose from and was measured by its purchases from other producers who did not contribute to the union funds, and if this obligation is illegal under the antitrust or labor laws, to order petitioner to pay would command unlawful conduct. Pp. 77–83.

(b) Although as a general rule federal courts do not have jurisdiction over activity that is arguably subject to § 8 of the NLRA and must defer to the exclusive competence of the National Labor Relations Board to determine what is and is not an unfair labor practice, a federal court has a duty to determine whether a contract violates federal law before enforcing it. Section 8(e) renders hot-cargo clauses void at their inception and at all times unenforceable by federal courts. Thus, where a § 8(e) defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense. Pp. 83–86.

(c) Assuming, *arguendo*, that § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980—which requires employers to make contributions to a multiemployer pension plan in accordance with the employer's obligation under the terms of the plan or a collective-bargaining agreement—is applicable to this case, it does not alter the result. Section 306(a) does not abolish all illegality defenses but explicitly requires employers to contribute to pension funds only where doing so would not be "inconsistent with law," and it was intended to simplify collection actions by precluding only defenses that are "unrelated" or "extraneous" to the employer's promise to make contributions. Nor does the statute's language or history indicate that Congress intended to implicitly repeal the antitrust laws, the labor laws, or any other statute which might be raised as a defense to a provision in a collective-bargaining agreement requiring an employer to contribute to a pension fund. Pp. 86–88.

206 U. S. App. D. C. 334, 642 F. 2d 1302, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 89.

A. Douglas Melamed argued the cause for petitioner. With him on the briefs was *Lynn Bregman.*

Stephen J. Pollak argued the cause for respondents. With him on the brief were *Ralph J. Moore, Jr.*, *Wendy S. White*, and *E. Calvin Golumbic.*

Barbara E. Etkind argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Lee*, *Assistant Attorney General*

Baxter, Deputy Solicitor General Wallace, Robert B. Nicholson, Robert J. Wiggers, and *T. Timothy Ryan, Jr.**

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether a coal producer, when it is sued on its promise to contribute to union welfare funds based on its purchases of coal from producers not under contract with the union, is entitled to plead and have adjudicated a defense that the promise is illegal under the antitrust and labor laws.

I

The National Bituminous Coal Wage Agreement of 1974 is a collective-bargaining agreement between the United Mine Workers of America (UMW) and hundreds of coal producers, including steel companies such as petitioner Kaiser Steel Corp. The agreement required signatory employers to contribute to specified employee health and retirement funds. Section (d)(1) of Article XX required employers to pay specified amounts for each ton of coal produced and for each hour worked by covered employees. In addition, the section included a purchased-coal clause requiring employers to contribute to the trust specified amounts on "each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by [the employer]

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*Briefs of *amici curiae* urging reversal were filed by *James D. Hutchinson* and *John M. Cannon* for the Mid-America Legal Foundation; and by *Steven L. Friedman* and *John L. Kilcullen* for the Pennsylvania Coal Mining Association.

Briefs of *amici curiae* urging affirmance were filed by *Alan M. Levy* for the Central States, Southeast and Southwest Areas Pension Fund; by *James P. Watson, George M. Cox, John S. Miller, Jr.,* and *Lionel Richman* for the Construction Laborers Trust Funds for Southern California et al.; by *Gerald M. Feder* and *Denis F. Gordon* for the National Coordinating Committee for Multiemployer Plans; by *Wayne Jett* and *Julius Reich* for the Operating Engineers Pension Trust et al.; and by *Harrison Combs* and *Willard P. Owens* for the United Mine Workers of America.

for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made. . . ."[1] Section (d) also provided that employers would furnish the trustees with monthly statements showing the full amounts due the trust funds as well as the tons of coal produced, procured, or acquired for use or for sale. The parties agreed that if the clause requiring contributions based on purchased coal was held illegal by any court or agency, the union could demand negotiations with respect to a replacement for the invalidated provision.[2]

Kaiser operates a steel mill in California and coal mines in Utah and New Mexico. Its mines produce only high-volatile coal, so it must purchase mid-volatile coal used in steel manufacturing from another producer. Since 1959, Kaiser has purchased virtually all of its mid-volatile coal requirements from Mid-Continent Coal and Coke Co. Mid-Continent's employees are represented by the Redstone Workers' Association, and their wages and benefits during the period covered by the 1974 Agreement were equal or superior to those required by the UMW contract. Nevertheless, the UMW has repeatedly attempted to become the collective-bargaining representative for Mid-Continent's employees. According to affidavits submitted by Kaiser, the purchased-coal clause was not taken into account in calculating the needs and

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[1] Kaiser has been a UMW signatory since the 1940's. The purchased-coal clause was first included in the 1964 Agreement, although the UMW agreements left steel companies such as Kaiser free to purchase non-UMW coal for use in steel production until 1971 without penalty.

[2] The 1971 purchased-coal clause and its predecessors have been subject to litigation on the grounds that the clause is an illegal "hot cargo" agreement under § 8(e) of the National Labor Relations Act (NLRA), 29 U. S. C. § 158(e), see, *e. g.*, *Riverton Coal Co.* v. *UMW*, 453 F. 2d 1035 (CA6), cert. denied, 407 U. S. 915 (1972), and that it constitutes a group boycott in violation of the antitrust laws. See, *e. g.*, *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965); *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F. 2d 767 (CA6 1970), cert. denied, 402 U. S. 983 (1971).

revenues of the various UMW trust funds during the negotiation of the 1974 Agreement.[3]

Kaiser complied with its obligation under the 1974 contract to make contributions based on the coal it produced and the hours worked by its miners. It did not, however, report the coal that it acquired from others or make contributions based on such purchased coal. After the expiration of the 1974 contract, the trustees of the UMW Health and Retirement Funds, respondents here, sued Kaiser seeking to enforce the latter's obligation to report and contribute with respect to coal not produced by Kaiser but acquired from others. Jurisdiction was asserted under § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185, and § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891, 29 U. S. C. § 1132. Kaiser admitted its failure to report and contribute but defended on the ground, among others, that the agreement in these respects was void and unenforceable as violative of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2, and § 8(e) of the NLRA, 73 Stat. 543, 29 U. S. C. § 158(e). The District Court did not pass on the legality of the purchased-coal agreement under either the Sherman Act or the NLRA. It nevertheless rejected Kaiser's defense of illegality and granted the trustees' motion for summary judgment. 466 F. Supp. 911 (1979). The Court of Appeals affirmed, 206 U. S. App. D. C. 334, 642 F. 2d 1302 (1980), also rejecting Kaiser's defense without adjudicating the legality of the purchased-coal clause.

We granted Kaiser's petition for certiorari raising the question, among others, whether the Court of Appeals had

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[3] If Kaiser had purchased its mid-volatile coal requirements from a UMW producer, it would not be required to make any payments under the purchased-coal clause. The producer of mid-volatile coal would increase its contributions to the trust funds based on the amount of coal mined and the number of hours worked by employees, but in turn the trust funds' obligations to UMW members would increase.

properly foreclosed its defense based on the illegality of its promise to report and contribute in connection with coal purchased from other producers. 451 U. S. 969 (1981). We now reverse.

II

There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law. In *McMullen* v. *Hoffman*, 174 U. S. 639 (1899), two bidders for public work submitted separate bids without revealing that they had agreed to share the work equally if one of them were awarded the contract. One of the parties secured the work and the other sued to enforce the agreement to share. The Court found the undertaking illegal and refused to enforce it, saying:

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it . . . ." *Id.*, at 654.
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> "[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest." *Id.*, at 669.

The rule was confirmed in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it

should be denied without regard to the interests of individual parties." *Id.*, at 262.[4]

Kaiser's position is that to require it to make contributions based on purchased coal would be to enforce a bargain that violates two different federal statutes, the Sherman Act and the NLRA. Sections 1 and 2 of the Sherman Act prohibit contracts, combinations, and conspiracies in restraint of trade, as well as monopolization and attempts to monopolize. Kaiser urges that the purchased-coal clause is illegal under these sections because it puts non-UMW producers at a disadvantage in competing for sales to concerns like Kaiser and because it penalizes Kaiser for shopping among sellers for the lowest available price.[5]

Section 8(e) of the NLRA forbids contracts between a union and an employer whereby the employer agrees to cease doing business with or to cease handling the products of another employer. Kaiser submits that being forced to contribute based on its purchases of coal from other employers violates § 8(e), the hot-cargo provision, because it penalizes Kaiser for dealing with other employers who do not have a contract with the union and because the major purpose of prohibiting hot-cargo agreements is to protect employers like Kaiser from being coerced into aiding the union in its organizational or other objectives with respect to other employers.

The Court of Appeals, like the District Court, declined to pass on the legality of the purchased-coal clause under either the Sherman Act or the NLRA. It was apparently of the

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[4] See also *Hurd* v. *Hodge*, 334 U. S. 24, 34–35 (1948); *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 177 (1915); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88 (1902); *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 548–549 (1902).

[5] In order to sell coal to Kaiser, a non-UMW producer must lower its price such that when added to the amount Kaiser must pay under the purchased-coal clause, the price is still competitive with those charged by UMW producers.

view that even if the agreement was unlawful, the illegality defenses should not be sustained in this case. We disagree. None of the grounds offered by the Court of Appeals or by the respondents for rejecting Kaiser's defenses are persuasive.

We do not agree, in the first place, that if Kaiser's agreement to contribute based on purchased coal is assumed to be illegal under either the Sherman Act or the NLRA, its promise to contribute could be enforced without commanding unlawful conduct. The argument is that employers' contributions to union welfare funds are not, in themselves and standing alone, illegal acts and that ordering Kaiser to pay would therefore not demand conduct that is inherently contrary to public policy. Kaiser, however, did not make a naked promise to pay money to the union funds. The purchased-coal provision obligated it to pay only if it purchased coal from other employers and then only if contributions to the UMW funds had not been made with respect to that coal. Kaiser's obligation arose from and was measured by its purchases from other producers. If Kaiser's undertaking is illegal under the antitrust or the labor laws, it is because of the financial burden which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds. It is plain enough that to order Kaiser to pay would command conduct that assertedly renders the promise an illegal undertaking under the federal statutes.

We do not agree that *Kelly* v. *Kosuga*, 358 U. S. 516 (1959), compels or even supports a contrary result. In that case, both petitioner and respondent were engaged in marketing onions. Petitioner agreed to buy a substantial portion of the onions owned by respondent. Petitioner and respondent mutually agreed that neither would deliver any onions to the futures market for the balance of the trading season. The agreement was for the purpose of fixing the price and limiting the amount of onions sold in the State of

Illinois, thereby "creating a false and a fictitious market" for that produce. *Id.*, at 517. After petitioner defaulted on the payments due under the contract, respondent sued for the balance of the purchase price and was awarded summary judgment. Both the District Court and the Court of Appeals rejected petitioner's claim that his undertaking was unenforceable because part of the agreement violated the Sherman Act. This Court affirmed. The Court said that "[a]s a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor," *id.*, at 518, particularly where the plea is made by a purchaser in an action to recover from him the agreed price for goods sold. Various cases in this Court were cited to support the observation, and *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), where the defense was sustained, was distinguished as a case where a judgment for an excessive purchase price "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kelly* v. *Kosuga*, *supra*, at 520. The Court went on to say that "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy . . . 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" 358 U. S., at 520–521 (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, *supra*, at 271). Applying this approach to the facts before it, the Court observed:

> "[W]hile the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. . . . [W]here, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent

of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." 358 U. S., at 521.

Respondents construe *Kosuga* as standing for two general propositions: first, that when a contract is wholly performed on one side, the defense of illegality to enforcing performance on the other side will not be entertained;[6] and second, that the express remedies provided by the Sherman Act are not to be added to by including the avoidance of contracts as a sanction.[7] It is apparent from the opinion in that case, however, that both propositions were subject to the limitation that the illegality defense should be entertained in those circum-

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[6] The contention is that since the contract has expired, enforcing the promise to contribute will not bring about any of the evils that the antitrust or labor laws are designed to prevent. But if a promise is illegal at its inception and cannot be enforced during the term of the contract, it does not spring to life and become enforceable when the contract expires. If penalizing Kaiser for purchasing coal from producers without contracts with the UMW is illegal, it is not less so if the penalty is extracted after the termination of the promise. The suit is still a suit on a presumptively illegal undertaking. If a promisee need only wait until a contract expires to enforce an illegal provision, the defense of illegality would obviously be ephemeral. Cases such as *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909), and *McMullen* v. *Hoffman*, 174 U. S. 639 (1899), confound such a rule. And if it be suggested that Kaiser should not have waited so long to assert its defense, the Court has held that "rules of estoppel will not be permitted to thwart the purposes of statutes of the United States." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).

[7] Refusing to enforce a promise that is illegal under the antitrust or labor laws is not providing an additional remedy contrary to the will of Congress. A defendant proffering the defense seeks only to be relieved of an illegal obligation and does not ask any affirmative remedy based on the antitrust or labor laws. "[A]ny one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action. . . . The act . . . gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence, and we think when

stances where its rejection would be to enforce conduct that the antitrust laws forbid. In *Kosuga*, there were two promises, one to pay for purchased onions and the other to withhold onions from the market. The former was legal and could be enforced, the latter illegal and unenforceable.

Kosuga thus contemplated that the defense of illegality would be entertained in a case such as this. If the purchased-coal agreement is illegal, it is precisely because the promised contributions are linked to purchased coal and are a penalty for dealing with producers not under contract with the UMW. In *Kosuga*, withholding onions from the market was not in itself illegal and could have been done unilaterally. But the agreement to do so, as the Court recognized, was unenforceable. Here, employer contributions to union welfare funds may be quite legal more often than not, but an agreement linking contributions to purchased coal, if illegal, is subject to the defense of illegality.

Respondents' reliance on *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960), is no more persuasive. There, as here, a collective-bargaining contract bound the coal company to contribute to an employee trust fund. When sued by the trustees for delinquent contributions, the employers defended on the ground that the union had violated the no-strike clause contained in the contract. Although the strikes were illegal, the Court held that the company's promise to contribute to the fund was independent of and not conditioned on the union's performance of its promise not to strike. Furthermore, the company was not entitled to a setoff

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proved it is a valid defence to any claim made under a contract thus denounced as illegal." *Bement* v. *National Harrow Co.*, 186 U. S., at 88.

As is evident from the text, *Kelly* v. *Kosuga* did not hold that the promisor may be forced to perform an illegal contract because he has another remedy that would make him whole. The case did hold that the promisor may not avoid performing a perfectly legal promise because he has also made a separate, illegal undertaking. In doing so, *Kosuga* conforms to a common-law exception to the rule that courts will not enforce illegal contracts. See 6A A. Corbin, Contracts §§ 1518–1531 (1962 ed. and Supp. 1964); Comment, 27 U. Chi. L. Rev. 758, and n. 2 (1959–1960).

against the trustees, who were innocent third parties, at least in the absence of some indication in the contract that the parties had intended to permit the employer to reduce its contributions by the amount of his damages caused by the striking unions. Just as in *Kosuga*, however, the promise that was enforced was not an illegal undertaking. Aside from the defense based on the union's default, there was no claim that the employer's promise to pay was illegal and unenforceable. The decision in no respect suggests that trustees could collect payments pursuant to a promise that itself violates the antitrust laws or the NLRA.[8]

III

We also do not agree that the question of the legality of the purchased-coal clause under § 8(e) of the NLRA was within the exclusive jurisdiction of the National Labor Relations Board and that the District Court was therefore without authority to adjudicate Kaiser's defense in this respect. The Board is vested with primary jurisdiction to determine what is or is not an unfair labor practice. As a general rule, federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959). See also *Garner* v. *Teamsters*, 346 U. S. 485, 490–491 (1953). It is also well established, however, that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the re-

[8] As the Court of Appeals recognized, "third-party beneficiaries, like the Trustees here, are subject to the contract defenses of nonperforming promisors." 206 U. S. App. D. C. 334, 344, 642 F. 2d 1302, 1312 (1980). In this respect, pension fund trustees have no special status which exempts them from the general rule that courts do not enforce illegal contracts. Only Congress could create such an exemption and, as discussed in Part IV, it has not done so.

strictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd* v. *Hodge*, 334 U. S. 24, 34–35 (1948) (footnotes omitted).

The "touchstone" and "central theme" of § 8(e) is the protection of neutral employers, such as Kaiser, which are caught in the middle of a union's dispute with a third party. *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 624–626, 645 (1967). Section 8(e) provides not only that "it shall be an unfair labor practice" to enter an agreement containing a hot-cargo clause, but also that "any contract or agreement entered into heretofore or hereafter containing [a hot-cargo clause] shall be to such extent unenforcible *[sic]* and void." This strongly implies that a court must reach the merits of an illegality defense in order to determine whether the contract clause at issue has any legal effect in the first place.

That § 8(e) renders hot-cargo clauses void at their inception and at all times unenforceable by federal courts is also evident from its legislative history. It was enacted to close a loophole created by *Carpenters* v. *NLRB*, 357 U. S. 93 (1958) *(Sand Door)*. There the Court held that the existence of a hot-cargo clause was not a defense to an unfair labor practice charge brought by a union against an employer, emphasizing that observance of the clause was not unlawful. "Section 8(e) was designed to plug this gap in the legislation by making the 'hot cargo' clause itself unlawful. The *Sand Door* decision was believed by Congress . . . to create the possibility of damage actions against employers for breaches of 'hot cargo' clauses . . . ." *National Woodwork Manufacturers Assn.* v. *NLRB*, *supra*, at 634. If a union may not maintain a damages action for violation of a hot-cargo clause, it also may not enforce a hot-cargo clause in an action for specific performance.

That a federal court may determine the merits of Kaiser's § 8(e) defense is further supported by *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975). There the petitioner filed suit claiming that an agreement between it and the respondent union violated §§ 1 and 2 of the Sherman Act. Respondent contended that the agreement was exempt from the antitrust laws because it was authorized by § 8(e). The Court of Appeals refused to decide whether § 8(e) permitted the agreement or whether the agreement constituted an unfair labor practice under § 8(e), holding that the NLRB "has exclusive jurisdiction to decide in the first instance what Congress meant in 8(e) and 8(b)(4)." *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 483 F. 2d 1154, 1174 (CA5 1973) (footnote omitted). This Court reversed on the ground that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U. S., at 626 (footnote omitted). See also *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 684–688 (1965). The Court then addressed the § 8(e) issue on the merits and found that § 8(e) did not allow the agreement at issue. 421 U. S., at 633. As a result, the agreement was subject to the antitrust laws, for the majority was persuaded that the legislative history did not suggest "labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA." *Id.*, at 634 (footnote omitted).

In *Connell*, we decided the § 8(e) issue in the first instance. It was necessary to do so to determine whether the agreement was immune from the antitrust laws. Here a court must decide whether the purchased-coal clause violates § 8(e) in order to determine whether to enforce the clause. As the Court recently stated with respect to a statute which also provides that contracts which violate it are "void," "[a]t the

very least Congress must have assumed that [the statute] could be raised defensively in private litigation to preclude the enforcement of . . . [a] contract." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 18 (1979). Therefore, where a § 8(e) defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.

IV

On September 26, 1980, nine days after the Court of Appeals issued the decision under review, Congress enacted legislation which respondents argue established a special rule governing the availability of illegality defenses in actions for delinquent contributions brought by pension fund trustees. It is urged that Congress intended to preclude employers from raising defenses such as those Kaiser has attempted to raise here. Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96–364, 94 Stat. 1295, added § 515 to ERISA, which provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U. S. C. § 1145 (1976 ed., Supp. V).[9]

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[9] The dissent rests entirely on § 306(a). It does not suggest that absent § 306(a), the purchased-coal clause would not be subject to the defense that its enforcement is forbidden by both the antitrust and labor laws.

The provision which was eventually enacted as § 306(a) was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson [10] explained the purpose and meaning of § 306(a) in the same language used in the Senate Labor Committee Print. Both legislators also stated that they endorsed cases such as *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960); *Huge* v. *Long's Hauling Co.*, 590 F. 2d 457 (CA3 1978), cert. denied, 442 U. S. 918 (1979); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F. 2d 552 (CA6 1962); and disapproved cases such as *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (DC 1980), appeal pending, No. 80–1501 (CADC), and *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell*, 103 LRRM 2219 (WD Wash. 1979), appeal pending, No. 80–3024 (CA9).[11]

Assuming, *arguendo*, that the 1980 Amendments are applicable to this case, they do not alter the result. Far from abolishing illegality defenses, § 306(a) explicitly requires employers to contribute to pension funds only where doing so

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[10] Senator Williams was Chairman of the Senate Committee on Labor and Human Resources and floor manager of S. 1076, the Senate counterpart of H. R. 3904, which became the Multiemployer Pension Plan Amendments Act of 1980. Similarly, Representative Thompson was Chairman of the House Education and Labor Committee and floor manager of H. R. 3904.

[11] 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.*, at 23288 (remarks of Sen. Williams).

would not be "inconsistent with law." Even if § 306(a) were construed as completely embracing the views expressed by Senator Williams and Representative Thompson, the statute would not require prohibiting Kaiser from raising defenses to the purchased-coal clause. The legislators did not say that employers should be prevented from raising all defenses; rather they spoke in terms of "unrelated" and "extraneous" defenses.[12] As the United States points out in its brief, none of the cases the legislators endorsed "involved the enforcement of a contribution clause that itself was alleged to violate the law." Brief for United States as *Amicus Curiae* 28 (footnote omitted). Neither *Lewis* v. *Benedict Coal Corp.*, *supra*, *Huge* v. *Long's Hauling Co.*, *supra*, nor *Lewis* v. *Mill Ridge Coals, Inc.*, *supra*, involved a defense based on the illegality of the very promise sought to be enforced.

Respondents' contention that § 306(a) permits only one defense to be raised in suits to recover delinquent contributions—that the making of the payment itself violates § 302(a) of the LMRA—must be rejected for another reason. Respondents' argument necessarily assumes that in enacting § 306(a), Congress implicitly repealed the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a provision in a collective-bargaining agreement requiring an employer to contribute to a pension fund. Since "repeals by implication are disfavored," *Allen* v. *McCurry*, 449 U. S. 90, 99 (1980), "'the intention of the legislature to repeal must be clear and manifest.'" *TVA* v. *Hill*, 437 U. S. 153, 189 (1978), quoting *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). The statutory language provides no basis for implying such a repeal, and nowhere in the legislative history is there any mention that § 306(a) might conflict with other laws.[13]

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[12] *Ibid.* (remarks of Sen. Williams); *id.*, at 23039 (remarks of Rep. Thompson); *id.*, at 20180 (colloquy between Sen. Williams and Sen. Matsunaga). See also 1980 Senate Labor Committee Print, at 44.

[13] According to the dissent, Congress intended to permit a union to extract a promise from an employer that would be illegal under the antitrust

The judgment of the Court of Appeals is reversed,[14] and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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

The salient facts of this case are not sufficiently stressed in the Court's opinion, and thus bear repeating. Kaiser Steel Corporation and the United Mine Workers (UMW) entered into a collective-bargaining agreement in 1974. As a part of that agreement, Kaiser promised to make contributions to certain UMW-designated employee health and retirement plan funds, based in part upon the amount of coal purchased by Kaiser from non-UMW mines. This purchased-coal

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and labor laws as long as the promise is to pay money to pension fund trustees. Under this view, the defense of illegality would be unavailable during the life of the contract; it would be of no avail to the employer to secure a declaratory judgment that its promise violated federal statutes. The promise would still be enforceable, the effect being that the antitrust and labor laws would be suspended for the life of the contract. The dissent concedes that § 306(a) itself does not support this result. It instead relies on scraps of legislative history to work its partial repeal of the antitrust and labor laws. We are unconvinced that Congress intended any such result.

It should also be pointed out that Kaiser paid all sums that were anticipated in calculating the needs of the trust funds. The purchased-coal clause was not taken into account in providing trust fund revenues. We are unpersuaded that Congress intended to give pension fund trustees the benefit of illegal bargains that were not, and should not have been, relied upon to ensure the solvency of the trust funds.

[14] Because attorney's fees are normally awarded only to prevailing parties, the award of attorney's fees to respondents is also reversed. The Court of Appeals held that the District Court had jurisdiction over this action pursuant to § 502 of ERISA and did not abuse its discretion in awarding attorney's fees under § 502(g). That section permits a court to "allow a reasonable attorney's fee and costs of action to either party" in an action brought under § 502. Petitioners contend that this is not a suit to enforce ERISA, it cannot be brought under § 502, and therefore there is no authority for an award of attorney's fees. It is unnecessary to reach this issue.

clause obviously had value to Kaiser's UMW employees, because the agreement provided that if that clause were adjudged illegal, then the union could demand renegotiation of the contract in order to secure a *quid pro quo* for the invalidated clause. During the life of the contract, from 1974 to 1977, Kaiser's UMW employees fully performed their obligations under the contract. Kaiser, in contrast, did not pay a penny of the money that it had promised to pay under the purchased-coal clause. Instead, Kaiser failed to disclose the fact that it had purchased outside coal to which the clause applied, in plain violation of the reporting requirements of the 1974 agreement. In 1978—after Kaiser's UMW employees had lost their opportunity to renegotiate the 1974 agreement, and after they had fully performed their part of that bargain—Kaiser for the first time interposed its claim of illegality as a defense to respondent trustees' suit to recover the moneys promised to their plan under the purchased-coal clause.

"'It has been often stated in similar cases that the defence [of illegality] is a very dishonest one, and it lies ill in the mouth of the defendant to allege it . . . .'" *Kelly* v. *Kosuga*, 358 U. S. 516, 519 (1959), quoting *McMullen* v. *Hoffman*, 174 U. S. 639, 669 (1899). This observation is peculiarly apt in the present case. The defense of illegality lies ill indeed in the mouth of the Kaiser Steel Corporation. In my view, this case exemplifies the very sort of abuse that Congress intended to stop with the enactment of § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980.[1]

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[1] 94 Stat. 1295.

The Court expresses doubt that § 306(a) is applicable to this case. *Ante*, at 87. But there is no basis for such doubt. Ever since *United States* v. *Schooner Peggy*, 1 Cranch 103, 109 (1801), we have recognized that "the court must decide according to existing laws." Recently, in *Bradley* v. *Richmond School Board*, 416 U. S. 696, 711 (1974), we reaffirmed our adherence to that rule, holding that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to

I

Section 306(a) of the 1980 Amendments reads as follows:

> "DELINQUENT CONTRIBUTIONS
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> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." Pub. L. 96–364, 94 Stat. 1295.

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the contrary." Because there is no dispute that § 306(a) is now "in effect," we must apply that provision here, unless Congress intended to the contrary or unless doing so would be manifestly unjust.

There is absolutely nothing to indicate any legislative intention that § 306(a) was not to be applied to cases on appeal at the time of its enactment. Indeed, § 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, made § 306(a) effective as of the date of enactment, indicating that Congress intended that provision to become applicable as soon as possible. Moreover, the legislative history of the Amendments suggests a congressional intention that § 306(a) *would* apply to pending appeals. The sponsors of the Amendments in both the Senate and the House, in explaining the intended effect of § 306(a), specifically disapproved of certain holdings that had been reached by lower federal courts and that were on appeal while the bill was pending. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.*, at 23039 (remarks of Rep. Thompson).

Nor would application of § 306(a) to the present case work any "manifest injustice" upon Kaiser, in the sense in which that term was used in *Bradley*, *supra*. The sort of "injustice" discussed in *Bradley* is that which "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Bradley*, *supra*, at 720. Application of § 306(a) would hardly impose any "new and unanticipated obligations" upon Kaiser. On the contrary, application of § 306(a) could at most require Kaiser to make payments that it knew of, and indeed *agreed* to make, back in 1974, as part of a collective-bargaining agreement that has been fully performed by the other side. In my view, it would be a manifest injustice to *respondents*—and, more importantly, to Kaiser's UMW employees who are the intended beneficiaries of the purchased-coal clause—if this Court *failed* to apply § 306(a) to the case before it.

The statutory language evinces an unmistakable congressional intention that obligatory payments shall be made, except when those payments are inconsistent with law. It is upon the construction of the phrase, "inconsistent with law," that the application of § 306(a), and the outcome of this case, obviously depend. The Court construes cases decided before the enactment of § 306(a) as suggesting that courts would not enforce collectively bargained payment obligations tainted by "consequential" illegality—payments that would "lead to" situations condemned by law, or that would allow a party to "reap the fruits" of illegal collective-bargaining provisions. *Ante*, at 81–83. Thus *Kelly* v. *Kosuga*, *supra*, is read to require that an illegality defense should be entertained when "its rejection would be to enforce conduct that the antitrust laws forbid." *Ante*, at 82. In the Court's view, § 306(a) constitutes no more than a statutory endorsement of these earlier cases, calling for a broad construction of the "inconsistent with law" phrase that would comport with those cases.

The Court's view is plausible only if the legislative history of § 306(a) is ignored. That history demonstrates beyond dispute that Congress was deeply concerned about the pre-1980 financial instability of employee benefit plans, and that this undesirable state of affairs was largely attributed to delinquent contributions by employers to those plans. The legislative history also demonstrates that Congress expressly intended § 306(a) to simplify and expedite plan trustees' suits to recover contractually required but delinquent employers' contributions, and that Congress chose to do so by, *inter alia*, substantially narrowing the scope of illegality defenses available to employers sued by plan trustees for delinquent contributions. With the benefit of the legislative history, it is apparent that § 306(a) was designed to allow an employer to be relieved of a plan contribution obligation *only* when the payment at issue is *inherently* illegal—for example, when the payment is in the nature of a bribe. In sum, illegality defenses, once arguably available whenever the payment in

question could be connected with illegal activities or results, are now meant by Congress to be available only when the payment in question itself constitutes an illegal act. An examination of the legislative history of § 306(a) makes this narrowing intention crystal clear.

II

The Court construes § 306(a) as merely declaratory of pre-existing case law. This construction implicitly assumes that Congress was on the whole satisfied with the pre-1980 condition of employee benefit plan funds. But that assumption is clearly erroneous. Congress was seriously troubled by a perception that employee benefit plans were highly vulnerable to financial instability,[2] and it identified employers' delinquent contributions as a principal cause of that vulnerability. The Senate Committee on Labor and Human Resources concluded:

> "Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily

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[2] The Senate Committee on Labor and Human Resources explained these concerns as follows:

"*Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans.* Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

"These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., 43–44 (unnumbered Comm. Print 1980) (emphasis added).

cumbersome and costly. *Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case.* Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., 44 (Comm. Print 1980) (emphasis added).[3]

Thus Congress' paramount concern in enacting § 306(a) was to expedite and simplify the collection of delinquent contributions by plan trustees—in other words, to expedite and simplify the very kind of suit brought by respondents in the present case. To solve this problem, Congress decided, among other things, to narrow the legal defenses available to employers sued by plan trustees seeking to recover delinquent plan contributions. The comments of the sponsors of § 306(a) in both the Senate and the House bear out this interpretation.

In the House, Representative Thompson stated that "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, *and without regard to issues which might arise under labor-management relations*

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[3] The Committee went on to stress that:

"The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans. . . . The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." *Ibid.*

law—other than 29 U. S. C. 186." 126 Cong. Rec. 23039 (1980) (emphasis added). Title 29 U. S. C. § 186, entitled "Restrictions on financial transactions," essentially prohibits an employer from paying bribes to his employees, their representatives, or their union.[4] In sum, the comments of Representative Thompson evince a congressional intention that employers sued by plan trustees should be able to interpose an illegality defense only if the claimed illegality resided *in the payment itself.*

In the Senate, Senator Williams stressed the same theme:

> "It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises. [P]lan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor *are entitled to rely on their employer's promises.* The bill clarifies the law in this regard by providing a direct ERISA cause of action against a delinquent employer *without regard to extraneous claims or defenses.*" 126 Cong. Rec., at 20180 (emphasis added).

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[4] Section 186 reads in pertinent part:

"(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of his employees . . . ; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer . . . ; or

"(3) to any employee or group or committee of employees of such employer . . . in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization . . . with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization."

Senator Williams later restated his view of the defenses available to an employer under § 306(a), and implicitly defined his understanding of the term, "extraneous," by using precisely the same words as Representative Thompson had. *Id.*, at 23288.

The sponsors of § 306(a) thus intended to cut off all illegality defenses that an employer might previously have interposed against a plan trustee, except those that claimed an illegality falling within the prohibition of 29 U. S. C. § 186. Congress perceived that a plan trustee is merely a third-party beneficiary of the collective-bargaining agreement reached by an employer and its employees. Such a trustee does not take part in the negotiations that give rise to the employer's contribution obligation. Nor does that trustee have any influence over the performance of other aspects of the collective-bargaining agreement, which are —as § 306(a)'s sponsors put it—"*extraneous*" or "*unrelated to*" the employer's promise to contribute to the plan. From the trustee's point of view, the employer's promise to make contributions to the designated plan is distinct and severable from all the other clauses of the collective-bargaining agreement, and failure of the agreement in any other respect is wholly irrelevant to the employer's contribution obligation. In order to achieve its goal of expediting and simplifying delinquent-contribution suits brought by plan trustees, Congress through § 306(a) essentially adopted the trustee's point of view on this issue. To ensure the full funding of employee benefit plans, Congress provided that when an employer is sued for plan contributions due and owing under a collective-bargaining agreement, the only defenses that will be permitted are those, arising under 29 U. S. C. § 186, involving a claim of illegality inherent in the payment itself.

III

The Court ignores this legislative prescription, thereby rendering § 306(a) a nullity and frustrating Congress' desire

to protect the economic integrity of the retirement, health, and unemployment plans upon which so many working people rely. The majority devotes little time or effort to its analysis of § 306(a), and its conclusion that that provision was intended merely to be declaratory of pre-existing law conflicts with the legislative history of § 306(a) in significant respects.

The Court does not explain why the modest, declaratory intention that it attributes to Congress is nowhere expressed in the legislative history of § 306(a). Nor does the Court even begin to reconcile its view of the limited purpose of § 306(a) with Congress' manifest concern for the financial vulnerability of employee benefit plans, or with Congress' express desire to simplify and expedite suits brought by plan trustees. The Court's position apparently is that Congress expected a mere statutory endorsement of existing case law to remedy the serious problems to which the 1980 Amendments were explicitly addressed. But simply to state this position is to expose its incredibility. The very fact that Congress perceived difficulties in the status quo, and sought to remedy them with § 306(a), demonstrates that that provision was *not* intended merely to express satisfaction with existing law, but rather was designed to narrow substantially the scope of defenses available to employers.

This conclusion naturally leads to, and in turn explains, Senator Williams' and Representative Thompson's explicit limitation of the defenses available under the new provision to those arising under 29 U. S. C. § 186. The Court, however, disregards these explicit limiting statements on the ground that "repeals by implication are disfavored," and that therefore "the intention of the legislature to repeal must be clear and manifest." The Court's reasoning is not even superficially persuasive. It is obvious that the Sherman Act is not "repealed" by § 306(a). The new provision merely channels the availability of the antitrust laws into employers' suits for declaratory and injunctive relief or for damages, the remedies normally afforded by those laws. See *Huge* v. *Long's*

Hauling Co., Inc., 590 F. 2d 457, 465 (CA3 1978) (concurring opinion). And—with respect to § 8(e) of the National Labor Relations Act—even if § 306(a) is construed as a partial repealer, the record before us presents plenty of "clear and manifest" evidence that Congress intended to effect such a repeal: if the Court would only address that evidence. There is Congress' express dissatisfaction with the current state of affairs respecting employers' contributions to employee benefit plans; there is Congress' express intention to simplify and expedite trustees' suits to recover contractually required but delinquent employers' contributions; and there is explicit legislative history, offered by the sponsors of the legislation, disclosing the limiting device—a cross-reference to 29 U. S. C. § 186—actually chosen by Congress in order to effect its stated purpose. By demanding more evidence than this, the Court simply imposes its own view of the wisdom of § 306(a) upon Congress and upon respondents, in the guise of judicial restraint.

IV

The legislative history of § 306(a) makes it plain that the judgment of the Court of Appeals below, affirming the District Court's rejection of the illegality defenses proffered by petitioner Kaiser, should be affirmed by this Court. Kaiser's defenses do not attack the legality of the delinquent plan contributions themselves. Indeed, Kaiser does not even attempt to argue that the overdue payments sought by respondent trustees are inherently illegal. Rather, Kaiser contends that the making of those payments would "lead to" an illegal restraint of trade, or would allow the trustees to "reap the fruits" of an illegal "hot cargo" clause. Whatever the merits of these contentions of consequential illegality, § 306(a) renders them quite irrelevant to Kaiser's obligation to make its promised contributions to the designated employee benefit plan funds. That was the very purpose of § 306(a).

This conclusion does not impair Kaiser's rights vis-à-vis the UMW, nor does it undercut the important national policies embodied in the Sherman Act and § 8(e) of the National Labor Relations Act. Kaiser can easily transform both of its illegality claims into causes of action brought directly against the union. "The employer may still have its claims adjudicated by bringing, in the proper forum, a timely suit against the union for rescission of the contract, antitrust damages, or a declaration that an unfair labor practice has been committed . . . ." *Huge*, *supra*, at 465 (concurring opinion).[5] Section 306(a) simply distinguishes Kaiser's rights against the union from its rights against respondents. In its effort to assure financial stability to employee benefit plans, § 306(a) prescribes the insulation of plan trustees—such as respondents—from the potentially never-ending disputes between labor and management.

Because I believe that § 306(a) of the 1980 Amendments requires affirmance of the judgment of the Court of Appeals, I dissent.

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[5] The *Huge* decision was specifically endorsed by the sponsors of § 306(a) in both the Senate and the House. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.*, at 23039 (remarks of Rep. Thompson).

PRINCETON UNIVERSITY ET AL. *v.* SCHMID

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 80–1576. Argued November 10, 1981—Decided January 13, 1982

Appellee, who was not a student at Princeton University, was arrested for criminal trespass while distributing political materials on the University's campus without having first received permission from University officials, as required by a University regulation. Appellee was convicted in state court, but the New Jersey Supreme Court reversed, holding that his rights of speech and assembly under the State Constitution had been violated. The University, which had intervened in the State Supreme Court proceedings, filed a notice of appeal and a jurisdictional statement (joined by the State) in this Court, claiming that the judgment below deprived it of its rights under the First, Fifth, and Fourteenth Amendments of the Federal Constitution.

Held: The appeal is dismissed for want of jurisdiction.

(a) The State, in its brief, asked that the issues be decided but declined to take a position on the merits. Thus, if the State were the sole appellant, the appeal would be dismissed for want of a case or controversy. Accordingly, the State's presence in the case does not provide a sound jurisdictional basis for undertaking to decide the constitutional issues.

(b) Nor does this Court have jurisdiction with respect to the University. While the case was pending on appeal, the University substantially amended its pertinent regulations, and the New Jersey Supreme Court did not pass on the validity of the revised regulations. The issue of the old regulation's validity is thus moot. Since the University is not prevented by the judgment below from having the validity of its new regulation ruled upon in another enforcement action, it is without standing to invoke this Court's jurisdiction.

Appeal dismissed. Reported below: 84 N. J. 535, 423 A. 2d 615.

Nicholas deB. Katzenbach argued the cause for appellants. With him on the briefs for appellant Princeton University were *Thomas H. Wright, Jr.*, and *Margaret B. G. Freiberg*. *James R. Zazzali*, Attorney General, and *Michael R. Cole*, Assistant Attorney General, filed a brief for appellant State of New Jersey.

Sanford Levinson argued the cause for appellee. With him on the brief were *Jerrold Kamensky* and *Douglas Laycock*.*

PER CURIAM.

I

Appellee Schmid was arrested and charged with criminal trespass while distributing political materials on the campus of Princeton University. Schmid was not a student at Princeton University. Under University regulations then in effect, members of the public who wished to distribute materials on the campus were required to receive permission from University officials. Appellee was tried in Princeton Borough Municipal Court and on October 20, 1978, the trial judge issued an opinion convicting appellee and fining him $15 plus $10 costs. A *de novo* trial in the New Jersey Superior Court, Law Division, also resulted in conviction and the same fine was imposed. While appeal was pending to the Superior Court, Appellate Division, the case was certified for review by the New Jersey Supreme Court. That court invited the University to intervene and participate as a party, which it did.

The New Jersey Supreme Court reversed the judgment of conviction, holding that appellee's rights of speech and assembly under the New Jersey Constitution had been violated. *State* v. *Schmid*, 84 N. J. 535, 423 A. 2d 615 (1980). The University filed a notice of appeal and jurisdictional statement. Its claim is that the judgment below deprives it

*Briefs of *amici curiae* urging reversal were filed by *R. Claire Guthrie* and *Christine Topping Milliken* for the American Council on Education et al.; and by *James Roosevelt, Jr.*, and *Kay H. Hodge* for the Massachusetts Institute of Technology.

Matthew W. Finkin filed a brief for the American Association of University Professors as *amicus curiae* urging affirmance.

Michael F. Spicer filed a brief for the Association of Independent Colleges and Universities in New Jersey as *amicus curiae*.

of its rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution. The State of New Jersey did not file a separate jurisdictional statement but joined in that of the University. We postponed jurisdiction, 451 U. S. 982 (1981), and now dismiss the appeal for want of jurisdiction.

II

The State of New Jersey has filed a brief in this Court asking us to review and decide the issues presented, but stating that it "deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action." Brief for Appellant State of New Jersey 4. Had the University not been a party to this case in the New Jersey Supreme Court and had the State filed a jurisdictional statement urging reversal, the existence of a case or controversy—and of jurisdiction in this Court—could not be doubted. However, if the State were the sole appellant and its jurisdictional statement simply asked for review and declined to take a position on the merits, we would have dismissed the appeal for want of a case or controversy. We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. See, *e. g.*, *Sierra Club* v. *Morton*, 405 U. S. 727, 731–732 (1972); *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968). Thus the presence of the State of New Jersey in this case does not provide a sound jurisdictional basis for undertaking to decide difficult constitutional issues.

Princeton defends its own standing and our jurisdiction on the grounds that it was a party to the case in the New Jersey Supreme Court,* that it is bound by the judgment of that

*That Princeton had standing in state court does not determine the power of this Court to consider the issue. Any determination of who has standing to assert constitutional rights is a federal question to be decided by the Court itself. *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 282 (1961); *United States* v. *Raines*, 362 U. S. 17, 23, n. 3 (1960).

court with respect to the validity of its regulations, and that no other forum is available in which to challenge the judgment on federal constitutional grounds. We have determined, however, that we lack jurisdiction with respect to Princeton. The New Jersey Supreme Court noted that while the case was pending on appeal, the University substantially amended its regulations governing solicitation, distribution of literature, and similar activities on University property by those not affiliated with the University. 84 N. J., at 539–541, n. 2, 568, 423 A. 2d, at 617–618, n. 2, 633. The opinion below rested on the absence of a reasonable regulatory scheme governing expressional activity on University property, but the regulation at issue is no longer in force. Furthermore, the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution. Thus the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law." *Hall* v. *Beals*, 396 U. S. 45, 48 (1969) *(per curiam)*.

Princeton does not claim standing on the ground that a private party may intervene and challenge the reversal of a criminal conviction of another party. See *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973). Its alleged standing in this Court rests on its claim that the judgment below would be res judicata against it and that it has thus finally been deprived of the authority to enforce the regulation as it stood prior to amendment. Since the judgment, however, does not prevent it from having the validity of its new regulation ruled upon in another enforcement action, the University is without standing to invoke our jurisdiction. Accordingly, we dismiss the appeal.

So ordered.

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

EDDINGS *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 80–5727. Argued November 2, 1981—Decided January 19, 1982

Petitioner was convicted in an Oklahoma trial court of first-degree murder for killing a police officer and was sentenced to death. At the time of the offense petitioner was 16 years old, but he was tried as an adult. The Oklahoma death penalty statute provides that in a sentencing proceeding evidence may be presented as to "any mitigating circumstances" or as to any of certain enumerated aggravating circumstances. At the sentencing hearing, the State alleged certain of the enumerated aggravating circumstances, and petitioner, in mitigation, presented substantial evidence of a turbulent family history, of beatings by a harsh father, and of serious emotional disturbance. In imposing the death sentence, the trial judge found that the State had proved each of the alleged aggravating circumstances. But he refused, as a matter of law, to consider in mitigation the circumstances of petitioner's unhappy upbringing and emotional disturbance, and found that the only mitigating circumstance was petitioner's youth, which circumstance was held to be insufficient to outweigh the aggravating circumstances. The Oklahoma Court of Criminal Appeals affirmed.

Held: The death sentence must be vacated as it was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett* v. *Ohio*, 438 U. S. 586, 606. Pp. 110–116.

(a) "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, *supra*, at 604. This rule follows from the requirement that capital punishment be imposed fairly and with reasonable consistency or not at all, and recognizes that a consistency produced by ignoring individual differences is a false consistency. Pp. 110–112.

(b) The limitation placed by the courts below upon the mitigating evidence they would consider violated the above rule. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. The sentencer and the review-

ing court may determine the weight to be given relevant mitigating evidence but may not give it no weight by excluding it from their consideration. Here, the evidence of a difficult family history and of emotional disturbance petitioner offered at the sentencing hearing should have been duly considered in sentencing. Pp. 112–116.

616 P. 2d 1159, reversed in part and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., *post*, p. 117, and O'CONNOR, J., *post*, p. 117, filed concurring opinions. BURGER, C. J., filed a dissenting opinion, in which WHITE, BLACKMUN, and REHNQUIST, JJ., joined, *post*, p. 120.

Jay C. Baker, by appointment of the Court, 451 U. S. 981, argued the cause and filed a brief for petitioner.

David W. Lee, Assistant Attorney General of Oklahoma, argued the cause for respondent. With him on the brief were *Jan Eric Cartwright*, Attorney General, and *Tomilou Gentry Liddell*, Assistant Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Monty Lee Eddings was convicted of first-degree murder and sentenced to death. Because this sentence was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett* v. *Ohio*, 438 U. S. 586, 606 (1978) (opinion of BURGER, C. J.), we reverse.

I

On April 4, 1977, Eddings, a 16-year-old youth, and several younger companions ran away from their Missouri homes. They traveled in a car owned by Eddings' brother, and drove

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*Briefs of *amici curiae* urging reversal were filed by *M. Gail Robinson*, *Kevin Michael McNally*, and *J. Vincent Aprile II* for Kentucky Youth Advocates et al.; and by *Robert L. Walker* for the National Council on Crime and Delinquency et al.

Daniel J. Popeo and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation as *amicus curiae*.

without destination or purpose in a southwesterly direction eventually reaching the Oklahoma Turnpike. Eddings had in the car a shotgun and several rifles he had taken from his father. After he momentarily lost control of the car, he was signalled to pull over by Officer Crabtree of the Oklahoma Highway Patrol. Eddings did so, and when the officer approached the car, Eddings stuck a loaded shotgun out of the window and fired, killing the officer.

Because Eddings was a juvenile, the State moved to have him certified to stand trial as an adult. Finding that there was prosecutive merit to the complaint and that Eddings was not amenable to rehabilitation within the juvenile system, the trial court granted the motion. The ruling was affirmed on appeal. *In re M. E.*, 584 P. 2d 1340 (Okla. Crim. App.), cert. denied *sub nom. Eddings* v. *Oklahoma*, 436 U. S. 921 (1978). Eddings was then charged with murder in the first degree, and the District Court of Creek County found him guilty upon his plea of *nolo contendere*.

The Oklahoma death penalty statute provides in pertinent part:

> "Upon conviction . . . of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. . . . In the sentencing proceeding, evidence may be presented as to *any mitigating circumstances* or as to any of the aggravating circumstances enumerated in this act." Okla. Stat., Tit. 21, § 701.10 (1980) (emphasis added).

Section 701.12 lists seven separate aggravating circumstances; the statute nowhere defines what is meant by "any mitigating circumstances."

At the sentencing hearing, the State alleged three of the aggravating circumstances enumerated in the statute: that the murder was especially heinous, atrocious, or cruel, that the crime was committed for the purpose of avoiding or pre-

venting a lawful arrest, and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. §§ 701.12(4), (5), and (7).

In mitigation, Eddings presented substantial evidence at the hearing of his troubled youth. The testimony of his supervising Juvenile Officer indicated that Eddings had been raised without proper guidance. His parents were divorced when he was 5 years old, and until he was 14 Eddings lived with his mother without rules or supervision. App. 109. There is the suggestion that Eddings' mother was an alcoholic and possibly a prostitute. *Id.*, at 110–111. By the time Eddings was 14 he no longer could be controlled, and his mother sent him to live with his father. But neither could the father control the boy. Attempts to reason and talk gave way to physical punishment. The Juvenile Officer testified that Eddings was frightened and bitter, that his father overreacted and used excessive physical punishment: "Mr. Eddings found the only thing that he thought was effectful with the boy was actual punishment, or physical violence—hitting with a strap or something like this."[1] *Id.*, at 121.

Testimony from other witnesses indicated that Eddings was emotionally disturbed in general and at the time of the crime, and that his mental and emotional development were at a level several years below his age. *Id.*, at 134, 149, and 173. A state psychologist stated that Eddings had a sociopathic or antisocial personality and that approximately 30% of youths suffering from such a disorder grew out of it as they aged. *Id.*, at 137 and 139. A sociologist specializing in juvenile offenders testified that Eddings was treatable. *Id.*, at 149. A psychiatrist testified that Eddings could be rehabilitated by intensive therapy over a 15- to 20-year period.

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[1] There was evidence that immediately after the shooting Eddings said: "I would rather have shot an Officer than go back to where I live." App. 93.

Id., at 181. He testified further that Eddings "did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it."[2] The psychiatrist suggested that, if treated, Eddings would no longer pose a serious threat to society. *Id.*, at 180–181.

At the conclusion of all the evidence, the trial judge weighed the evidence of aggravating and mitigating circumstances. He found that the State had proved each of the three alleged aggravating circumstances beyond a reasonable doubt.[3] Turning to the evidence of mitigating circumstances, the judge found that Eddings' youth was a mitigating factor of great weight: "I have given very serious consideration to the youth of the Defendant when this particular

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[2] The psychiatrist suggested that, at the time of the murder, Eddings was in his own mind shooting his stepfather—a policeman who had been married to his mother for a brief period when Eddings was seven. The psychiatrist stated: "I think that given the circumstances and the facts of his life, and the facts of his arrested development, he acted as a seven year old seeking revenge and rebellion; and the act—he did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it." *Id.*, at 172.

[3] The trial judge found first that the crime was "heinous, atrocious, and cruel" because "designed to inflict a high degree of pain . . . in utter indifference to the rights of Patrolman Crabtree." *Id.*, at 187. Second, the judge found that the crime was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." *Id.*, at 187–188. The evidence was sufficient to indicate that at the time of the offense Eddings did not wish to be returned to Missouri and that in stopping the car the officer's intent was to make a lawful arrest. Finally, the trial judge found that Eddings posed a continuing threat of violence to society. There was evidence that at one point on the day of the murder, after Eddings had been taken to the county jail, he told two officers that "if he was loose . . . he would shoot" them all. *Id.*, at 77. There was also evidence that at another time, when an officer refused to turn off the light in Eddings' cell, Eddings became angry and threatened the officer: "Now I have shot one of you people, and I'll get you too if you don't turn this light out." *Id.*, at 103. Based on these two "spontaneous utterances," *id.*, at 188, the trial judge found a strong likelihood that Eddings would again commit a criminal act of violence if released.

crime was committed. Should I fail to do this, I think I would not be carrying out my duty." *Id.*, at 188–189. But he would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance: "[T]he Court cannot be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. *Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.*" *Id.*, at 189 (emphasis added). Finding that the only mitigating circumstance was Eddings' youth and finding further that this circumstance could not outweigh the aggravating circumstances present, the judge sentenced Eddings to death.

The Court of Criminal Appeals affirmed the sentence of death. 616 P. 2d 1159 (1980). It found that each of the aggravating circumstances alleged by the State had been present.[4] It recited the mitigating evidence presented by Eddings in some detail, but in the end it agreed with the trial court that only the fact of Eddings' youth was properly considered as a mitigating circumstance:

> "[Eddings] also argues his mental state at the time of the murder. He stresses his family history in saying he was suffering from severe psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised. There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility

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[4] We understand the Court of Criminal Appeals to hold that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel" under the Oklahoma statute. See *Roberts* v. *Louisiana*, 431 U. S. 633, 636 (1977). However, we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). See n. 3, *supra*.

in this State. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior." *Id.*, at 1170 (citation omitted).

II

In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), CHIEF JUSTICE BURGER, writing for the plurality, stated the rule that we apply today:[5]

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original).

Recognizing "that the imposition of death by public authority is . . . profoundly different from all other penalties," the plurality held that the sentencer must be free to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation . . . ." *Id.*, at 605. Because the Ohio death penalty statute only permitted consideration of three mitigating circumstances, the Court found the statute to be invalid.

As THE CHIEF JUSTICE explained, the rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. Since the early days of the common law, the legal system has struggled to accommodate these twin objectives. Thus, the common law began by treating all criminal homicides as capital offenses, with a

[5] Because we decide this case on the basis of *Lockett* v. *Ohio*, we do not reach the question of whether—in light of contemporary standards—the Eighth Amendment forbids the execution of a defendant who was 16 at the time of the offense. Cf. *Bell* v. *Ohio*, 438 U. S. 637 (1978).

mandatory sentence of death. Later it allowed exceptions, first through an exclusion for those entitled to claim benefit of clergy and then by limiting capital punishment to murders upon "malice prepensed." In this country we attempted to soften the rigor of the system of mandatory death sentences we inherited from England, first by grading murder into different degrees of which only murder of the first degree was a capital offense and then by committing use of the death penalty to the absolute discretion of the jury. By the time of our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), the country had moved so far from a mandatory system that the imposition of capital punishment frequently had become arbitrary and capricious.

Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused. Thus, in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), the principal opinion held that the danger of an arbitrary and capricious death penalty could be met "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Id.*, at 195. By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to "the characteristics of the person who committed the crime . . . ." *Id.*, at 197.[6]

Similarly, in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), the plurality held that mandatory death sentencing was not a permissible response to the problem of arbitrary

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[6] "[T]he jury's attention is focused on the characteristics of the person who committed the crime: . . . Are there any special facts about this defendant that mitigate against imposing capital punishment (*e. g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)." 428 U. S., at 197.

jury discretion. As the history of capital punishment had shown, such an approach to the problem of discretion could not succeed while the Eighth Amendment required that the individual be given his due: "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304.[7] See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633 (1977); *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325 (1976).

Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg* v. *Georgia*, *supra*, at 197, the rule in *Lockett* recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

III

We now apply the rule in *Lockett* to the circumstances of this case. The trial judge stated that "in following the law,"

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[7] "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings . . . ." 428 U. S., at 304.

he could not "consider the fact of this young man's violent background." App. 189. There is no dispute that by "violent background" the trial judge was referring to the mitigating evidence of Eddings' family history.[8] From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence.

The Court of Criminal Appeals took the same approach. It found that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility. Thus the court conceded that Eddings had a "personality disorder," but cast this evidence aside on the basis that "he knew the difference between right and wrong . . . and that is the test of criminal responsibility." 616 P. 2d, at 1170. Similarly, the evidence of Eddings' family history was "useful in explaining" his behavior, but it did not "excuse" the behavior. From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability.

We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*.[9] Just as the State may not by statute preclude

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[8] Brief for Respondent 55 ("the inference that can be drawn is that the court did not consider petitioner's juvenile record and family life to be a mitigating circumstance"); Tr. of Oral Arg. 36 ("the trial court did not consider the fact of his family background as a mitigating circumstance. . . . [T]he violent background, which I assume he meant was . . . [that Eddings] was subject to some slapping around and some beating by his father") (argument of respondent).

[9] Eddings argued to the Court of Criminal Appeals that imposition of the death penalty in the particular circumstances of his case, and in light of the mitigating factors present, was excessive punishment under the Eighth Amendment. But he did not specifically argue that the trial judge erred in refusing to consider relevant mitigating circumstances in the process of

the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may

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sentencing. In rejecting his claim of excessive punishment, the court examined the aggravating and mitigating circumstances and held that Eddings' family history and emotional disorder were *not* mitigating circumstances that ought to be weighed in the balance. The court's holding that these factors were irrelevant to an inquiry into excessiveness was also a holding that they need not have been considered by the sentencer in imposing capital punishment. Similarly, Eddings' argument in his petition for certiorari that imposition of the death penalty was excessive on the facts of this case comprises the argument that the sentencer erred in refusing to consider relevant mitigating circumstances proffered by him at the sentencing hearing. In short, although neither the opinion of the Court of Criminal Appeals nor Eddings' petition for certiorari spoke to our decision in *Lockett* by name, the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us. Our jurisdiction does not depend on citation to book and verse. See, *e. g.*, *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928).

Although Eddings' petition for certiorari did not expressly present the *Lockett* issue, his brief in this Court argued it, and the State responded to the argument. Brief for Petitioner 64–67; Brief for Respondent 55–57. The dissenting opinion of THE CHIEF JUSTICE, *post*, at 120, n. 1, states that the courts below were not afforded the opportunity to consider this issue. The fact is, however, that in his petition to the Court of Criminal Appeals for a rehearing, Eddings specifically presented the issue and at some considerable length. See Petition for Re-Hearing and Supporting Brief in No. C–78–325, p. 10 ("This Court, by its interpretation of mitigating circumstances, has effectively limited the scope of mitigation and that limitation renders the Oklahoma death penalty statute unconstitutional"). The Court of Criminal Appeals denied the petition, stating that it had given it full consideration and had been "fully advised in the premises." See Rule 1.18, Rules of the Court of Criminal Appeals (1980) (court will entertain new arguments upon a petition for rehearing). Cf. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 476 (1975). See also *Wood* v. *Georgia*, 450 U. S. 261, 265, n. 5 (1981); *Beck* v. *Alabama*, 447 U. S. 625, 631, n. 6 (1980); *Vachon* v. *New Hampshire*, 414 U. S. 478, 479, n. 3 (1974).

determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.[10]

Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See *McGautha* v. *California*, 402 U. S. 183, 187–188, 193 (1971). In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.[11] Our history is replete with laws and judicial recognition that minors, especially in their earlier years, gener-

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[10] We note that the Oklahoma death penalty statute permits the defendant to present evidence "as to any mitigating circumstances." Okla. Stat., Tit. 21, § 701.10 (1980). *Lockett* requires the sentencer to listen.

[11] "Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 41 (1967). "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

ally are less mature and responsible than adults.[12] Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults. *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979).

Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

We are not unaware of the extent to which minors engage increasingly in violent crime.[13] Nor do we suggest an absence of legal responsibility where crime is committed by a minor. We are concerned here only with the manner of the imposition of the ultimate penalty: the death sentence imposed for the crime of murder upon an emotionally disturbed youth with a disturbed child's immaturity.

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[12] As Justice Frankfurter stated, "[c]hildren have a very special place in life which law should reflect." *May* v. *Anderson*, 345 U. S. 528, 536 (1953) (concurring opinion). And indeed the law does reflect this special place. Every State in the country makes some separate provision for juvenile offenders. See *In re Gault*, 387 U. S. 1, 14 (1967).

[13] See, *e. g.*, National Advisory Committee on Criminal Justice Standards and Goals, Task Force Report on Juvenile Justice and Delinquency Prevention 3 (1976).

On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion without, however, departing from my view 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 (1976) (dissenting opinion).

JUSTICE O'CONNOR, concurring.

I write separately to address more fully the reasons why this case must be remanded in light of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), which requires the trial court to consider and weigh all of the mitigating evidence concerning the petitioner's family background and personal history.*

Because sentences of death are "qualitatively different" from prison sentences, *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and

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*Despite THE CHIEF JUSTICE's argument that we may not consider the *Lockett* issue because it was never fairly presented to the court below, there is precedent for this Court to consider the merits of the issue. In *Wood* v. *Georgia*, 450 U. S. 261, 265, n. 5 (1981), this Court wrote:

"Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice. See 28 U. S. C. § 2106 (authorizing this Court to 'require such further proceedings to be had as may be just under the circumstances')."

Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.

STEVENS, JJ.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake. Surely, no less can be required when the defendant is a minor. One example of the measures taken is in *Lockett* v. *Ohio*, *supra*, where a plurality of this Court wrote:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*, at 605 (opinion of BURGER, C. J.).

In order to ensure that the death penalty was not erroneously imposed, the *Lockett* plurality concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original) (footnote omitted).

In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. Stat., Tit. 21, § 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before *Lockett* was decided), the judge remarked that he could not "in following the law . . . consider

the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in *Lockett* compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U. S., at 605.

I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

THE CHIEF JUSTICE may be correct in concluding that the Court's opinion reflects a decision by some Justices that they would not have imposed the death penalty in this case had they sat as the trial judge. See *post*, at 127. I, however, do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16. Rather, by listing in detail some of the circumstances surrounding the petitioner's life, the Court has sought to emphasize the variety of mitigating information that may not have been considered by the trial court in deciding whether to impose the death penalty or some lesser sentence.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE REHNQUIST join, dissenting.

It is important at the outset to remember—as the Court does not—the narrow question on which we granted certiorari. We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16 years old in 1977 at the time he committed the offense; review of all other questions raised in the petition for certiorari was denied. 450 U. S. 1040 (1981). Yet the Court today goes beyond the issue on which review was sought—and granted—to decide the case on a point raised for the first time in petitioner's brief to this Court. This claim was neither presented to the Oklahoma courts nor presented to this Court in the petition for certiorari.[1] Relying on this "11th-hour" claim, the Court strains to construct a plausible legal theory to support its mandate for the relief granted.

I

In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), we considered whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Lockett to death under a statute that "narrowly limit[ed] the sentencer's discretion to consider the

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[1] The Court struggles to demonstrate that "the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us." *Ante*, at 113–114, n. 9. It argues that petitioner's "*Lockett* claim" was somehow inherent in his general assertion that the death penalty was "excessive." However, it is obvious that petitioner not only failed to present to this Court the question which the Court now addresses, but also never "fairly presented" the *Lockett* argument to the state courts so as to have afforded them the first "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Picard* v. *Connor*, 404 U. S. 270, 275–277 (1971). Indeed, petitioner concedes as much, admitting that the "*Lockett* error was not enumerated or argued on appeal to the Oklahoma Court of Criminal Appeals . . . ." Brief for Petitioner 64.

circumstances of the crime and the record and character of the offender as mitigating factors." *Id.*, at 589. The statute at issue, Ohio Rev. Code §§2929.03–2929.04(B) (1975), required the trial court to impose the death penalty upon Lockett's conviction for "aggravated murder with specifications,"[2] unless it found "that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she 'was under duress, coercion, or strong provocation,' or (3) the offense was 'primarily the product of [Lockett's] psychosis or mental deficiency.'" 438 U. S., at 593–594. It was plain that although guilty of felony homicide under Ohio law, Lockett had played a relatively minor role in a robbery which resulted in a homicide actually perpetrated by the hand of another. Lockett had previously committed no major offenses; in addition, a psychological report described her "prognosis for rehabilitation" as "favorable." *Id.*, at 594. However, since she was not found to have acted under duress, did not suffer from "psychosis," and was not "mentally deficient," the sentencing judge concluded that he had "'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Ibid.*

We held in *Lockett* that the "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original). We therefore found the Ohio statute flawed, be-

[2] In that case the evidence showed that while Lockett waited in a "getaway" car, her three companions robbed a store; during the robbery, the proprietor was fatally wounded. Lockett was charged with aggravated murder with two "specifications" of "aggravating circumstances": (1) that the murder was "committed for the purpose of escaping detection, apprehension, trial, or punishment" for aggravated robbery; and (2) that the murder was "committed while . . . committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery." See Ohio Rev. Code §2929.04(A) (1975).

cause it did not permit individualized consideration of mitigating circumstances—such as the defendant's comparatively minor role in the offense, lack of intent to kill the victim, or age. *Id.*, at 606–608. We did not, however, undertake to dictate the *weight* that a sentencing court must ascribe to the various factors that might be categorized as "mitigating," nor did we in any way suggest that this Court may substitute its sentencing judgment for that of state courts in capital cases.

In contrast to the Ohio statute at issue in *Lockett*, the Oklahoma death penalty statute provides:

> "In the sentencing proceeding, evidence may be presented as to *any* mitigating circumstances or as to any of the aggravating circumstances enumerated in this act." Okla. Stat., Tit. 21, § 701.10 (1980) (emphasis added).

The statute further provides that

> "[u]nless at least one of the statutory aggravating circumstances enumerated in this act is [found to exist beyond a reasonable doubt] or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed." § 701.11.

This provision, of course, instructs the sentencer to weigh the mitigating evidence introduced by a defendant against the aggravating circumstances proved by the State.[3]

The Oklahoma statute thus contains provisions virtually identical to those cited with approval in *Lockett*, as examples of proper legislation which highlighted the Ohio statute's "constitutional infirmities." 438 U. S., at 606–607. Indeed, the Court does not contend that the Oklahoma sentencing

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[3] It is ironic that in his petition for certiorari filed with the Oklahoma Court of Criminal Appeals, petitioner asserted that the Oklahoma sentencing scheme was constitutionally deficient, because "[t]he mitigating circumstances which may be considered are not statutorily defined *or limited*" (emphasis added).

provisions are inconsistent with *Lockett*. Moreover, the Court recognizes that, as mandated by the Oklahoma statute, Eddings was permitted to present "substantial evidence at the [sentencing] hearing of his troubled youth." *Ante*, at 107.[4]

In its attempt to make out a violation of *Lockett*, the Court relies entirely on a single sentence of the trial court's opinion delivered from the bench at the close of the sentencing hearing. After discussing the aggravated nature of petitioner's offense, and noting that he had "given very serious consideration to the youth of the Defendant when this particular crime was committed," the trial judge said that he could not

[4] Although I think it is immaterial to a correct decision of this case, it is worth noting that the Court overstates and oversimplifies the evidence presented by Eddings at the sentencing hearing. For example, it twice characterizes the testimony as indicating that, at the time of the crime, Eddings' "mental and emotional development were at a level several years below his age." *Ante*, at 107, 116. Dr. Dietsche, a psychologist, testified that if forced to extrapolate from the Wechsler Adult Intelligence Scale he would place petitioner's "mental age" at about 14 years, 6 months; however, he then said that this mental age would have "no meaning" since "the mental age concepts break down . . . between fourteen to sixteen years of age." He went on to state: "*My opinion is that [Eddings] has the intelligence of an adult.*" App. 134–136 (emphasis added). Describing a single interview with petitioner while he was awaiting trial on murder charges, Dr. Rettig, a sociologist, said that petitioner's "responses appeared to me to be several years below his chronological age"; he "qualif[ied]" this answer, however, by noting that petitioner was "under a great deal of constraint in the atmosphere in which I saw him." *Id.*, at 149. Finally, Dr. Gagliano, a psychiatrist, opined on the basis of a one-hour interview—during which petitioner's attorney was present and refused to allow questioning about petitioner's "mental status" on the day of the shooting, *id.*, at 177—that at the time petitioner pulled the trigger, "he acted as a seven year old seeking revenge and rebellion" against his stepfather, a policeman. *Id.*, at 172–173. Dr. Gagliano was also willing to state categorically, on the basis of this single interview, and without reference to the results of the psychological testing of Eddings, *id.*, at 174, that Eddings was "preordained" to commit the murder from the time his parents were divorced, when he was five. *Id.*, at 179–180. This sort of "determinist" approach is rejected by an overwhelming majority of psychiatrists.

> "be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background." App. 189.

From this statement, the Court concludes "it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that *as a matter of law* he was unable even to consider the evidence." *Ante*, at 113. This is simply not a correct characterization of the sentencing judge's action.

In its parsing of the trial court's oral statement, the Court ignores the fact that the judge was delivering his opinion extemporaneously from the bench, and could not be expected to frame each utterance with the specificity and precision that might be expected of a written opinion or statute. Extemporaneous courtroom statements are not often models of clarity. Nor does the Court give any weight to the fact that the trial court had spent considerable time listening to the testimony of a probation officer and various mental health professionals who described Eddings' personality and family history—an obviously meaningless exercise if, as the Court asserts, the judge believed he was barred "as a matter of law" from "considering" their testimony. Yet even examined in isolation, the trial court's statement is at best ambiguous;[5] it can just as easily be read to say that, while the court

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[5] It is not even clear what the trial court meant by Eddings' "violent background." For example, Eddings' probation officer testified that Eddings had "problems with fighting" while in school, and had once been charged with "Assault with intent to do great bodily harm." *Id.*, at 106–107. The State seems to concede, however, that the court was probably referring, at least in part, to Eddings' family history. See Brief for Respondent 55 ("the inference that can be drawn is that the court did not consider petitioner's *juvenile record and* family life to be a mitigating circumstance") (emphasis added). But cf. Tr. of Oral Arg. 35 ("the remark is

had taken account of Eddings' unfortunate childhood, it did not consider that either his youth or his family background was sufficient to offset the aggravating circumstances that the evidence revealed. Certainly nothing in *Lockett* would preclude the court from making such a determination.

The Oklahoma Court of Criminal Appeals independently examined the evidence of "aggravating" and "mitigating" factors presented at Eddings' sentencing hearing. 616 P. 2d 1159 (1980). After reviewing the testimony concerning Eddings' personality and family background, and after referring to the trial court's discussion of mitigating circumstances, it stated that while Eddings' "family history is useful in explaining why he behaved the way he did, . . . *it does not excuse his behavior.*" *Id.*, at 1170 (emphasis added). From this the Court concludes that "the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." *Ante*, at 113.[6] However, there is no reason to read that court's statements as reflecting anything more than a conclusion that Eddings' background was not a sufficiently mitigating factor to tip the scales, given the aggravating circumstances, including Eddings' statements immediately before the killing.[7] The Court of Criminal Appeals most assuredly did *not*, as the Court's opinion suggests, hold that this "evidence in mitigation was not relevant," see *ibid.;* indeed, had the Court of Criminal Appeals thought the evidence irrele-

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ambiguous. It could be interpreted to mean that [the trial court] was not going to consider the juvenile's previous juvenile record in Missouri, which was extensive . . .").

[6] On the other hand, the Court's opinion concedes that petitioner's *youth* was given serious consideration as a "mitigating circumstance," although his age at the time of the offense would not "tend to support a legal excuse from criminal responsibility."

[7] When Eddings' companions informed him that the officer's patrol car was approaching, Eddings responded that if the "mother . . . pig tried to stop him he was going to blow him away." App. 66.

vant, it is unlikely that it would have spent several paragraphs summarizing it. The Court's opinion offers no reasonable explanation for its assumption that the Court of Criminal Appeals considered itself bound by some unstated legal principle not to "consider" Eddings' background.

To be sure, neither the Court of Criminal Appeals nor the trial court labeled Eddings' family background and personality disturbance as "mitigating factors." It is plain to me, however, that this was purely a matter of semantics associated with the rational belief that "evidence in mitigation" must rise to a certain level of persuasiveness before it can be said to constitute a "mitigating circumstance." In contrast, the Court seems to require that any potentially mitigating evidence be described as a "mitigating factor"—regardless of its weight; the insubstantiality of the evidence is simply to be a factor in the process of weighing the evidence against aggravating circumstances. Yet if this is all the Court's opinion stands for, it provides scant support for the result reached. For it is clearly the choice of the Oklahoma courts—a choice not inconsistent with *Lockett* or any other decision of this Court—to accord relatively little weight to Eddings' family background and emotional problems as balanced against the circumstances of his crime and his potential for future dangerousness.[8]

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[8] Nor is this choice necessarily an unreasonable one. As the Court notes, "[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." *Ante*, at 115. One might even be surprised if a person capable of a brutal and unprovoked killing of a police officer did not suffer from some sort of "personality disorder."

Indeed, Dr. Dietsche, who testified that Eddings had a "sociopathic or antisocial personality," see *ante*, at 107, estimated that 91% "of your criminal element" would test as sociopathic or antisocial. App. 136. Dr. Dietsche defined "antisocial personalities" as individuals without "the usual type of companions" or "loyalties," who are "[f]requently . . . selfish, . . . very impulsive," showing "little in the line of responsibility" or concern "for the needs or wants of others," and "hav[ing] little in the line of guilt or

II

It can never be less than the most painful of our duties to pass on capital cases, and the more so in a case such as this one. However, there comes a time in every case when a court must "bite the bullet."

Whether the Court's remand will serve any useful purpose remains to be seen, for petitioner has already been given an opportunity to introduce whatever evidence he considered relevant to the sentencing determination. Two Oklahoma courts have weighed that evidence and found it insufficient to offset the aggravating circumstances shown by the State. The Court's opinion makes clear that some Justices who join it would not have imposed the death penalty had they sat as the sentencing authority, see, *e. g.*, *ante*, at 115–116. In-

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remorse." *Id.*, at 137–138. Although the Court describes Dietsche's testimony as indicating that "approximately 30% of youths suffering from such a disorder grew out of it as they aged," *ante*, at 107, Dietsche was in fact describing a study which he thought had subsequently been discredited. App. 139–141. Even that study, however, concluded that most of those who "grew out of" the disorder by the age of 35 or 40 were "more of a con-artist type" and "not . . . the assaultive type." *Ibid.* A more recent study estimated that only 20% of sociopathic persons were "treatable," *id.*, at 141; in this study, only 9 of 255 initial participants were successfully treated, after "literally . . . thousands of hours of therapy." *Id.*, at 142. Thus, characterization of Eddings as a "sociopath" may connote little more than that he is egocentric, concerned only with his own desires and unremorseful, has a propensity for criminal conduct, and is unlikely to respond well to conventional psychiatric treatment—hardly significant "mitigating" factors. See *Blocker* v. *United States*, 110 U. S. App. D. C. 41, 48–49, and nn. 11, 12, 288 F. 2d 853, 860–861, and nn. 11, 12 (1961) (Burger, J., concurring in result). While the Court speaks of Eddings' "severe emotional disturbance," *ante*, at 115; see also *ante*, at 116, it appears to be referring primarily to the testimony that Eddings was a sociopath, and to Dr. Gagliano's rather fantastic speculation concerning Eddings' dissociation at the time of the crime, see n. 4, *supra*. The Court's opinion exemplifies the proposition that the very occurrence of the crime functions as a powerful impetus to search for a theory to explain it. See Szasz, Psychiatry, Ethics, and the Criminal Law, 58 Colum. L. Rev. 183, 190–191 (1958).

deed, I am not sure I would have done so. But the Constitution does not authorize us to determine whether sentences imposed by state courts are sentences we consider "appropriate"; our only authority is to decide whether they are constitutional under the Eighth Amendment. The Court stops far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed. In the last analysis, the Court is forced to conclude that it is "the state courts [which] must consider [petitioner's mitigating evidence] and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." *Ante*, at 117.

Because the sentencing proceedings in this case were in no sense inconsistent with *Lockett* v. *Ohio*, 438 U. S. 586 (1978), I would decide the sole issue on which we granted certiorari, and affirm the judgment.

COMMON CAUSE ET AL. *v.* SCHMITT ET AL.

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

No. 80–847. Argued October 7, 1981—Decided January 19, 1982*

512 F. Supp. 489, affirmed by an equally divided Court.

Archibald Cox argued the cause for appellants in No. 80–847. With him on the briefs were *Michael L. Burack*, *Louis R. Cohen*, *Roger M. Whitten*, *Kenneth J. Guido, Jr.*, and *Ellen G. Block*.

Jan W. Baran argued the cause for appellees in both cases and filed a brief for appellees Schmitt et al. *Roderick M. Hills*, *Robert K. Burgess*, *Robert B. Shanks*, and *Edward Sonnenschein, Jr.*, filed a brief for Americans for an Effective Presidency, appellee in No. 80–847. *J. Curtis Herge* filed a brief for Fund for a Conservative Majority, appellee in No. 80–1067.

Charles N. Steele argued the cause for the Federal Election Commission, intervenor-appellee in No. 80–847 and appellant in No. 80–1067. With him on the briefs were *Kathleen Imig Perkins* and *Richard B. Bader*.†

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

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*Together with No. 80–1067, *Federal Election Commission* v. *Americans for Change et al.*, also on appeal from the same court.

†Briefs of *amici curiae* urging affirmance were filed by *Phillip A. Lacovara*, *Gerald Goldman*, *Ronald A. Stern*, *Charles S. Sims*, and *Arthur B. Spitzer* for the American Civil Liberties Union; and by *Wayne T. Elliot* and *Allen R. Hirons* for the Southeastern Legal Foundation, Inc.

MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.

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

No. 80–11. Argued March 30, 1981—Reargued November 4, 1981—Decided January 25, 1982*

Respondent Indian Tribe, pursuant to its Revised Constitution (which had been approved by the Secretary of the Interior (Secretary) as required by the Indian Reorganization Act of 1934), enacted an ordinance (also approved by the Secretary) imposing a severance tax on oil and gas production on the tribal reservation land. Oil and gas received by the Tribe as in-kind royalty payments from lessees of mineral leases on the reservation are exempted from the tax. Petitioners, lessees under Secretary-approved long-term leases with the Tribe to extract oil and natural gas deposits on reservation land, brought separate actions in Federal District Court to enjoin enforcement of the tax. The District Court, consolidating the actions, entered a permanent injunction, ruling that the Tribe had no authority to impose the tax, that only state and local authorities had the power to tax oil and gas production on Indian reservations, and that the tax violated the Commerce Clause. The Court of Appeals reversed, holding that the taxing power is an inherent attribute of tribal sovereignty that has not been divested by any treaty or Act of Congress, and that there was no Commerce Clause violation.

Held:

1. The Tribe has the inherent power to impose the severance tax on petitioners' mining activities as part of its power to govern and to pay for the costs of self-government. Pp. 136–152.

(a) The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to receive revenues for its essential services. The power does not derive solely from the Tribe's power to exclude non-Indians from tribal lands but from the Tribe's general authority, as sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in such activities. Here, petitioners, who have availed themselves of

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*Together with No. 80–15, *Amoco Production Co. et al.* v. *Jicarilla Apache Tribe et al.*, also on certiorari to the same court.

the privilege of carrying on business on the reservation, benefit from police protection and other governmental services, as well as from the advantages of a civilized society assured by tribal government. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of such government. The mere fact that the Tribe enjoys rents and royalties as the lessor of the mineral lands does not undermine its authority to impose the tax. Pp. 137–144.

(b) Even if the Tribe's power to tax were derived solely from its power to exclude non-Indians from the reservation, the Tribe has the authority to impose the severance tax. Non-Indians who lawfully enter tribal lands remain subject to a tribe's *power* to exclude them, which power includes the lesser power to tax or place other conditions on the non-Indian's conduct or continued presence on the reservation. The Tribe's role as commercial partner with petitioners should not be confused with its role as sovereign. It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract. To presume that a sovereign forever waives the right to exercise one of its powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head. Pp. 144–148.

(c) The Federal Government did not deprive the Tribe of its authority to impose the severance tax by Congress' enactment of the 1938 Act establishing the procedures for leasing oil and gas interests on tribal lands. Such Act does not prohibit the Tribe from imposing the tax when both the tribal Constitution and the ordinance authorizing the tax were approved by the Secretary. Nor did the 1927 Act permitting state taxation of mineral leases on Indian reservations divest the Tribe of its taxing power. The mere existence of state authority to tax does not deprive an Indian tribe of its power to tax. Moreover, the severance tax does not conflict with national energy policies. To the contrary, the fact that the Natural Gas Policy Act of 1978 includes taxes imposed by an Indian tribe in its definition of costs that may be recovered under federal energy pricing regulations, indicates that such taxes would not contravene such policies and that the tribal authority to do so is not implicitly divested by that Act. Pp. 149–152.

2. The severance tax does not violate the "negative implications" of the Commerce Clause. Pp. 152–158.

(a) Courts are final arbiters under the Commerce Clause only when Congress has not acted. Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal

tax can take effect, and in this case the severance tax was enacted in accordance with this congressional scheme. Pp. 154–156.

(b) Even if judicial scrutiny under the Commerce Clause were necessary, the challenged tax would survive such scrutiny. The tax does not discriminate against interstate commerce since it is imposed on minerals either sold on the reservation or transported off the reservation before sale. And the exemption for minerals received by the Tribe as in-kind payments on the leases and used for tribal purposes merely avoids the administrative make-work that would ensue if the Tribe taxed the minerals that it, as a commercial partner, received in royalty payments, and thus cannot be deemed a discriminatory preference for local commerce. Pp. 156–158.

617 F. 2d 537, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 159.

Jason W. Kellahin reargued the cause for the petitioners in No. 80–11. With him on the briefs were *Bruce D. Black*, *Thomas H. Burton*, and *John Wimbish*. *John R. Cooney* reargued the cause for petitioners in No. 80–15. With him on the briefs were *Mark B. Thompson III*, *John H. Pickering*, *Samuel A. Stern*, *R. H. Landt*, and *Richard L. Marlar*.

Deputy Solicitor General Claiborne reargued the cause for respondent Secretary of the Interior in both cases. With him on the brief on reargument were *Acting Solicitor General Wallace* and *Assistant Attorney General Dinkins*. With him on the brief on the original argument were *Solicitor General McCree*, *Acting Assistant Attorney General Liotta*, *Edwin S. Kneedler*, *Jacques B. Gelin*, and *Martin W. Matzen*. *Robert J. Nordhaus* reargued the cause for respondents Jicarilla Apache Tribe et al. in both cases. With him on the briefs were *B. Reid Haltom* and *Terry D. Farmer*.†

†Briefs of *amici curiae* urging reversal were filed by *Helena S. Maclay*, *Deirdre Boggs*, and *Bruce McEvoy*, Special Assistant Attorneys General, for the State of Montana; by *Bruce L. Herr*, *John B. Draper*, *Allen I.*

JUSTICE MARSHALL delivered the opinion of the Court.

Pursuant to long-term leases with the Jicarilla Apache Tribe, petitioners, 21 lessees, extract and produce oil and gas from the Tribe's reservation lands. In these two consolidated cases, petitioners challenge an ordinance enacted by the Tribe imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." See Oil and Gas Severance Tax No. 77–0–02, App. 38. We granted certiorari to determine whether the Tribe has the authority to impose this tax, and, if so, whether the tax imposed by the Tribe violates the Commerce Clause.

I

The Jicarilla Apache Tribe resides on a reservation in northwestern New Mexico. Established by Executive Order in 1887,[1] the reservation contains 742,315 acres, all of which are held as tribal trust property. The 1887 Executive

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Olson, Attorney General of North Dakota, *Albert R. Hausauer*, Special Assistant Attorney General, *Robert B. Hansen*, Attorney General of Utah, *Richard L. Dewsnup* and *Michael Quealy*, Assistant Attorneys General, *John D. Troughton*, Attorney General of Wyoming, and *Ron Arnold*, Assistant Attorney General, for the States of New Mexico et al.; by *Slade Gorton*, Attorney General, and *Timothy Malone*, Assistant Attorney General, for the State of Washington; by *James G. Watt* and *William H. Mellor III* for the Mountain States Legal Foundation; by *Frederick J. Martone* for the Salt River Project Agricultural Improvement and Power District et al.; by *Edward L. Barrett, Jr.*, *Richard C. Cahoon*, *Dennis McCarthy*, and *Arthur H. Nielsen*, for Shell Oil Co. et al.; and by *George J. Miller* for Westmoreland Resources, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Harry R. Sachse*, *Reid Peyton Chambers*, *Charles A. Hobbs*, *Robert A. Warden*, *Lawrence White*, and *Steven S. Anderson* for the Council of Energy Resource Tribes et al.; and by *George P. Vlassis* for the Navajo Tribe of Indians.

[1] See 1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904) (Order of President Cleveland). Two earlier Orders setting aside land for the Tribe had been canceled. See *id.*, at 874–875 (Orders of Presidents Hayes and Grant). The boundaries of the reservation were redefined or clarified by Executive Orders issued by President Theodore Roosevelt on Novem-

Order set aside public lands in the Territory of New Mexico for the use and occupation of the Jicarilla Apache Indians, and contained no special restrictions except for a provision protecting pre-existing rights of bona fide settlers.[2] Approximately 2,100 individuals live on the reservation, with the majority residing in the town of Dulce, N. M., near the Colorado border.

The Tribe is organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, which authorizes any tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior (Secretary).[3] The Tribe's first Constitution, approved by the Secretary on August 4, 1937, preserved all powers conferred by § 16 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 987, 25 U. S. C. § 476. In 1968, the Tribe revised its Constitution to specify:

> "The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of

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ber 11, 1907, and January 28, 1908, and by President Taft on February 17, 1912. See 3 C. Kappler, Indian Affairs, Laws and Treaties 681, 682, 684, 685 (1913).

The fact that the Jicarilla Apache Reservation was established by Executive Order rather than by treaty or statute does not affect our analysis; the Tribe's sovereign power is not affected by the manner in which its reservation was created. *E. g.*, *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980).

[2] The proviso reads as follows: "this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the law of the United States providing for the disposition of the public domain." 1 Kappler, *supra*, at 875.

[3] The Tribe is also chartered under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 988, 25 U. S. C. § 477, which permits the Secretary to issue to an Indian tribe a charter of incorporation that may give the tribe the power to purchase, manage, operate, and dispose of its property.

> the Department of the Interior, and the restrictions established by this revised constitution." Revised Constitution of the Jicarilla Apache Tribe, Art. XI, § 1.

The Revised Constitution provides that "[t]he tribal council may enact ordinances to govern the development of tribal lands and other resources," Art. XI, § 1(a)(3). It further provides that "[t]he tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation," Art. XI, § 1(e). The Revised Constitution was approved by the Secretary on February 13, 1969.

To develop tribal lands, the Tribe has executed mineral leases encompassing some 69% of the reservation land. Beginning in 1953, the petitioners entered into leases with the Tribe. The Commissioner of Indian Affairs, on behalf of the Secretary, approved these leases, as required by the Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U. S. C. §§ 396a–396g (1938 Act). In exchange for a cash bonus, royalties, and rents, the typical lease grants the lessee "the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under" the leased land for as long as the minerals are produced in paying quantities. App. 22. Petitioners may use oil and gas in developing the lease without incurring the royalty. *Id.*, at 24. In addition, the Tribe reserves the rights to use gas without charge for any of its buildings on the leased land, and to take its royalties in kind. *Id.*, at 27–28. Petitioners' activities on the leased land have been subject to taxes imposed by the State of New Mexico on oil and gas severance and on oil and gas production equipment. *Id.*, at 129. See Act of Mar. 3, 1927, ch. 299, § 3, 44 Stat. 1347, 25 U. S. C. § 398c (permitting state taxation of mineral production on Indian reservations) (1927 Act).

Pursuant to its Revised Constitution, the Tribal Council adopted an ordinance imposing a severance tax on oil and gas

production on tribal land. See App. 38. The ordinance was approved by the Secretary, through the Acting Director of the Bureau of Indian Affairs, on December 23, 1976. The tax applies to "any oil and natural gas severed, saved and removed from Tribal lands . . . ." *Ibid.* The tax is assessed at the wellhead at $0.05 per million Btu's of gas produced and $0.29 per barrel of crude oil or condensate produced on the reservation, and it is due at the time of severance. *Id.*, at 38–39. Oil and gas consumed by the lessees to develop their leases or received by the Tribe as in-kind royalty payments are exempted from the tax. *Ibid.;* Brief for Respondent Jicarilla Apache Tribe 59, n. 42.

In two separate actions, petitioners sought to enjoin enforcement of the tax by either the tribal authorities or the Secretary. The United States District Court for the District of New Mexico consolidated the cases, granted other lessees leave to intervene, and permanently enjoined enforcement of the tax. The District Court ruled that the Tribe lacked the authority to impose the tax, that only state and local authorities had the power to tax oil and gas production on Indian reservations, and that the tax violated the Commerce Clause.

The United States Court of Appeals for the Tenth Circuit, sitting en banc, reversed. 617 F. 2d 537 (1980).[4] The Court of Appeals reasoned that the taxing power is an inherent attribute of tribal sovereignty that has not been divested by any treaty or Act of Congress, including the 1927 Act, 25 U. S. C. § 398c. The court also found no Commerce Clause violation. We granted certioriari, 449 U. S. 820 (1980), and we now affirm the decision of the Court of Appeals.

II

Petitioners argue, and the dissent agrees, that an Indian tribe's authority to tax non-Indians who do business on the

[4] Two judges dissented. Both argued that tribal sovereignty does not encompass the power to tax non-Indian lessees, 617 F. 2d, at 551–556 (Seth, C. J., dissenting); *id.*, at 556–565 (Barrett, J., dissenting) (also arguing the tax violates the Commerce Clause).

reservation stems exclusively from its power to exclude such persons from tribal lands. Because the Tribe did not initially condition the leases upon the payment of a severance tax, petitioners assert that the Tribe is without authority to impose such a tax at a later time. We disagree with the premise that the power to tax derives only from the power to exclude. Even if that premise is accepted, however, we disagree with the conclusion that the Tribe lacks the power to impose the severance tax.

A

In *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980) *(Colville)*, we addressed the Indian tribes' authority to impose taxes on non-Indians doing business on the reservation. We held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.*, at 152. The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. See, *e. g.*, *Gibbons* v. *Ogden*, 9 Wheat. 1, 199 (1824).

The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 437 (1980); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445 (1940). They benefit from the provision of police protection and other governmental services, as well as from "'the ad-

vantages of a civilized society'" that are assured by the existence of tribal government. *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 228 (1980) (quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 445 (1979)). Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.[5] Cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 624–629 (1981); *id.*, at 647 (BLACKMUN, J., dissenting); *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 436–437.

As we observed in *Colville*, *supra*, the tribe's interest in levying taxes on nonmembers to raise "revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." 447 U. S., at 156–157. This surely is the case here. The mere fact that the government imposing the tax also enjoys rents and royalties as the lessor of the mineral lands does not undermine the government's authority to impose the tax. See *infra*, at 145–148. The royalty payments from the mineral leases are paid to the Tribe in its role as partner in petitioners' commercial venture. The severance tax, in contrast, is petitioners' contribution "to the general cost of providing governmental services." *Commonwealth Edison Co.* v. *Montana*, *supra*, at 623. State governments commonly receive both royalty payments and severance taxes from lessees of mineral lands within their borders.

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[5] Through various Acts governing Indian tribes, Congress has expressed the purpose of "fostering tribal self-government." *Colville*, 447 U. S., at 155. We agree with Judge McKay's observation that "[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal

Viewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government. Cf. *Colville*, *supra*, at 153. In *Colville*, the Court relied in part on a 1934 opinion of the Solicitor for the Department of the Interior. In this opinion, the Solicitor recognized that, in the absence of congressional action to the contrary, the tribes' sovereign power to tax "'may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.'" 447 U. S., at 153 (quoting *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934)). *Colville* further noted that official executive pronouncements have repeatedly recognized that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest . . . , including jurisdiction to tax." 447 U. S., at 152–153 (citing 23 Op. Atty. Gen. 214 (1900); 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855)).[6]

Similarly, Congress has acknowledged that the tribal power to tax is one of the tools necessary to self-government and territorial control. As early as 1879, the Senate Judi-

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taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes." 617 F. 2d, at 550 (McKay, J., concurring).

[6] Moreover, in its revision of the classic treatise on Indian Law, the Department of the Interior advances the view that the Indian tribes' power to tax is not limited by the power to exclude. See U. S. Solicitor for Dept. of Interior, Federal Indian Law 438 (1958) ("The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction") (footnote omitted). See also F. Cohen, Handbook of Federal Indian Law 142 (1942) ("One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed") (footnote omitted).

ciary Committee acknowledged the validity of a tax imposed by the Chickasaw Nation on non-Indians legitimately within its territory:

> "We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life; and *they undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects*—a right not in any sense derived from the Government of the United States." S. Rep. No. 698, 45th Cong., 3d Sess., 1–2 (1879) (emphasis added).

Thus, the views of the three federal branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services. Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed permits no other conclusion. As we observed in *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975), "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'" They "are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Ibid.* See, *e. g.*, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89, 92, 99 (CA8 1956); *Crabtree* v. *Madden*, 54 F. 426, 428–429 (CA8 1893); Cohen, 'The Spanish Origin of Indian Rights in the Law of the United States,' in The Legal Conscience 230, 234 (L. Cohen ed.

1960). Adhering to this understanding, we conclude that the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management.

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

We are not persuaded by the dissent's attempt to limit an Indian tribe's authority to tax non-Indians by asserting that its only source is the tribe's power to exclude such persons from tribal lands. Limiting the tribes' authority to tax in this manner contradicts the conception that Indian tribes are domestic, dependent nations, as well as the common understanding that the sovereign taxing power is a tool for raising revenue necessary to cover the costs of government.

Nor are we persuaded by the dissent that three early decisions upholding tribal power to tax nonmembers support this limitation. *Post*, at 175–183, discussing *Morris* v. *Hitchcock*, 194 U. S. 384 (1904); *Buster* v. *Wright*, 135 F. 947 (CA8 1905), appeal dism'd, 203 U. S. 599 (1906); *Maxey* v. *Wright*, 3 Ind. T. 243, 247–250, 54 S. W. 807, 809 (Ct. App. Ind. T.), aff'd, 105 F. 1003 (CA8 1900). In discussing these cases, the dissent correctly notes that a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax. None of these cases, however, establishes that the authority to tax derives *solely* from the power to exclude. Instead, these cases demonstrate that a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the

privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Morris v. *Hitchcock*, for example, suggests that the taxing power is a legitimate instrument for raising revenue, and that a tribe may exercise this power over non-Indians who receive privileges from the tribe, such as the right to trade on Indian land. In *Morris*, the Court approved a tax on cattle grazing and relied in part on a Report to the Senate by the Committee on the Judiciary, which found no legal defect in previous tribal tax legislation having "a twofold object—to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and *to raise revenue*." 194 U. S., at 389 (emphasis added). In *Maxey* v. *Wright*, the question of Indian sovereignty was not even raised: the decision turned on the construction of a treaty denying the Tribe any governing or jurisdictional authority over nonmembers. 3 Ind. T., at 247–248, 54 S. W., at 809.[7]

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[7] The governing treaty in *Maxey* v. *Wright* restricted the tribal right of self-government and jurisdiction to members of the Creek or Seminole Tribes. The court relied, at least in part, on opinions of the Attorney General interpreting this treaty. For example, one such opinion stated that, whatever the meaning of the clause limiting to tribal members the Tribes' unrestricted rights of self-government and jurisdiction, it did

"'not limit the right of these tribes to pass upon the question, who . . . shall

Finally, the decision in *Buster* v. *Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster* v. *Wright*. In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorporated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners*." 135 F., at 952 (empha-

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share their occupancy, and upon what terms. That is a question which all private persons are allowed to decide for themselves; and even wild animals, not men, have a certain respect paid to the instinct which in this respect they share with man. The serious words "jurisdiction" and "self-government" are scarcely appropriate to the right of a hotel keeper to prescribe rules and charges for persons who become his fellow occupants.'" 3 Ind. T., at 250, 54 S. W., at 809 (quoting 18 Op. Atty. Gen. 4, 36, 37 (1884)).

The court, as well as the opinion of the Attorney General, found that the Tribes' "natural instinct" to set terms on occupancy was unaltered by the treaty. Neither the court nor the Attorney General adressed the scope of Indian sovereignty when unlimited by treaty; instead, they identified a tribe's right, as a social group, to exclude intruders and place conditions on their occupancy. The court's dependence on this reasoning hardly bears on the more general question posed here: what is the source of the Indian tribes' sovereign power to tax absent a restriction by treaty or other federal law?

sis added).[8] This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

We choose not to embrace a new restriction on the extent of the tribal authority to tax, which is based on a questionable interpretation of three early cases. Instead, based on the views of each of the federal branches, general principles of taxation, and the conception of Indian tribes as domestic, dependent nations, we conclude that the Tribe has the authority to impose a severance tax on the mining activities of petitioners as part of its power to govern and to pay for the costs of self-government.

B

Alternatively, if we accept the argument, advanced by petitioners and the dissent, that the Tribe's authority to tax derives solely from its power to exclude non-Indians from the reservation, we conclude that the Tribe has the authority to impose the severance tax challenged here. Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to

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[8] Both the classic treatise on Indian law and its subsequent revision by the Department of the Interior, see n. 6, *supra*, agree with this reading of *Buster* v. *Wright*. Federal Indian Law, *supra* n. 6, at 438; Cohen, *supra* n. 6, at 142 (both citing *Buster* v. *Wright* for the proposition that the power to tax is an inherent sovereign power not dependent on the power to exclude).

place other conditions on the non-Indian's conduct or continued presence on the reservation.[9] A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power. The fact that the tribe chooses not to exercise its power to tax when it initially grants a non-Indian entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax.[10]

Petitioners argue that their leaseholds entitle them to enter the reservation and exempt them from further exercises of the Tribe's sovereign authority. Similarly, the dissent asserts that the Tribe has lost the power to tax petitioners' mining activities because it has leased to them the use of the mineral lands and such rights of access to the reservation as might be necessary to enjoy the leases. *Post*, at 186–190.[11] However, this conclusion is not compelled by linking the taxing power to the power to exclude. Instead, it is based on additional assumptions and confusions about the consequences of the commercial arrangement between petitioners and the Tribe.

Most important, petitioners and the dissent confuse the Tribe's role as commercial partner with its role as sover-

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[9] See also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (CA8 1958) (lessees of tribal lands subject to Indian tax on use of land).

[10] Here, the leases extend for as long as minerals are produced in paying quantities, in other words, until the resources are depleted. Thus, under the dissent's approach, the Tribe would never have the power to tax petitioners regardless of the financial burden to the Tribe of providing and maintaining governmental services for the benefit of petitioners.

[11] But see *Buster* v. *Wright*, 135 F., at 958:

"The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns . . . ."

eign.[12] This confusion relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign's commercial agreements. It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract.

Confusing these two results denigrates Indian sovereignty. Indeed, the dissent apparently views the tribal power to exclude, as well as the derivative authority to tax, as merely the power possessed by any individual landowner or any social group to attach conditions, including a "tax" or fee, to the entry by a stranger onto private land or into the social group, and not as a sovereign power. The dissent does pay lipservice to the established views that Indian tribes retain those fundamental attributes of sovereignty, including the power to tax transactions that occur on tribal lands, which have not been divested by Congress or by necessary implication of the tribe's dependent status, see *Colville*, 447 U. S., at 152, and that tribes "are a good deal more than 'private, voluntary organizations.'" *United States* v. *Mazurie*, 419 U. S., at 557. However, in arguing that the Tribe somehow "lost" its power to tax petitioners by not in-

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[12] In contrast, the 1958 treatise on Indian law written by the United States Solicitor for the Department of the Interior recognized and distinguished the scope of these two roles when it embraced as the "present state of the law" the following summary:

"'Over tribal lands, *the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.* But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.'" Federal Indian Law, *supra* n. 6, at 439 (quoting Solicitor's Opinion of Oct. 25, 1934) (emphasis added).

See Cohen, *supra* n. 6, at 143.

cluding a taxing provision in the original leases or otherwise notifying petitioners that the Tribe retained and might later exercise its sovereign right to tax them, the dissent attaches little significance to the sovereign nature of the tribal authority to tax, and it obviously views tribal authority as little more than a landowner's contractual right. This overly restrictive view of tribal sovereignty is further reflected in the dissent's refusal to apply established principles for determining whether other governmental bodies have waived a sovereign power through contract. See *post*, at 189, n. 50. See also *infra*, at 148.

Moreover, the dissent implies that the power to tax depends on the consent of the taxed as well as on the Tribe's power to exclude non-Indians. Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority. Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority. *E. g.*, *United States* v. *Wheeler*, 435 U. S. 313, 322 (1978).[13] Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.

Viewed in this light, the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax. Contractual arrangements remain subject to subsequent legislation by the presiding sovereign. See, *e. g.*, *Veix* v. *Sixth Ward Building & Loan Assn. of*

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[13] See also P. Maxfield, M. Dieterich, & F. Trelease, Natural Resources Law on American Indian Lands 4–6 (1977). Federal limitations on tribal sovereignty can also occur when the exercise of tribal sovereignty would be inconsistent with overriding national interests. See *Colville*, 447 U. S., at 153. This concern is not presented here. See *ibid.*

Newark, 310 U. S. 32 (1940); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934). Even where the contract at issue requires payment of a royalty for a license or franchise issued by the governmental entity, the government's power to tax remains unless it "has been specifically surrendered in terms which admit of no other reasonable interpretation." *St. Louis* v. *United R. Co.*, 210 U. S. 266, 280 (1908).

To state that Indian sovereignty is different than that of Federal, State or local Governments, see *post*, at 189, n. 50, does not justify ignoring the principles announced by this Court for determining whether a sovereign has waived its taxing authority in cases involving city, state, and federal taxes imposed under similar circumstances. Each of these governments has different attributes of sovereignty, which also may derive from different sources. These differences, however, do not alter the principles for determining whether any of these governments has waived a sovereign power through contract, and we perceive no principled reason for holding that the different attributes of Indian sovereignty require different treatment in this regard. Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.

No claim is asserted in this litigation, nor could one be, that petitioners' leases contain the clear and unmistakable surrender of taxing power required for its extinction. We could find a waiver of the Tribe's taxing power only if we inferred it from silence in the leases. To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head, and we do not adopt this analysis.[14]

[14] Petitioners and the dissent also argue that we should infer a waiver of the taxing power from silence in the Tribe's original Constitution. Although it is true that the Constitution in force when petitioners signed

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The Tribe has the inherent power to impose the severance tax on petitioners, whether this power derives from the Tribe's power of self-government or from its power to exclude. Because Congress may limit tribal sovereignty, we now review petitioners' argument that Congress, when it enacted two federal Acts governing Indians and various pieces of federal energy legislation, deprived the Tribe of its authority to impose the severance tax.

In *Colville*, we concluded that the "widely held understanding within the Federal Government has always been that *federal law to date has not worked a divestiture of Indian taxing power.*" 447 U. S., at 152 (emphasis added). Moreover, we noted that "[n]o federal statute cited to us shows any congressional departure from this view." *Id.*, at 153. Likewise, petitioners can cite to no statute that specifically divests the Tribe of its power to impose the severance tax on their mining activities. Instead, petitioners argue that Congress *implicitly* took away this power when it enacted the Acts and various pieces of legislation on which petitioners rely. Before reviewing this argument, we reiterate here our admonition in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 60 (1978): "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."

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their leases did not include a provision specifically authorizing a severance tax, neither the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes. *E. g.*, *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89, 94 (CA8 1956); *Buster* v. *Wright*, 135 F., at 950. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence on this point is that the sovereign power to tax remains intact. The Tribe's Constitution was amended to authorize the tax before the tax was imposed, and this is the critical event necessary to *effectuate* the tax. See *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d, at 554, 556; *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, *supra*, at 99.

Petitioners argue that Congress pre-empted the Tribe's power to impose a severance tax when it enacted the 1938 Act, 25 U. S. C. §§ 396a–396g. In essence, petitioners argue that the tax constitutes an additional burden on lessees that is inconsistent with the Act's regulatory scheme for leasing and developing oil and gas reserves on Indian land. This Act, and the regulations promulgated by the Department of the Interior for its enforcement, establish the procedures to be followed for leasing oil and gas interests on tribal lands. However, the proviso to 25 U. S. C. § 396b states that "the foregoing provisions *shall in no manner restrict the right of tribes* . . . to lease lands for mining purposes . . . *in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, [464–475, 476–478], and 479 of this title*" (emphasis added).[15] Therefore, this Act does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its Revised Constitution, when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary.[16]

Petitioners also assert that the 1927 Act, 25 U. S. C. §§ 398a–398e, divested the Tribe's taxing power. We disagree. The 1927 Act permits state taxation of mineral les-

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[15] The Secretary has implemented the substance of this proviso by the following regulation:

"The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. 461–479), . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior." 25 CFR § 171.29 (1980).

[16] In arguing that the 1938 Act was intended to pre-empt the severance tax, petitioners attach great significance to the Secretary's approval of the leases. Curiously, they attach virtually no significance to the fact that the Secretary also approved the tax ordinance that they challenge here.

sees on Executive Order reservations, but it indicates no change in the taxing power of the affected tribes. See 25 U. S. C. § 398c. Without mentioning the tribal authority to tax, the Act authorizes state taxation of royalties from mineral production on all Indian lands. Petitioners argue that the Act transferred the Indian power to tax mineral production to the States in exchange for the royalties assured the tribes. This claim not only lacks any supporting evidence in the legislative history, it also deviates from settled principles of taxation: different sovereigns can enjoy powers to tax the same transactions. Thus, the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax. *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F. 2d 1253 (CA9 1976), cert. denied, 430 U. S. 983 (1977). Cf. *Colville*, 447 U. S., at 158 ("There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other").[17]

Finally, petitioners contend that tribal taxation of oil and gas conflicts with national energy policies, and therefore the tribal tax is pre-empted by federal law. Again, petitioners cite no specific federal statute restricting Indian sovereignty. Nor do they explain why state taxation of the same type of activity escapes the asserted conflict with federal policy. Cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981). Indeed, rather than forbidding tribal severance taxes, Congress has included taxes imposed by an Indian

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[17] The Tribe argues that the 1927 Act granting the States the power to tax mineral production on Indian land is inapplicable because the leases at issue here were signed pursuant to the 1938 Act. The 1938 Act, which makes uniform the laws applicable to leasing mineral rights on tribal lands, does not contain a grant of power to the States comparable to that found in the 1927 Act. As a result, the Tribe asserts that the State of New Mexico has no power to tax the production under petitioners' leases with the Tribe. Because the State of New Mexico is not a party to this suit, the Court of Appeals did not reach this issue. See 617 F. 2d, at 547–548, n. 5. For this reason, and because we conclude that the 1927 Act did not affect the Tribe's authority to tax, we likewise do not reach this issue.

tribe in its definition of costs that may be recovered under federal energy pricing regulations. Natural Gas Policy Act of 1978, Pub. L. 95–621, §§ 110(a), (c)(1), 92 Stat. 3368, 15 U. S. C. §§ 3320(a), (c)(1) (1976 ed., Supp. IV). Although this inclusion may not reflect Congress' view with respect to the source of a tribe's power to impose a severance tax,[18] it surely indicates that imposing such a tax would not contravene federal energy policy and that the tribal authority to do so is not implicitly divested by that Act.

We find no "clear indications" that Congress has implicitly deprived the Tribe of its power to impose the severance tax. In any event, if there were ambiguity on this point, the doubt would benefit the Tribe, for "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143–144 (1980). Accordingly, we find that the Federal Government has not divested the Tribe of its inherent authority to tax mining activities on its land, whether this authority derives from the Tribe's power of self-government or from its power to exclude.

III

Finding no defect in the Tribe's exercise of its taxing power, we now address petitioners' contention that the severance tax violates the "negative implications" of the Commerce Clause because it taxes an activity that is an integral

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[18] The statute provides that Indian severance taxes may be recovered through federal energy pricing. However, the legislative history indicates that Congress took no position on the source of the Indian tribes' power to impose the tax in the first place:

"While severance taxes which may be imposed by an Indian tribe are to be treated in the same manner as State imposed severance taxes, the conferees do not intend to prejudge the outcome of the cases on appeal before the Tenth Circuit Court of Appeals respecting the right of Indian tribes to

part of the flow of commerce, discriminates against interstate commerce, and imposes a multiple burden on interstate commerce. At the outset, we note that reviewing tribal action under the Interstate Commerce Clause is not without conceptual difficulties. *E. g.*, nn. 21 and 24, *infra*. Apparently recognizing these difficulties, the Solicitor General, on behalf of the Secretary, argues that the language,[19] the structure, and the purposes of the Commerce Clause support the conclusion that the Commerce Clause does not, of its own force, limit Indian tribes in their dealings with non-Indians. Brief for Secretary of Interior 35–40. The Solicitor General reasons that the Framers did not intend "the courts, through the Commerce Clause, to impose their own views of the proper relationship between Indians and non-Indians and to strike down measures adopted by a tribe with which the political departments of government had not seen fit to disagree." *Id.*, at 39. Instead, where tribal legislation is inimical to the national welfare, the Solicitor asserts that the Framers contemplated that the remedies would be the negotiation or renegotiation of treaties, the enactment of legislation governing trade and other relations, or the exertion of superior force by the United States Government. *Id.*, at 38–39. Using similar reasoning, the Solicitor suggests that if the Commerce Clause does impose restrictions on tribal activity, those restrictions must arise from the Indian Commerce Clause, and not its interstate counterpart. *Id.*, at 40–43.

To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state

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impose taxes on persons or organizations other than Indians who are engaged in business activities on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes." S. Conf. Rep. No. 95–1126, p. 91 (1978); H. R. Conf. Rep. No. 95–1752, p. 91 (1978).

[19] The Commerce Clause empowers Congress "[t]o regulate Commerce *with* foreign Nations, and *among* the several States, and *with* the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3 (emphasis added).

and local interference, and has not relied on the Clause to authorize tribal regulation of commerce without any constitutional restraints. We see no need to break new ground in this area today: even if we assume that tribal action is subject to the limitations of the Interstate Commerce Clause, this tax does not violate the "negative implications" of that Clause.

A

A state tax may violate the "negative implications" of the Interstate Commerce Clause by unduly burdening or discriminating against interstate commerce. See, *e. g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981); *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). Judicial review of state taxes under the Interstate Commerce Clause is intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States.

However, we only engage in this review when Congress has not acted or purported to act. See, *e. g.*, *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 421–427 (1946). Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action. See *Prudential Insurance Co.* v. *Benjamin*, *supra*, at 431.[20] Courts are

[20] In *Prudential Insurance Co.* v. *Benjamin*, this Court refused to invalidate a South Carolina tax on out-of-state insurance companies despite appellant's contention that the tax impermissibly burdened interstate commerce. The Court refused to entertain appellant's argument because Congress, in passing the McCarran-Ferguson Act, had provided that "si-

final arbiters under the Commerce Clause only when Congress has not acted. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S., at 454.

Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect.[21] Under the Indian Reorganization Act, 25 U. S. C. §§ 476, 477, a tribe must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers. Further, before the ordinance imposing the severance tax challenged here could take effect, the Tribe was required again to obtain approval from the Secretary. See Revised Constitution of the Jicarilla Tribe, Art. XI, §§ 1(e), 2. Cf. 25 U. S. C. §§ 476, 477; 25 CFR § 171.29 (1980) (implementing the proviso to 25 U. S. C. § 396b, quoted in n. 15, *supra*).

As we noted earlier, the severance tax challenged by petitioners was enacted in accordance with this congressional scheme. Both the Tribe's Revised Constitution and the challenged tax ordinance received the requisite approval from the Secretary. This course of events fulfilled the administrative process established by Congress to monitor such exercises of tribal authority. As a result, this tribal tax comes to us in a

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lence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States." 59 Stat. 33, 15 U. S. C. § 1011.

[21] Although Congress has not expressly announced that Indian taxes do not threaten its latent power to regulate interstate commerce, it is unclear how Congress could articulate that intention any more convincingly than it has done here. In contrast to when Congress acts with respect to the States, when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes, not pursuant to its authority under the Interstate Commerce Clause. This is but one of the difficulties inherent in reviewing under the Interstate Commerce Clause both tribal action and congressional action regulating the tribes. Therefore, in determining whether Congress has "acted" to preclude judicial review, we do not find it significant that the congressional action here was not taken pursuant to the Interstate Commerce Clause.

posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.

Finally, Congress is well aware that Indian tribes impose mineral severance taxes such as the one challenged by petitioners. See Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3320(a), (c)(1) (1976 ed., Supp. IV). Congress, of course, retains plenary power to limit tribal taxing authority or to alter the current scheme under which the tribes may impose taxes. However, it is not our function nor our prerogative to strike down a tax that has traveled through the precise channels established by Congress, and has obtained the specific approval of the Secretary.

B

The tax challenged here would survive judicial scrutiny under the Interstate Commerce Clause, even if such scrutiny were necessary. In *Complete Auto Transit, Inc.* v. *Brady*, *supra*, at 279, we held that a state tax on activities connected to interstate commerce is sustainable if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Petitioners do not question that the tax on the severance of minerals from the mines[22] meets the first and the

[22] Petitioners initially contend that the ordinance taxes the transportation of the minerals from the reservation, not their severance from the mines. As a result, they argue that the ordinance impermissibly burdens interstate commerce by taxing the movement in commerce itself, which is not a local event. The tax, by its terms, applies to resources that are "produced on the Jicarilla Apache Tribe Reservation and sold or transported off the Reservation." App. 39. The Tribe explains that this language was used

second tests: the mining activities taxed pursuant to the ordinance occur entirely on reservation land. Furthermore, petitioners do not challenge the tax on the ground that the amount of the tax is not fairly related to the services provided by the Tribe. See Supplemental Brief for Petitioners in No. 80–15, pp. 11, 17–20.[23]

Instead, petitioners focus their attack on the third factor, and argue that the tax discriminates against interstate commerce. In essence, petitioners argue that the language "sold or transported off the reservation" exempts from taxation minerals sold on the reservation, kept on the reservation for use by individual members of the Tribe, and minerals taken by the Tribe on the reservation as in-kind royalty. Although petitioners admit that no sales have occurred on the reservation to date, they argue that the Tribe might induce private industry to locate on the reservation to take advantage of this allegedly discriminatory taxing policy. We do not accept petitioners' arguments; instead, we agree with the Tribe, the Solicitor General, and the Court of Appeals that the tax is imposed on minerals sold on the reservation or transported off the reservation before sale. See 617 F. 2d, at 546. Cf. n. 22, *supra*.[24] Under this interpretation, the tax does not

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because no sale occurs prior to the transportation off the reservation. The Tribe's tax is due at the time of severance. *Id.*, at 38. Therefore, we agree with the Court of Appeals that the taxable event defined by the ordinance is the removal of minerals from the soil, not their transportation from the reservation. See 617 F. 2d, at 546.

[23] The Court of Appeals noted that, because the lessees chose not to build a factual foundation to challenge the tax on this ground, there was no basis on which to find that the tax was not fairly related to the services provided by the Tribe. See *id.*, at 545, n. 4. Indeed, when the Tribe attempted to introduce at trial evidence of the services it had provided to establish this relationship, the District Court rejected this evidence upon petitioners' objection that such evidence was irrelevant to their challenge. Brief for Respondent Jicarilla Apache Tribe 7–8; 6 Record 278–290, 294, 300–308.

[24] The ordinance does not distinguish between minerals remaining within New Mexico and those transported beyond the state boundary. As a result, petitioners' argument that the tax discriminates against interstate

treat minerals transported away from the reservation differently than it treats minerals that might be sold on the reservation. Nor does the Tribe's tax ordinance exempt minerals ultimately received by individual members of the Tribe. The ordinance does exempt minerals received by the Tribe as in-kind payments on the leases and used for tribal purposes,[25] but this exemption merely avoids the administrative makework that would ensue if the Tribe, as local government, taxed the amount of minerals that the Tribe, as commercial partner, received in royalty payments. Therefore, this exemption cannot be deemed a discriminatory preference for local commerce.[26]

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commerce by favoring local sales focuses on the boundary between the reservation and the State of New Mexico and not on any interstate boundaries. We will assume for purposes of this argument only that this alleged reservation-state discrimination could give rise to a Commerce Clause violation.

[25] Paragraph 4 of the ordinance specifies that "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation." App. 39.

[26] Petitioners contend that because New Mexico may tax the same mining activity at full value, the Indian tax imposes a multiple tax burden on interstate commerce in violation of the Commerce Clause. The multiple taxation issue arises where two or more taxing jurisdictions point to some contact with an enterprise to support a tax on the entire value of its multistate activities, which is more than the contact would justify. *E. g.*, *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 384–385 (1952). This Court has required an apportionment of the tax based on the portion of the activity properly viewed as occurring within each relevant State. See, *e. g.*, *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 219 (1980); *Washington Revenue Dept.* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734, 746, and n. 16 (1978).

This rule has no bearing here, however, for there can be no claim that the Tribe seeks to tax any more of petitioners' mining activity than the portion occurring within tribal jurisdiction. Indeed, petitioners do not even argue that the Tribe is seeking to seize more tax revenues than would be fairly related to the services provided by the Tribe. See *supra*, at 157, and n. 23. In the absence of such an assertion, and when the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State* attempted to levy a tax on the same activ-

IV

In *Worcester* v. *Georgia*, 6 Pet., at 559, Chief Justice Marshall observed that Indian tribes had "always been considered as distinct, independent political communities, retaining their original natural rights." Although the tribes are subject to the authority of the Federal Government, the "weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection." *Id.*, at 561. Adhering to this understanding, we conclude that the Tribe did not surrender its authority to tax the mining activities of petitioners, whether this authority is deemed to arise from the Tribe's inherent power of self-government or from its inherent power to exclude nonmembers. Therefore, the Tribe may enforce its severance tax unless and until Congress divests this power, an action that Congress has not taken to date. Finally, the severance tax imposed by the Tribe cannot be invalidated on the ground that it violates the "negative implications" of the Commerce Clause.

Affirmed.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The Indian tribes that occupied North America before Europeans settled the continent were unquestionably sovereigns. They ruled themselves and they exercised dominion over the lands that nourished them. Many of those tribes, and some attributes of their sovereignty, survive today. This Court, since its earliest days, has had the task of identi-

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ity, which is more than the *State's* contact with the activity would justify. In such a circumstance, any challenge asserting that tribal and state taxes create a multiple burden on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause. These cases, of course, do not involve a challenge to state taxation, and we intimate no opinion on the possibility of such a challenge.

fying those inherent sovereign powers that survived the creation of a new Nation and the introduction of an entirely new system of laws applicable to both Indians and non-Indians.

In performing that task, this Court has guarded carefully the unique status of Indian tribes within this Nation. Over its own members, an Indian tribe's sovereign powers are virtually unlimited; the incorporation of the tribe into the United States has done little to change internal tribal relations. In becoming part of the United States, however, the tribes yielded their status as independent nations; Indians and non-Indians alike answered to the authority of a new Nation, organized under a new Constitution based on democratic principles of representative government. In that new system of government, Indian tribes were afforded no general powers over citizens of the United States. Many tribes, however, were granted a power unknown to any other sovereignty in this Nation: a power to exclude nonmembers entirely from territory reserved for the tribe. Incident to this basic power to exclude, the tribes exercise limited powers of governance over nonmembers, though those nonmembers have no voice in tribal government. Since a tribe may exclude nonmembers entirely from tribal territory, the tribe necessarily may impose conditions on a right of entry granted to a nonmember to do business on the reservation.

The question presented in these cases is whether, after a tribe has granted nonmembers access to its reservation on specified terms and conditions to engage in an economic venture of mutual benefit, the tribe may impose a tax on the nonmembers' share of benefits derived from the venture. The Court today holds that it may do so. In my opinion this holding distorts the very concept of tribal sovereignty. Because I am convinced that the Court's treatment of these important cases gives inadequate attention to the critical difference between a tribe's powers over its own members and its powers over nonmembers, I set forth my views at greater length than is normally appropriate in a dissenting opinion.

I

The 2,100 members of the Jicarilla Apache Tribe live on a reservation in northern New Mexico.[1] The area encompassed by the reservation became a part of the United States in 1848 when the Mexican War ended in the Treaty of Guadalupe Hidalgo. See 9 Stat. 922. Between 1848 and 1871, the United States did not enter into any treaty with the Jicarillas or enact any special legislation relating to them; in 1871 Congress outlawed any future treaties with Indian tribes.[2] In 1887, President Cleveland issued an Executive Order setting aside a tract of public lands in the Territory of New Mexico "as a reservation for the use and occupation of the Jicarilla Apache Indians." Except for a provision protecting bona fide settlers from deprivation of previously acquired rights, the Executive Order contained no special rules applicable to the reservation.[3] The mineral leases at issue in this case

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[1] See Plaintiff's Exhibit E, p. 4.

[2] "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." 16 Stat. 566, current version at 25 U. S. C. § 71.

[3] The entire Executive Order reads as follows:

"EXECUTIVE MANSION, FEBRUARY 11, 1887.

"It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz:

"27, 28, 29, and 30 north, ranges 1 east, and 1, 2, and 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided*, That this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the law of the United States providing for the disposition of the public domain.

"Grover Cleveland."

1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904).

were granted by the Jicarilla Apache Tribe on these reservation lands.

The record does not indicate whether any leasing activity occurred on the Jicarilla Reservation between 1887 and 1953. During that period, however, the authority of Indian tribes to enter into mineral leases was clarified. In 1891 Congress passed a statute permitting the mineral leasing of Indian lands. Act of Feb. 28, 1891, § 3, 26 Stat. 795, 25 U. S. C. § 397. Because the statute applied only to lands "occupied by Indians who have bought and paid for the same," the statute was interpreted to be inapplicable to reservations created by Executive Order. See *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159, 161–162, 164. In 1922, the Secretary of the Interior took the position that Indian reservations created by Executive Order were public lands and that Indians residing on those reservations had no right to share in royalties derived from oil and gas leases. 49 I. D. 139.[4]

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[4] The Secretary contended that the land on Executive Order reservations was subject to leasing, as "lands of the United States," under the Mineral Lands Leasing Act of February 25, 1920, 41 Stat. 437, 30 U. S. C. § 181 *et seq.* In 1924, Attorney General Stone rendered an opinion stating that the Mineral Lands Leasing Act did not apply to Executive Order reservations. 34 Op. Atty. Gen. 181. In 1925, Stone instituted litigation in the District Court of Utah to cancel certain leases that had been authorized by the Secretary of the Interior pursuant to the Mineral Lands Leasing Act. See H. R. Rep. No. 1791, 69th Cong., 2d Sess., 5 (1927). The case was dismissed by stipulation after the enactment of the 1927 Act noted in the text. See *United States* v. *McMahon*, 273 U. S. 782.

A later decision by this Court suggests that the Secretary's position was correct. In *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317, the Court held that an Indian tribe was not entitled to compensation from the United States when an Executive Order reservation was abolished. The Court said:

"Perhaps the most striking proof of the belief shared by Congress and the Executive that the Indians were not entitled to compensation upon the abolition of an executive order reservation is the very absence of compensatory payments in such situations. It was a common practice, during the

In 1927, Congress enacted a statute expressly providing that unallotted lands on any Indian reservation created by Executive Order could be leased for oil and gas mining purposes with the approval of the Secretary of the Interior.[5] The statute directed that all rentals, royalties, or bonuses for such leases should be paid to the Treasurer of the United States for the benefit of the tribe for which the reservation was created.[6] The statute further provided that state taxes

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period in which reservations were created by executive order, for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it. That is to say, the procedure followed in the case before us was typical. No compensation was made, and neither the Government nor the Indians suggested that it was due.

. . . . .

"We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four executive orders of 1875 and 1876, and that no implied Congressional delegation of the power to do so can be spelled out from the evidence of Congressional and executive understanding. The orders were effective to withdraw from sale the lands affected and to grant the use of the lands to the petitioner. But the interest which the Indians received was subject to termination at the will of either the executive or Congress and without obligation to the United States. The executive orders of 1879 and 1884 were simply an exercise of this power of termination, and the payment of compensation was not required." *Id.*, at 330–331.

See also *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 279–282.

[5] Act of Mar. 3, 1927, 44 Stat. (part 2) 1347, current version at 25 U. S. C. § 398a. Section 1 of the Act provided:

"[U]nallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 [25 U. S. C. § 398]."

See also 25 U. S. C. § 398. Unallotted land is land that had not been allotted in severalty to individual Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388.

[6] Section 2 of the Act provided:

"[T]he proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the

could be levied upon the output of such oil and gas leases,[7] but made no mention of the possibility that the Indian tribes, in addition to receiving royalties, could impose taxes on the output.[8]

In 1934, Congress enacted the Indian Reorganization Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, which authorized any Indian tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior. The Act provided that, "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law," the constitution should vest certain specific powers, such as the power to employ legal counsel, in the tribe.[9] The Act

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tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress." 44 Stat. (part 2) 1347, current version at 25 U. S. C. § 398b.

[7] Section 3 of the Act provided:

"[T]axes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians." 44 Stat. (part 2) 1347, current version at 25 U. S. C. § 398c.

[8] In 1938, Congress passed the Act of May 11, 1938, 52 Stat. 347, 25 U. S. C. §§ 396a–396g, which was designed in part to achieve uniformity for all mineral leases of Indian lands. Like the 1927 Act, the statute provided that the tribes were entitled to the royalties from such leases. The statute made no mention of taxes. See n. 45, *infra*.

[9] The statute provided, in part:

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate

also authorized the Secretary of the Interior to issue a charter of incorporation to an Indian tribe, and provided that the charter could convey to the tribe the power to purchase, manage, and dispose of its property.[10] The 1934 Act was silent concerning the right of an Indian tribe to levy taxes.[11] The first Jicarilla Apache Constitution was approved by the Secretary of the Interior in 1937.[12]

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constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. . . .

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments." 25 U. S. C. § 476.

[10] The statute provided:

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress." 25 U. S. C. § 477.

[11] See F. Cohen, Handbook of Federal Indian Law 267 (1942) (hereinafter Cohen).

[12] The 1937 Constitution made no reference to any power to assess taxes against nonmembers. See 1937 Constitution and By-Laws of the Jicarilla Apache Tribe, Defendants' Exhibit G.

In 1953, the Tribe executed an oil and gas lease with the Phillips Petroleum Co. App. 22–30. The lease, prepared on a form provided by the Bureau of Indian Affairs of the Department of the Interior, presumably is typical of later leases executed between other companies and the Tribe.[13] The lease provides that in return for certain rents, royalties, and a cash bonus of $71,345.99, all to be paid to the treasurer of the Tribe, the Tribe as lessor granted to the lessee "the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under" the described tracts of land, together with the right to construct and maintain buildings, plants, tanks, and other necessary structures on the surface. *Id.*, at 22–23. The lease is for a term of 10 years following approval by the Secretary of the Interior "and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." *Ibid.* The lessee is obligated to use reasonable diligence in the development of the property, and to pay an annual rental of $1.25 per acre and a royalty of 12½% "of the value or amount" of all oil and gas "produced and saved" from the leased land. *Id.*, at 24, 26. Oil and gas used by the lessee for development and operation of the lease is royalty-free. *Id.*, at 24. The Tribe reserved the rights to use free of charge sufficient gas for any school or other building owned by the Tribe on the leased premises, and to take its royalty in kind. *Id.*, at 27–28.

The lease contains no reference to the payment of taxes. The lessee does, however, agree to comply with all regulations of the Secretary of the Interior

> "now or hereafter in force relative to such leases: *Provided*, That no regulation hereafter approved shall effect

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[13] This lease is attached to petitioners' complaint in No. 80–11. The lease attached to the complaint in No. 80–15 was also executed in 1953. See App. 62. The record does not disclose the date on which most of the leases with petitioners were executed, but the record does indicate that leases were executed as late as 1967. See Plaintiffs' Exhibit 1. Leases of Jicarilla tribal property cover in the aggregate over 500,000 acres of

> a change in rate or royalty or annual rental herein specified without the written consent of the parties to this lease." *Id.*, at 27.

The lease was approved by the Commissioner of Indian Affairs on behalf of the Secretary of the Interior. *Id.*, at 32. Both of the 1953 leases described in the record are still producing.

In 1968, the Tribe adopted a Revised Constitution giving its Tribal Council authority, subject to approval by the Secretary of the Interior, "to impose taxes and fees on non-members of the tribe doing business on the reservation."[14] Eight years later, the Tribal Council enacted an Oil and Gas Severance Tax Ordinance, which was approved by the Secretary of the Interior. The tribal ordinance provides that a severance tax "is imposed on any oil and natural gas severed, saved and removed from Tribal lands . . . ." *Id.*, at 38. The rate of the tax is $0.05 per million Btu's of gas produced on the reservation and sold or transported off the reservation and $0.29 per barrel of crude or condensate produced on the reservation and sold or transported off the reservation. *Id.*, at 39. Royalty gas or oil taken by the Tribe, as well as gas or oil used by the Tribe, is exempt from the tax. *Ibid.* Thus the entire burden of the tax apparently will fall on nonmembers of the Tribe. The tax, if sustained, will produce over $2 million in revenues annually.[15]

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land, comprising almost 69% of the acreage within the Jicarilla Reservation. Brief for Respondent Jicarilla Apache Tribe 2.

[14] App. to Brief for Petitioners in No. 80–15, pp. 12a–13a. An earlier Constitution adopted in 1960 contained a similar provision permitting "taxes and fees on persons doing business on the reservation." See 1960 Constitution of the Jicarilla Apache Tribe, Art. VI, § 5, Defendant's Exhibit A.

[15] See District Court's Findings of Fact and Conclusions of Law, Finding No. 32, App. 130. The Tribe's answers to interrogatories indicate that in 1976 the royalties on the leases received by the Tribe amounted to $3,995,469.69. See Plaintiff's Exhibit E, p. 7; Tr. 269.

II

The powers possessed by Indian tribes stem from three sources: federal statutes, treaties, and the tribe's inherent sovereignty. Neither the Tribe nor the Federal Government seeks to justify the Jicarilla Tribe's severance tax on the basis of any federal statute,[16] and the Jicarilla Apaches, who reside on an Executive Order reservation, executed no treaty with the United States from which they derive sovereign powers. Therefore, if the severance tax is valid, it must be as an exercise of the Tribe's inherent sovereignty.

Tribal sovereignty is neither derived from nor protected by the Constitution.[17] Indian tribes have, however, retained many of the powers of self-government that they possessed at the time of their incorporation into the United States. As stated by Justice M'Lean in *Worcester* v. *Georgia*, 6 Pet. 515, 580 (concurring opinion):

> "At no time has the sovereignty of the country been recognised as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognised as vested in them."

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[16] Congress may delegate "sovereign" powers to the tribes. See *United States* v. *Mazurie*, 419 U. S. 544. As indicated, however, neither the 1927 statute permitting Indians to receive royalties from the lease of tribal lands nor the Indian Reorganization Act of 1934 conveys authority to the Indian tribes to tax. See *supra*, at 163–165.

[17] The only reference to Indian tribes in the Constitution is in Art. I, § 8, cl. 3, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." More significant than this reference to Indian tribes is the absence of any mention of the tribes in the Tenth Amendment, which provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Similarly, the Court in *United States* v. *Kagama*, 118 U. S. 375, 381–382, stated:

> "[The Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

Two distinct principles emerge from these early statements of tribal sovereignty: that Indian tribes possess broad powers of self-governance over tribal members, but that tribes do not possess the same attributes of sovereignty that the Federal Government and the several States enjoy.[18] In determining the extent of the sovereign powers that the tribes retained in submitting to the authority of the United States,

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[18] The Indian tribes often have been described as "domestic dependent nations." The term was first used in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, where Chief Justice Marshall, writing for the Court, explained:

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet, it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Id.*, at 17.

The United States retains plenary authority to divest the tribes of any attributes of sovereignty. See *United States* v. *Wheeler*, 435 U. S. 313, 319; *Winton* v. *Amos*, 255 U. S. 373, 391–392; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565; 1 American Indian Policy Review Commission, Final Report 106–107 (1977) (hereinafter AIPRC Final Report). Thus, for example, Congress can waive the tribes' sovereign immunity. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512.

this Court has recognized a fundamental distinction between the right of the tribes to govern their own internal affairs and the right to exercise powers affecting nonmembers of the tribe.

The Court has been careful to protect the tribes from interference with tribal control over their own members. The Court has recognized that tribes have the power to prosecute members for violations of tribal criminal law, and that this power is an inherent attribute of tribal sovereignty. *United States* v. *Wheeler*, 435 U. S. 313. The tribes also retain the power to create substantive law governing internal tribal affairs. Tribes may define rules of membership, and thus determine who is entitled to the benefits of tribal citizenship, *Roff* v. *Burney*, 168 U. S. 218; establish rules of inheritance, which supersede applicable state law, *Jones* v. *Meehan*, 175 U. S. 1, 29; and determine rights to custody of a child of divorced parents of the tribe, and thus pre-empt adoption proceedings brought in state court. *Fisher* v. *District Court*, 424 U. S. 382. This substantive tribal law may be enforced in tribal courts. *Williams* v. *Lee*, 358 U. S. 217; *Fisher* v. *District Court*, *supra*.

In many respects, the Indian tribes' sovereignty over their own members is significantly greater than the States' powers over their own citizens. Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community. The equal protection components of the Fifth and Fourteenth Amendments, which limit federal or state authority, do not similarly limit tribal power. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56, and n. 7.[19] The criminal jurisdiction of the tribes over their own members is similarly uncon-

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[19] The Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U. S. C. §§ 1301–1303, prohibits Indian tribes from denying "to any person within its jurisdiction the equal protection of its laws." § 1302(8). In *Santa Clara Pueblo*, however, the Court held that sovereign immunity protected a tribe from suit under the Act, that the Act did not create a pri-

strained by constitutional limitations applicable to the States and the Federal Government.[20] Thus the use of the word "sovereign" to characterize tribal powers of self-government is surely appropriate.

In sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined.[21] The Court has emphasized that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana* v. *United States*, 450 U. S. 544, 564. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, the Court held that tribes have no criminal jurisdiction over crimes committed by nonmembers within the reservations.[22] In *Montana* v. *United States*, *supra*, the Court held that the Crow Tribe could not prohibit hunting and fishing by nonmembers on res-

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vate cause of action cognizable in federal court, and that a tribal court was the appropriate forum for vindication of rights created by the Act.

[20] In *Talton* v. *Mayes*, 163 U. S. 376, the Court held that the Fifth Amendment right to indictment by grand jury does not apply to prosecutions in tribal courts. See also *United States* v. *Wheeler*, *supra*, at 328–329.

[21] Certain treaties that specifically granted the right of self-government to the tribes also specifically excluded jurisdiction over nonmembers. See, *e. g.*, Treaty with the Cherokees, Art. 5, 7 Stat. 481 (1835); Treaty with the Choctaws and Chickasaws, Art. 7, 11 Stat. 612 (1855); Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 703 (1856).

[22] In support of that holding, the Court stated:

"Upon incorportion into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574 (1823)." 435 U. S., at 209.

See also *New York ex rel. Ray* v. *Martin*, 326 U. S. 496, 499 (state court has jurisdiction to try a non-Indian for a crime committed against a non-Indian on a reservation).

ervation land no longer owned by the Tribe, and indicated that the principle underlying *Oliphant*—that tribes possess limited power over nonmembers—was applicable in a civil as well as a criminal context. As stated by the Court, "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana* v. *United States*, *supra*, at 565 (footnote omitted).[23]

The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is

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[23] Preceding this statement the Court noted that "the Court [in *Oliphant*] quoted Justice Johnson's words in his concurrence in *Fletcher* v. *Peck*, 6 Cranch 87, 147—the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.' 435 U. S., at 209." *Montana* v. *United States*, 450 U. S., at 565. See also *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661 (tribes cannot freely alienate to non-Indians the land they occupy); *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17–18 (tribes cannot enter into direct commercial or foreign relations with other nations).

In *United States* v. *Wheeler*, *supra*, the Court held that the tribes' power to prosecute its members for tribal offenses was not "implicitly lost by virtue of their dependent status," but stated:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . .

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. '[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection.' *Worcester* v. *Georgia* [6 Pet.], at 560–561." 435 U. S., at 326.

consistent with the fundamental principle that "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada* v. *Hall*, 440 U. S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited. Certainly, tribal authority over nonmembers—including the power to tax—is not unprecedented. An examination of cases that have upheld this power, however, demonstrates that the power to impose such a tax derives solely from the tribes' power to exclude nonmembers entirely from territory that has been reserved for the tribe. This "power to exclude" logically has been held to include the lesser power to attach conditions on a right of entry granted by the tribe to a nonmember to engage in particular activities within the reservation.

III

A study of the source of the tribes' power to tax nonmembers must focus on the extent of the tribal power to tax that existed in 1934, when the Indian Reorganization Act was enacted to prevent further erosion of Indian sovereign powers.[24]

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[24] The Indian Reorganization Act of 1934 confirmed but did not enlarge the inherent sovereign powers of the Indian tribes. Congress intended the Act to "stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority. . . ." S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934). As one commentator interpreted § 16 of the Act:

"[I]t would appear that powers originally held by tribes that were recognized and allowed to be retained by treaties or prior statutes, as well as any additional powers conferred in the same manner, would be retained by tribes that accepted the terms of the 1934 Act. . . . The provision is consistent with the act's purpose of enhancing tribal government in that it recognized and reconfirmed those powers a tribe may already have had as a government." Mettler, A Unified Theory of Indian Tribal Sovereignty, 30 Hastings L. Rev. 89, 97 (1978).

Moreover, although the power given by the Reorganization Act to the Secretary of the Interior to approve or disapprove of the exercise of tribal

Shortly after the Act was passed, the Solicitor of the Department of the Interior issued a formal opinion setting forth his understanding of the powers that might be secured by an Indian tribe and incorporated in its constitution by virtue of the reference in the Reorganization Act to powers vested in an Indian tribe "by existing law."[25] Solicitor Margold con-

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powers places a limit on tribal sovereignty, that power does not enable the Secretary to add to the inherent powers that a tribe possessed before the Act was passed.

On the other hand, the fact that an Indian tribe may never have had the occasion to exercise a particular power over nonmembers in its early history is not a sufficient reason to deny the existence of that power. Accordingly, the fact that there is no evidence that the Jicarilla Apache Tribe ever imposed a tax of any kind on a nonmember does not require the conclusion that it has no such taxing power. To the extent that the power to tax was an attribute of sovereignty possessed by Indian tribes when the Reorganization Act was passed, Congress intended the statute to preserve those powers for all Indian tribes that adopted a formal organization under the Act.

[25] 55 I. D. 14 (1934). Solicitor Margold described the scope of this opinion as follows:

"My opinion has been requested on the question of what powers may be secured to an Indian tribe and incorporated in its constitution and by-laws by virtue of the following phrase, contained in section 16 of the Wheeler-Howard Act (48 Stat. 984, 987) [the Reorganization Act of 1934]:

'In addition to *all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest . . . . [Italics added.]'

"The question of what powers are vested in an Indian tribe or tribal council by existing law cannot be answered in detail for each Indian tribe without reference to hundreds of special treaties and special acts of Congress. It is possible, however, on the basis of the reported cases, the written opinions of the various executive departments, and those statutes of Congress which are of general import, to define the powers which have heretofore been recognized as lawfully within the jurisdiction of an Indian tribe. My answer to the propounded question, then, will be general, and subject to correction for particular tribes in the light of the treaties and statutes affecting such tribe wherever such treaties or statutes contain peculiar provisions restricting or enlarging the general authority of an Indian tribe." *Id.*, at 17–18.

cluded that among those powers was a power of taxation; his opinion described the permissible exercise of that power:

> "Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 I. D. 14, 46 (1934).

Solicitor Margold cited three decisions in support of this opinion. These three cases, *Buster* v. *Wright*, 135 F. 947 (CA8 1905), appeal dism'd, 203 U. S. 599; *Morris* v. *Hitchcock*, 194 U. S. 384; and *Maxey* v. *Wright*, 3 Ind. T. 243, 54 S. W. 807 (Ct. App. Ind. T.), aff'd, 105 F. 1003 (CA8 1900), were decided shortly after the turn of the century and are the three leading cases considering the power of an Indian tribe to assess taxes against nonmembers.[26] The three cases are similar in result and in their reasoning. In each the court upheld the tax; in each the court relied on the Tribe's power to exclude non-Indians from its reservation and concluded that the Tribe could condition entry or continued presence within the reservation on the payment of a license fee or tax; and in each the court assumed that the ultimate remedy for nonpayment of the tax would be exclusion from the reservation.

In the first of these cases, *Maxey* v. *Wright*, the Court of Appeals of Indian Territory affirmed an order by a federal territorial court dismissing a complaint filed by non-Indian lawyers practicing in the Creek Nation. The complaint sought to enjoin the Indian agent for the Five Civilized Tribes from collecting an annual occupation tax of $25 assessed on each non-Indian lawyer residing and practicing

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[26] Felix Cohen, in his Handbook on Federal Indian Law published in 1942, also relies on these cases in his discussion of tribal taxation of nonmembers. Cohen 266–267. The Court in *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, cited both *Buster* v. *Wright* and *Morris* v. *Hitchcock* in upholding an exercise of the tribal power to tax. 447 U. S., at 153. See *infra*, at 185.

his profession on the reservation. In rejecting the attorneys' claim, the Court of Appeals first analyzed the relevant treaties between the United States and the Creeks and noted that the Indians had "carefully guarded their sovereignty, and their right to admit, and consequently to exclude, all white persons, except such as are named in the treaty." 3 Ind. T., at 247, 54 S. W., at 809. The court noted that the United States had agreed that all persons who were not expressly excepted and were present in the Creek Nation "without the consent of that Nation [were] deemed to be intruders," and that the Government had "pledge[d] itself to remove them." *Id.*, at 248, 54 S. W., at 809. Because attorneys were not within any excepted class,[27] the court concluded that the Tribe had the authority to require them either to pay the license fee or to be removed as "intruders."[28] The court held:

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[27] "Attorneys practicing in the United States courts are not persons who come within the exceptions, for they are not 'in the employment of the government of the United States,' or 'persons peaceably traveling or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States.' " 3 Ind. T., at 248–249, 54 S. W., at 809.

[28] In reaching this conclusion the court relied heavily on two opinions of the Attorney General of the United States. In the first opinion, issued in 1881, Attorney General MacVeagh supported the validity of Indian permit laws that determined which persons would be permitted to reside on the Choctaw and Chickasaw Reservations. 17 Op. Atty. Gen. 134. In his discussion of the right of non-Indians to enter and remain on tribal lands, MacVeagh stated:

"Replying to your fourth question: it seems from what has been already said that, besides those persons or classes mentioned by you, only those who have been permitted by the Choctaws or Chickasaws to reside within their limits, or to be employed by their citizens as teachers, mechanics, or skilled agriculturists, have a right to enter and remain on the lands of these tribes; *and the right to remain is gone when the permit has expired.*" *Id.*, at 136 (emphasis added).

In a second opinion on the same subject, Attorney General Phillips stated in 1884 that, in the absence of a treaty or statute, the power of an Indian tribe "to regulate its own rights of *occupancy*, and to say who shall participate therein and upon what conditions, can not be doubted." 18 Op.

"[T]he Creek nation had the power to impose this condition or occupation tax, if it may be so called, upon attorneys at law (white men) residing and practicing their profession in the Indian Territory. And inasmuch as the government of the United States, in the treaty, had declared that all persons not authorized by its terms to reside in the Creek Nation should be deemed to be intruders, and had obligated itself to remove all such persons from the Creek Nation, the remedy to enforce this provision of the treaty was a removal by the United States from the Creek Nation of the delinquent as an intruder." *Id.*, at 250, 54 S. W., at 809–810.[29]

Atty. Gen. 34, 36. Although the treaties applicable to the Choctaw and Chickasaw Tribes specifically excepted from the grant of self-government the power over nonmembers, the Attorney General did not construe this provision to limit the Tribes' power to exclude:

"I submit that whatever this may mean it does not limit the right of these *tribes* to pass upon the question, who (of persons *indifferent to the United States, i. e.*, neither employés, nor objectionable) shall share their *occupancy* and upon what terms. That is a question which all private persons are allowed to decide for themselves . . . ." *Id.*, at 37.

[29] In other parts of its opinion, the court restated the propositions that the Tribe was "clothed with the power to admit white men, or not, at its option, which, as we hold, gave it the right to impose conditions," 3 Ind. T., at 253, 54 S. W., at 811, and that a lawyer who refused to pay for the privilege of remaining would become an "intruder":

"On the whole case we therefore hold that a lawyer who is a white man, and not a citizen of the Creek Nation, is, pursuant to their statute, required to pay for the privilege of remaining and practicing his profession in that nation the sum of $25; that, if he refuse the payment thereof, he becomes, by virtue of the treaty, an intruder, and that in such a case the government of the United States may remove him from the nation; and that this duty devolves upon the interior department. Whether the interior department or its Indian agents can be controlled by the courts by the writs of mandamus and injunction is not material in this case, because, as we hold, an attorney who refuses to pay the amount required by the statute by its very terms becomes an intruder, whom the United States promises by the terms of the treaty to remove, and therefore in such cases the officers and agents of the interior department would be acting clearly and properly within the scope of their powers." *Id.*, at 256–257, 54 S. W., at 812.

Morris v. *Hitchcock*, 194 U. S. 384, decided by this Court in 1904, also arose from a challenge to an enactment of one of the Five Civilized Tribes that required non-Indians to pay annual permit fees. The complainants owned cattle and horses that were grazing on land in the Chickasaw Nation pursuant to contracts with individual members of the Tribe. Complainants filed suit in the District of Columbia seeking an injunction preventing federal officials from removing their cattle and horses from the Indian Territory for failure to pay the permit fees assessed by the Tribe. An order dismissing the complaint was affirmed by the Court of Appeals for the District of Columbia and by this Court.

This Court's opinion first noted that treaties between the United States and the Chickasaw Nation had granted the Tribe the right "to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders,"[30] and that the United States had assumed the obligation of protecting the Indians from aggression by persons not subject to their jurisdiction. *Id.*, at 389. The Court then reviewed similar legislation that had been adopted by the Chickasaw Nation in 1876,[31] and noted that in 1879 the Senate Committee on the Judiciary had specifically referred to the 1876 legislation and expressed an opinion that it was valid. *Id.*, at 389–390.

The Court also reviewed two opinions of the Attorney General that had concluded that the power of the Chickasaw to impose permit fees had not been withdrawn by Congress.[32]

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[30] The Court stated:

"And it is not disputed that under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." 194 U. S., at 389.

[31] The 1876 legislation required licensed merchants and traders to obtain a permit and pay a fee of $25.

[32] The Court relied on 23 Op. Atty. Gen. 214 (1900) and 23 Op. Atty. Gen. 528 (1901). In the first opinion, Attorney General John W. Griggs stated:

"The treaties and laws of the United States make all persons, with a

Although Congress subsequently had created an express exception in favor of owners of town lots and thus protected them from eviction as intruders, the Court noted that no comparable protection had been given to owners of cattle and horses. *Id.*, at 392–393. On the basis of these authorities, the Court concluded that the Chickasaw legislation imposing grazing fees was valid.

In the third case, *Buster* v. *Wright*, 135 F. 947 (CA8 1905), nonmembers of the Creek Nation brought suit against federal inspectors to enjoin them from stopping the plaintiffs from doing business within the reservation; the nonmembers feared such action because they had refused to pay a permit tax assessed on traders by the Tribe. The Court of Appeals relied on *Morris* v. *Hitchcock* and *Maxey* v. *Wright* in upholding the tax. The opinion for the court by Judge Walter H. Sanborn emphasized that the tax was in the nature of a condition precedent to transacting business within the reservation and that the plaintiffs had ample notice of the tax:

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few specified exceptions, who are not citizens of an Indian nation or members of an Indian tribe, and are found within an Indian nation without permission, intruders there, and require their removal by the United States. This closes the whole matter, absolutely excludes all but the excepted classes, and fully authorizes these nations to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose, and it must be borne in mind that citizens of the United States, have, as such, no more right or business to be there than they have in any foreign nation, and can lawfully be there at all only by Indian permission; and that their right to be or remain or carry on business there depends solely upon whether they have such permission.

"As to the power or duty of your Department in the premises there can hardly be a doubt. Under the treaties of the United States with these Indian nations this Government is under the most solemn obligation, and for which it has received ample consideration, to remove and keep removed from the territory of these tribes, all this class of intruders who are there without Indian permission. The performance of this obligation, as in other matters concerning the Indians and their affairs, has long been devolved upon the Department of the Interior." 23 Op. Atty. Gen., at 218.

"The permit tax of the Creek Nation, which is the subject of this controversy, is the annual price fixed by the act of its national council, which was approved by the President of the United States in the year 1900, for the privilege which it offers to those who are not citizens of its nation of trading within its borders. The payment of this tax is a mere condition of the exercise of this privilege. No noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other. Thus, without entering upon an extended discussion or consideration of the question whether this charge is technically a license or a tax, the fact appears that it partakes far more of the nature of a license than of an ordinary tax, because it has the optional feature of the former and lacks the compulsory attribute of the latter.

"Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate the propositions that prior to March 1, 1901, the Creek Nation had lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders, and that the executive department of the government of the United States had plenary power to enforce its payment through the Secretary of the Interior and his subordinates, the Indian inspector, Indian agent, and Indian police." 135 F., at 949–950.

The court noted that the traders, who had purchased town lots of the Creek Nation pursuant to a 1901 agreement between the Creeks and the United States, could not rely on that agreement as an implied divestiture of a pre-existing power to tax.[33] The court held that even though noncitizens

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[33] After citing the opinion of Attorney General Griggs quoted at length in *Morris* v. *Hitchcock*, Judge Sanborn wrote:

"Pursuant to this decision the civilized tribes were charging, and the Indian agent was collecting, taxes from noncitizens engaged in business in

of the Tribe had acquired lawful ownership of lots pursuant to the 1901 agreement and could not be evicted from those lots, they had no right to conduct business within the reservation without paying the permit taxes.[34]

Prior to the enactment of the Indian Reorganization Act in 1934, these three cases were the only judicial decisions considering the power of an Indian tribe to impose a tax on nonmembers.[35] These cases demonstrate that the power of an

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these nations. It was under this state of facts that the United States and the Creek Nation made the agreement of 1901. Did they intend by that agreement that the Creek Nation should thereby renounce its conceded power to exact these permit taxes? Both parties knew that this power existed, and the United States, by the act of its President approving the law of the Creek national council, and the Secretary of the Interior by enforcing it, had approved its exercise. The subject of these taxes was presented to the minds of the contracting parties and was considered during the negotiation of the agreement, for that contract contains express stipulations that cattle grazed on rented allotments shall not be liable to any tribal tax (chapter 676, 31 Stat. 871, § 37), and that 'no noncitizen renting lands from a citizen for agricultural purposes as provided by law, whether such lands have been selected as an allotment or not, shall be required to pay any permit tax' (chapter 676, 31 Stat. 871, § 39). But they made no provision that noncitizens who engaged in the mercantile business in the Creek Nation should be exempt from these taxes. As the law then in force required such noncitizens to pay such taxes, as both parties were then aware of that fact and considered the question, and as they made no stipulation to abolish these taxes, the conclusive presumption is that they intended to make no such contract, and that the power of the Creek Nation to exact these taxes, and the authority of the Secretary of the Interior and of his subordinates to collect them, were neither renounced, revoked, nor restricted, but that they remained in full force and effect after as before the agreement of 1901." 135 F., at 954.

[34] *Ibid.* The court stated:

"The legal effect . . . of the law prescribing the permit taxes is to prohibit noncitizens from conducting business within the Creek Nation without the payment of these taxes." *Id.*, at 955.

[35] Two decades after the Reorganization Act was passed the problem was revisited by the Eighth Circuit. In *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89 (1956), the court held that the Tribe had the power to assess a tax on a nonmember lessee of land within the reservation for the privilege of grazing stock on reservation land. And

Indian tribe to impose a tax solely on nonmembers doing business on the reservation derives from the tribe's power to exclude those persons entirely from tribal lands or, in the alternative, to impose lesser restrictions and conditions on a right of entry granted to conduct business on the reservation.[36] This interpretation is supported by the fact that the

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in *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (1958), the court held that the United States could bring an action on behalf of the Tribe to collect a license tax of 3 cents per acre per annum for grazing land and 15 cents per acre per annum for farm land levied on nonmember lessees. The court in *Barta* held that the tax did not violate the constitutional rights of the nonmember lessees, stating in part:

"The tribe by provisions of its treaty with the United States has power to provide for the admission of nonmembers of the tribe onto the reservation. Having such power, it has the authority to impose restrictions on the presence of nonmembers within the reservation." *Id.*, at 556.

Language in both *Iron Crow* and *Barta* suggests that the Court of Appeals, unlike the earlier courts, may not have rested the taxing power solely on the power to exclude. The Court of Appeals of course did not have the benefit of our decisions in *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, *Wheeler*, and *Montana* v. *United States*.

[36] In the chapter of his treatise entitled "Taxation," Felix Cohen states:

"Though the scope of the power [to tax] as applied to nonmembers is not clear, it extends at least to property of nonmembers used in connection with Indian property as well as to privileges enjoyed by nonmembers in trading with the Indians. The power to tax nonmembers is derived in the cases from the authority, founded on original sovereignty and guaranteed in some instances by treaties, to remove property of nonmembers from the territorial limits of the tribe. Since the tribal government has the power to exclude, it can extract a fee from nonmembers as a condition precedent to granting permission to remain or to operate within the tribal domain." Cohen 266–267 (footnotes omitted).

In another chapter, entitled "The Scope of Tribal Self-Government," cited by the Secretary of the Interior and the Tribe here, Cohen describes the power of taxation as "an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress . . . ." *Id.*, at 142. After discussing *Buster* v. *Wright*, Cohen cites that case for the proposition that "[t]he power to tax does not depend upon the power to remove and has been upheld where there was no power in the

remedy for the nonpayment of the tax in all three cases was exclusion from the reservation.[37]

As I have noted, a limitation on the power of Indian tribes to tax nonmembers is not simply an archaic concept derived from three old cases that has no basis in logic or equity. Tribal powers over nonmembers are appropriately limited because nonmembers are foreclosed from participation in tribal government. If the power to tax is limited to situations in which the tribe has the power to exclude, then the nonmember is subjected to the tribe's jurisdiction only if he accepts the conditions of entry imposed by the tribe.[38] The limited source of the power to tax nonmembers—the power to exclude intruders—is thus consistent with this Court's rec-

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tribe to remove the taxpayer from the tribal jurisdiction." Cohen 143. As demonstrated above, however, the license tax in *Buster* was predicated on the tribe's right to attach conditions on the right of nonmembers to conduct business on the reservation; the tribe could prevent such nonmembers from doing business regardless of whether it could physically remove them from the reservation. Moreover, in that same chapter on tribal self-government, Cohen recognizes that tribal taxes have been upheld on the basis of the tribe's power to remove nonmembers from the reservation, and that "[i]t is therefore pertinent, in analyzing the scope of tribal taxing powers, to inquire how far an Indian tribe is empowered to remove nonmembers from its reservation." Cohen 143.

The American Indian Policy Review Commission recognized that the court decisions upholding the tribes' taxing powers "rely largely upon the power of tribes to remove persons from the reservation, and consequently, to prescribe the conditions upon which they shall enter," but argued for a broader source of the right to tax. AIPRC Final Report 178–179.

[37] In *Buster* v. *Wright*, the penalty for nonpayment of the tax was the closing of the nonmember's business, enforced by the Secretary of the Interior. 135 F., at 954. In *Morris* v. *Hitchcock*, the remedy was the removal of the nonmember's cattle from the reservation, again enforced by the United States. 194 U. S., at 392. In *Maxey* v. *Wright*, an attorney refusing to pay the license fee to the Interior Department was subject to removal from the reservation. 3 Ind. T., at 250, 54 S. W., at 810.

[38] "No noncitizen is required to exercise a privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other." *Buster* v. *Wright*, 135 F., at 949.

ognition of the limited character of the power of Indian tribes over nonmembers in general.[39] The proper source of the taxing authority asserted by the Jicarilla Apache Tribe in these cases, therefore, is not the Tribe's inherent power of self-government, but rather its power over the territory that has been set apart for its use and occupation.[40]

This conclusion is consistent with our recent decision in *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134. In that case we held that a tribal tax on cigarettes sold on the reservations of the Colville, Makah, and Lummi Tribes to nonmembers of the Tribes was a permis-

[39] See *supra*, at 171–172. As I have indicated, see n. 21, *supra*, treaties recognizing the inherent power of tribal self-government have also deprived the tribes of jurisdiction over nonmembers. Nevertheless, those same treaties often specifically recognized the right of the tribe to exclude nonmembers from the reservation or to attach conditions on their entry. See *e. g.*, Treaty with the Choctaw and Chickasaw, Art. 7, 11 Stat. 612 (1855); Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 699 (1856). See 2 C. Kappler, Indian Affairs, Laws and Treaties 7, 9, 12, 15, 17, 20, 21, 27, 30, 42, 75, 418, 682, 699, 703, 719, 761, 774, 779, 790, 794, 800, 866, 886, 888, 929, 985, 990, 998, 1008, 1016, 1021 (1904).

[40] The various tribes may have taken a similar view of their power to tax at the time of the Indian Reorganization Act. Cohen's treatise notes:

"The power of an Indian tribe to levy taxes upon its own members and upon nonmembers doing business within the reservations has been affirmed in many tribal constitutions approved under the Wheeler-Howard Act [Indian Reorganization Act], as has the power to remove nonmembers from land over which the tribe exercises jurisdiction." Cohen 143.

The following clause from the 1935 Constitution of the Rosebud Sioux Tribe, which Cohen cites as a "typical" statement of such "tribal powers," indicates that the Tribe perceived the scope of its taxation powers over nonmembers to be narrower than the scope of that power over members. The Constitution conveys tribal power—

"(h) To levy taxes upon members of the tribe and to require the performance of reservation labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon nonmembers doing business within the reservation.

"(i) To exclude from the restricted lands on the reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior." *Ibid.*

sible exercise of the Tribes' retained sovereign power to tax.[41] We recognized that the power to tax non-Indians entering the reservation had not been divested by virtue of the Tribes' dependent status and that no overriding federal interest would be frustrated by the tribal taxation. The Court quoted with approval, as an indication of the Executive Branch's understanding of the taxing power, Solicitor Margold's 1934 opinion. The Court noted further that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" and cited *Buster* v. *Wright* and *Morris* v. *Hitchcock*. 447 U. S., at 153.[42] The tax in *Colville*, which was applied to nonmembers who entered the reservation and sought to purchase cigarettes, is clearly valid under the rationale that the tribes' power to tax derives from the right to exclude nonmembers from the reservation and the lesser right to attach conditions on the entry of such nonmembers seeking to do business there.[43] *Colville* is consistent with the principles set forth above. The power of Indian tribes to tax nonmembers stems from the tribes' power to exclude those nonmembers; any exercise of this power must be consistent with its source.[44]

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[41] The Court stated:

"The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 447 U. S., at 152.

[42] The Court also cited, without discussion, the Eighth Circuit's decision in *Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2d 89 (1956). See n. 35, *supra*.

[43] A nonmember can avoid the tax by declining to do business on the reservation; the "sanction" imposed for refusal to pay the tax is denial of permission to buy cigarettes.

[44] In some respects the tribal power to tax nonmembers may be greater than the taxing power of other sovereigns. States do not have any power to exclude nonresidents from their borders. Moreover, their taxing statutes, like their other laws, must comply with the Equal Protection Clause of the Fourteenth Amendment. They may not, therefore, impose discriminatory taxes as a condition attached to entry into the jurisdiction in

IV

The power to exclude petitioners would have supported the imposition of a discriminatory tribal tax on petitioners when they sought to enter the Jicarilla Apache Reservation to explore for minerals. Moreover, even if no tax had been imposed at the time of initial entry, a discriminatory severance tax could have been imposed as a condition attached to the grant of the privilege of extracting minerals from the earth.[45] But the Tribe did not impose any tax prior to petitioners' entry or as a condition attached to the privileges granted by the leases in 1953. As a result, the tax imposed in 1976 is not valid unless the Tribe retained its power either to exclude petitioners from the reservation or to prohibit them from continuing to extract oil and gas from reservation lands.

The leases executed by the Tribe and petitioners are clearly valid and binding on both parties. The Tribe does not contend that the leases were not the product of arm's-length bargaining. Moreover, the leases were executed on a form prepared by the Department of the Interior, the Department gave specific approval to the terms of the leases, and they were executed pursuant to explicit congressional authority.[46] Under the leases petitioners clearly have the

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order to engage in economic activity. But since an Indian tribe has exclusive control over the "use and occupancy" of land within its reservation, it arguably could attach special discriminatory conditions to any license to a nonmember to use or occupy a portion of that land. As stated earlier, at a minimum the equal protection components of the Fifth and Fourteenth Amendments, which limit the sovereign powers of the Federal and State Governments, do not similarly restrict the sovereign powers of an Indian tribe. See *supra*, at 170.

[45] "[A]s the payment of a tax or license fee may be made a condition of entry upon tribal land, it may also be made a condition to the grant of other privileges, such as the acquisition of a tribal lease." Cohen 143.

[46] Congress intended the Act of March 3, 1927, to make applicable to Executive Order reservations the leasing provisions already applicable to treaty reservations pursuant to the Act of May 29, 1924, ch. 210, 43 Stat. 244. S. Rep. No. 1240, 69th Cong., 2d Sess., 3 (1927). The 1927 Act thus permitted the leasing of unallotted Indian land for terms not to exceed 10

right to remain on the reservation to do business for the duration of the contracts.[47]

There is no basis for a claim that exercise of the mining rights granted by the leases was subject to an additional, unstated condition concerning the payment of severance taxes.[48]

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years and as much longer as oil and gas in paying quantities were found on the land. 44 Stat. (part 2) 1347. Among the purposes of the 1927 statute were to "[p]ermit the exploration for oil and gas on Executive-order Indian Reservations," to "[g]ive the Indian tribes all the oil and gas royalties," and to "[p]lace with Congress the future determination of any changes of boundaries of Executive-order reservations or withdrawals." S. Rep. No. 1240, *supra*, at 3. In light of these purposes, it is clear that Congress intended leases executed pursuant to the 1927 Act to be binding.

The Tribe contends that the leases in these cases were executed pursuant to the Act of May 11, 1938, 52 Stat. 347, and not the 1927 Act. The Tribe notes that the lease in No. 80–15 states that it was executed pursuant to the 1938 Act. See App. 64. In response, petitioners note that, although the Tribe argues that the 1938 Act—unlike the 1927 Act—does not require that royalties be paid to the Secretary of the Interior for the benefit of the Tribe, petitioners make their royalty payments to the United States Geological Survey for the benefit of the Jicarilla Apache. See Tr. 79–80. There is no need to resolve this question, because for our purposes the provisions of the 1938 Act do not vary significantly from the provisions of the 1927 Act. The 1938 Act, like the 1927 Act, permits the leasing of Indian lands for a period "not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U. S. C. § 396a. One of the purposes of the 1938 Act was to establish uniformity in the leasing of tribal lands by applying the law governing oil and gas leasing to all other mineral leasing as well. S. Rep. No. 985, 75th Cong., 1st Sess., 1–2 (1937). Other purposes were to "bring all mineral leasing matters in harmony with the Indian Reorganization Act," *id.*, at 3, and to enact changes designed "to give the Indians the greatest return from their property." *Id.*, at 2. There is no indication in the legislative history that the purposes of the 1938 Act are in any way inconsistent with the purposes of the 1927 Act and prior legislation. Presumably the purposes of the earlier legislation were incorporated into the uniform scheme intended by the 1938 Act.

[47] As Attorney General MacVeagh stated in 1881, only those permitted by the tribe to remain on the reservation may do so, "and the right to remain is gone when the permit has expired." 17 Op. Atty. Gen., at 136.

[48] In *Colville*, the nonmember desiring to purchase cigarettes on the reservation knew that his right to do so was conditioned on his consent to pay the tax. Attorney General Griggs, in his 1900 opinion on "Trespassers on

At the time the leases contained in the record were executed, the Jicarilla Apache Constitution contained no taxing authorization whatever; the severance tax ordinance was not enacted until many years after all lessees had been granted an unlimited right to extract oil and gas from the reservation. In addition, the written leases unambiguously stated:

> "[N]o regulation hereafter approved shall effect a change in rate or royalty or annual rental herein specified without the written consent of the parties to this lease." App. 27.

Nor can it be said that notice of an inherent right to tax could have been gleaned from relevant statutory enactments. When Congress enacted legislation in 1927 granting the Indians the royalty income from oil and gas leases on reservations created by Executive Order, it neither authorized nor prohibited the imposition of any taxes by the tribes. Although the absence of such reference does not indicate that Congress pre-empted the right of the tribes to impose such a tax,[49] the lack of any mention of tribal severance taxes defeats the ar-

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Indian Lands," discussed in similar terms the effect on tribal laws of a federal statute providing for the sale of reservation lots to non-Indians:

"[T]he legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation, nor does it authorize him to do any act in violation of the treaties with such nation. These laws requiring a permit to reside or carry on business in the Indian country existed long before and at the time this act was passed. And if any outsider saw proper to purchase a town lot under this act of Congress, he did so with full knowledge that he could occupy it for residence or business only by permission from the Indians." 23 Op. Atty. Gen., at 217.

In 1977, the American Indian Policy Review Commission noted that Indian tribes "do not both tax and receive royalties. Usually, they just receive royalties." AIPRC Final Report 344.

[49] The statute did authorize the collection of severance taxes by the States. Petitioners have argued that this authorization pre-empted any tribal power to impose a comparable tax. As recognized by the Court of Appeals, however, the legislative history indicates that Congress simply did not consider the question of tribal taxes on mineral output from reservation lands. 617 F. 2d 537, 547 (CA10 1980).

gument that all parties were aware as a matter of law that a severance tax could be imposed at any time as a condition to the continued performance of a mineral lease.

Thus, nothing in the leases themselves or in any Act of Congress conveyed an indication that petitioners could accept the rights conferred by the leases only by accepting a condition that they pay any subsequently enacted severance tax. Nor could such a condition be presumed from prior taxing activity of the Tribe. In my opinion it is clear that the parties negotiated the leases in question with absolutely no expectation that a severance tax could later be imposed; in the contemplation of the parties, the conditions governing petitioners' right to extract oil and gas were not subject to change during the terms of the agreements. There simply is no support for the proposition that the Tribe retained the power in the leases to impose an additional condition on petitioners' right to enter the reservation and extract oil and gas from reservation lands. Since that authority was not retained, the Tribe does not now have the power to alter unilaterally the terms of the agreement and impose an additional burden on petitioners' right to do business on the reservation.[50]

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[50] The Secretary of the Interior argues that a license or franchise issued by a governmental body does not prevent the later imposition of a tax unless the right to tax "'has been specifically surrendered in terms which admit of no other reasonable interpretation.'" Brief for Secretary of Interior 13, n. 7 (quoting *St. Louis* v. *United R. Co.*, 210 U. S. 266, 280). See also *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192, 195; *New York Transit Corp.* v. *City of New York*, 303 U. S. 573, 590–593. The principal issue in these cases cited by the Secretary was whether the retroactive imposition of a franchise tax violated the Contract Clause of the Constitution or was so fundamentally unfair as to constitute a denial of due process in violation of the Fourteenth Amendment. Although this argument was by no means frivolous, cf. *Puerto Rico* v. *Russell & Co.*, 315 U. S. 610, no such issue is raised here. These cases are distinguishable from the instant cases because Indian tribes do not have the same attributes of sovereignty as do States and their subdivisions. See *supra*, at 168–173.

In these cases, the Tribe seeks to impose a tax on the very activity that the leases granted petitioners the right to undertake. As Solicitor Margold wrote long ago:

> "Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But on all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and *does not infringe any vested rights of persons now occupying reservation land under lawful authority*." 55 I. D., at 50 (emphasis added).

Petitioners were granted authority by the Tribe to extract oil and gas from reservation lands. The Tribe now seeks to change retroactively the conditions of that authority. These petitioners happen to be prosperous oil companies. Moreover, it may be sound policy to find additional sources of revenue to better the economic conditions of many Indian tribes. If this retroactive imposition of a tax on oil companies is permissible, however, an Indian tribe may with equal legitimacy contract with outsiders for the construction of a school or a hospital, or for the rendition of medical or technical services, and then—after the contract is partially performed—change the terms of the bargain by imposing a gross receipts tax on the outsider. If the Court is willing to ignore the risk of such unfair treatment of a local contractor or a local doctor because the Secretary of the Interior has the power to veto a tribal tax, it must equate the unbridled discretion of a political appointee with the protection afforded by rules of law. That equation is unacceptable to me. Neither wealth, political opportunity, nor past transgressions can justify denying any person the protection of the law.

IN RE R. M. J.

APPEAL FROM THE SUPREME COURT OF MISSOURI

No 80–1431. Argued November 9, 1981—Decided January 25, 1982

Rule 4 of the Missouri Supreme Court, regulating advertising by lawyers, states that a lawyer may include 10 categories of information in a published advertisement: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain "routine" legal services. Although the Rule does not state explicitly that these 10 categories of information are the only information that will be permitted, that is the interpretation given the Rule by the State Supreme Court and appellee Advisory Committee, which is charged with its enforcement. An addendum to the Rule specifies two ways in which areas of practice may be listed in an advertisement, under one of which the lawyer may use one or more of a list of 23 areas of practice but may not deviate from the precise wording stated in the Rule to describe these areas. In addition, the Rule permits a lawyer to send professional announcement cards announcing a change of address or firm name, or similar matters, but only to "lawyers, clients, former clients, personal friends, and relatives." An information was filed in the Missouri Supreme Court by appellee Advisory Committee, charging appellant, a practicing lawyer in St. Louis, Mo., with violations of Rule 4. The information charged that appellant published advertisements which listed areas of practice in language other than that specified in the Rule and which listed the courts in which appellant was admitted to practice although this information was not included among the 10 categories of information authorized by the Rule. In addition, the information charged that appellant had mailed announcement cards to persons other than those permitted by the Rule. Appellant claimed that each of the restrictions upon advertising was unconstitutional under the First and Fourteenth Amendments, but the Missouri Supreme Court upheld the constitutionality of Rule 4 and issued a private reprimand.

Held: None of the restrictions in question upon appellant's First Amendment rights can be sustained in the circumstances of this case. Pp. 199–207.

(a) Although the States retain the ability to regulate commercial speech, such as lawyer advertising, that is inherently misleading or that has proved to be misleading in practice, the First and Fourteenth

Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. Pp. 199–204.

(b) Because the listing published by appellant—*e. g.*, "real estate" instead of "property law" as specified by Rule 4, and "contracts" and "securities," which were not included in the Rule's listing—has not been shown to be misleading, and appellee suggests no substantial interest promoted by the restriction, the portion of Rule 4 specifying the areas of practice that may be listed is an invalid restriction upon speech as applied to appellant's advertisements. P. 205.

(c) Nor has appellee identified any substantial interest in prohibiting a lawyer from identifying the jurisdictions in which he is licensed to practice. Such information is not misleading on its face. That appellant was licensed to practice in both Illinois and Missouri is factual and highly relevant information, particularly in light of the geography of the region in which he practices. While listing the relatively uninformative fact that he is a member of the United States Supreme Court Bar could be misleading, there was no finding to this effect by the Missouri Supreme Court, there is nothing in the record to indicate it was misleading, and the Rule does not specifically identify it as potentially misleading. Pp. 205–206.

(d) With respect to the restriction on announcement cards, while mailings may be more difficult to supervise, there is no indication in the record that an inability to supervise is the reason the State restricts the potential audience of the cards. Nor is it clear that an absolute prohibition is the only solution, and there is no indication of a failed effort to proceed along a less restrictive path. P. 206.

609 S. W. 2d 411, reversed.

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

Charles B. Blackmar argued the cause for appellant. With him on the briefs were *Charles A. Blackmar*, *Bruce J. Ennis*, and *Charles S. Sims*.

John W. Inglish argued the cause and filed a brief for appellee.*

**Thomas Lumbard* and *Harry M. Philo* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging reversal.

Jerry L. Zunker filed a brief for the State Bar of Texas as *amicus curiae*.

JUSTICE POWELL delivered the opinion of the Court.

The Court's decision in *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), required a re-examination of long-held perceptions as to "advertising" by lawyers. This appeal presents the question whether certain aspects of the revised ethical rules of the Supreme Court of Missouri regulating lawyer advertising conform to the requirements of *Bates*.

I

As with many of the States, until the decision in *Bates*, Missouri placed an absolute prohibition on advertising by lawyers.[1] After the Court's invalidation of just such a prohibition in *Bates*, the Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri revised that court's Rule 4 regulating lawyer advertising. The Committee sought to "strike a midpoint between prohibition and unlimited advertising,"[2] and the revised regulation of advertising, adopted with slight modification by the State Supreme Court, represents a compromise. Lawyer advertising is permitted, but it is restricted to certain categories of information, and in some instances, to certain specified language.

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[1] Prior to the 1977 revision, Rule 4 provided in pertinent part:

"(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, 'public communication' includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

"(B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf . . . ." Mo. Sup. Ct. Rules Ann., Rule 4, DR 2–101, p. 63 (Vernon 1981) (historical note).

[2] Report of Committee to Chief Justice of Supreme Court of Missouri (Sept. 9, 1977), reprinted in App. A–30.

Thus, part B of DR 2–101 of the Rule states that a lawyer may "publish . . . in newspapers, periodicals and the yellow pages of telephone directories" 10 categories of information: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified "routine" legal services.[3] Although the Rule does not state explicitly that these 10 categories of information or the 3 indicated forms of printed advertisement are the only information and the only means of advertising that will be permitted,[4] that is the interpretation given the Rule by the State Supreme Court and the Advisory Committee[5] charged with its enforcement.

In addition to these guidelines, and under authority of the Rule, the Advisory Committee has issued an addendum to the Rule providing that if the lawyer chooses to list areas of

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[3] The 10 listed "routine" services are: an uncontested dissolution of marriage; an uncontested adoption; an uncontested personal bankruptcy; an uncomplicated change of name; a simple warranty or quitclaim deed; a simple deed of trust; a simple promissory note; an individual Missouri or federal income tax return; a simple power of attorney; and a simple will. Mo. Rev. Stat., Sup. Ct. Rule 4, DR 2–101(B) (1978) (Index Vol.). The Rule authorizes the Advisory Committee to approve additions to this list of routine services. *Ibid.*

[4] Indeed, on its face, the Rule would appear to suggest that its specific provisions are intended only to provide a safe harbor, and not to prohibit all other forms of advertising or categories of information. This impression is conveyed by the Rule's inclusion of a general prohibition on misleading advertising in DR 2–101(A):

"A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Rule 4, DR 2–101(A).

[5] The Advisory Committee is a standing committee of the Supreme Court of Missouri and is responsible for prosecuting disciplinary proceedings and for giving formal and informal opinions on the Canons of Professional Responsibility. See Rule 5.

practice in his advertisement, he must do so in one of two prescribed ways. He may list one of three general descriptive terms specified in the Rule—"General Civil Practice," "General Criminal Practice," or "General Civil and Criminal Practice." Alternatively, he may use one or more of a list of 23 areas of practice, including, for example, "Tort Law," "Family Law," and "Probate and Trust Law." He may not list both a general term and specific subheadings, nor may he deviate from the precise wording stated in the Rule. He may not indicate that his practice is "limited" to the listed areas and he must include a particular disclaimer of certification of expertise following any listing of specific areas of practice.[6]

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[6] The addendum to the rule promulgated by the Advisory Committee provided in relevant part as follows:

"[T]he following areas for fields of law may be advertised by use of the specific language hereinafter set out:

1. 'General Civil Practice'
2. 'General Criminal Practice'
3. 'General Civil and Criminal Practice.'

"If a lawyer or law firm uses one of the above, no other area can be used . . . . If one of the above is *not* used, then a lawyer or law firm can use one or more of the following:

1. 'Administrative Law'
2. 'Anti-Trust Law'
3. 'Appellate Practice'
4. 'Bankruptcy'
5. 'Commercial Law'
6. 'Corporation Law and Business Organizations'
7. 'Criminal Law'
8. 'Eminent Domain Law'
9. 'Environmental Law'
10. 'Family Law'
11. 'Financial Institution Law'
12. 'Insurance Law'
13. 'International Law'
14. 'Labor Law'
15. 'Local Government Law'

[Footnote 6 is continued on p. 196]

Finally, one further aspect of the Rule is relevant in this case. DR 2–102 of Rule 4 regulates the use of professional announcement cards. It permits a lawyer or firm to mail a dignified "brief professional announcement card stating new or changed associates or addresses, change of firm name, or similar matters." The Rule, however, does not permit a general mailing; the announcement cards may be sent only to "lawyers, clients, former clients, personal friends, and relatives."[7] Mo. Rev. Stat., Sup. Ct. Rule 4, DR 2–102(A)(2) (1978) (Index Vol.).

II

Appellant graduated from law school in 1973 and was admitted to the Missouri and Illinois Bars in the same year. After a short stint with the Securities and Exchange Commission in Washington, D. C., appellant moved to St. Louis, Mo., in April 1977, and began practice as a sole practitioner. As a means of announcing the opening of his office, he mailed professional announcement cards to a selected list of addressees. In order to reach a wider audience, he placed several advertisements in local newspapers and in the yellow pages of the local telephone directory.

The advertisements at issue in this litigation appeared in January, February, and August 1978, and included informa-

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16. 'Military Law'
17. 'Probate and Trust Law'
18. 'Property Law'
19. 'Public Utility Law'
20. 'Taxation Law'
21. 'Tort Law'
22. 'Trial Practice'
23. 'Workers Compensation Law.'

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

"If one or more of these specific areas of practice are used in any advertisement, the following statement must be included . . . :
'Listing of the above areas of practice does not indicate any certification of expertise therein.'" Rule 4, Addendum III (Adv. Comm. Nov. 13, 1977).

[7] This provision of Rule 4 was not altered by the 1977 amendments.

tion that was not expressly permitted by Rule 4. They included the information that appellant was licensed in Missouri and Illinois. They contained, in large capital letters, a statement that appellant was "Admitted to Practice Before THE UNITED STATES SUPREME COURT." And they included a listing of areas of practice that deviated from the language prescribed by the Advisory Committee—*e. g.*, "personal injury" and "real estate" instead of "tort law" and "property law"—and that included several areas of law without analogue in the list of areas prepared by the Advisory Committee—*e. g.*, "contract," "zoning & land use," "communication," "pension & profit sharing plans."* See n. 6, *supra*. In addition, and with the exception of the advertisement appearing in August 1978, appellant failed to include the required disclaimer of certification of expertise after the listing of areas of practice.

On November 19, 1979, the Advisory Committee filed an information in the Supreme Court of Missouri charging appel-

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* In an advertisement published in the August 1978 yellow pages for St. Louis, and typical of appellant's other advertisements, appellant included a listing of 23 areas of practice. Four of the areas conformed to the language prescribed in the Rule—"bankruptcy," "anti-trust," "labor," and "criminal." Eleven of the areas deviated from the precise language of the Rule—"tax," "corporate," "partnership," "real estate," "probate," "wills, estate planning," "personal injury," "trials & appeals," "workmen's compensation," "divorce-separation," and "custody-adoption," instead of, respectively, and as required by the Rule, "taxation law," "corporation law and business organizations," "property law," "probate & trust law," "tort law," "trial practice," "appellate practice," "workers compensation law," and "family law." Eight other areas listed in the advertisement are not listed in any manner by the Advisory Committee's addendum: "contract," "aviation," "securities-bonds," "pension & profit sharing plans," "zoning & land use," "entertainment/sports," "food, drug & cosmetic," and "communication."

A photograph of the advertisements as they appeared in the St. Louis, Suburban West, Telephone Directory for February 1978, and in the January/February 1978 issue of the West End Word is reproduced as an Appendix to this opinion. In all of appellant's advertisements the statement as to his membership in the Bar of the United States Supreme Court was printed conspicuously in large capital letters.

lant with unprofessional conduct. The information charged appellant with publishing three advertisements that listed areas of law not approved by the Advisory Committee, that listed the courts in which appellant was admitted to practice, and, in the case of two of the advertisements, that failed to include the required disclaimer of certification. The information also charged appellant with sending announcement cards to "persons other than lawyers, clients, former clients, personal friends, and relatives" in violation of DR 2–102(A)(2). In response, appellant argued that, with the exception of the disclaimer requirement, each of these restrictions upon advertising was unconstitutional under the First and Fourteenth Amendments.

In a disbarment proceeding, the Supreme Court of Missouri upheld the constitutionality of DR 2–101 of Rule 4 and issued a private reprimand. 609 S. W. 2d 411 (1981). But the court did not explain the reasons for its decision, nor did it state whether it found appellant to have violated each of the charges lodged against him or only some of them. Indeed, the court only purported to uphold the constitutionality of DR 2–101; it did not mention the propriety of DR 2–102, which governs the use of announcement cards.

Writing in separate dissenting opinions, Chief Justice Bardgett and Judge Seiler argued that the information should be dismissed. The dissenters suggested that the State did not have a significant interest either in requiring the use of certain, specified words to describe areas of practice or in prohibiting a lawyer from informing the public as to the States and courts in which he was licensed to practice. Nor would the dissenters have found the mailing of this sort of information to be unethical.[9]

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[9] The dissenting judges differed in several respects. Chief Justice Bardgett considered that appellant's listing of the fact that he was admitted to practice before the United States Supreme Court was not improper; Judge Seiler argued that this information was more misleading than helpful. Moreover, Judge Seiler argued that appellant should not be penalized

III

In *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), the Court considered whether the extension of First Amendment protection to commercial speech announced in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), applied to the regulation of advertising by lawyers.[10] The *Bates* Court held that indeed lawyer advertising was a form of commercial speech, protected by the First Amendment, and that "advertising by attorneys may not be subjected to blanket suppression." 433 U. S., at 383.

More specifically, the *Bates* Court held that lawyers must be permitted to advertise the fees they charge for certain "routine" legal services. The Court concluded that this sort of price advertising was not "inherently" misleading, and therefore could not be prohibited on that basis. The Court also rejected a number of other justifications for broad restrictions upon advertising including the potential adverse effect of advertising on professionalism, on the administration

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for having omitted a disclaimer of certification when the addendum requiring the disclaimer was not available until after appellant had placed the advertisements and after it was too late to add the disclaimer. Chief Justice Bardgett's dissent omits any mention of appellant's failure to include a disclaimer. See n. 18, *infra*. Finally, Chief Justice Bardgett expressed his belief that our decision in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557 (1980), concerning the regulation of commercial speech, does not apply in its entirety to the regulation of lawyer advertising. Judge Seiler appeared to take the opposite position. Both of the dissenting opinions reflect a thoughtful examination of the charges made against appellant.

[10] The Court in *Virginia Pharmacy*, expressly reserved this question:

"We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." 425 U. S., at 773, n. 25.

of justice, and on the cost and quality of legal services, as well as the difficulties of enforcing standards short of an outright prohibition. None of these interests was found to be sufficiently strong or sufficiently affected by lawyer advertising to justify a prohibition.

But the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated.[11] False, deceptive, or misleading advertising remains subject to restraint,[12] and the Court recognized that advertising by the professions poses special risks of deception—"because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Ibid.* (footnote

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[11] Even as to price advertising, the Court suggested that some regulation would be permissible. For example, the bar may "define the services that must be included in an advertised package . . . ." 433 U. S., at 373, n. 28, and the bar could require disclaimers or explanations to avoid false hopes, *id.*, at 384 ("[S]ome limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled").

Presumably, too, the bar may designate the services that may be considered "routine." Moreover, the Court might reach a different decision as to price advertising on a different record. If experience with particular price advertising indicates that the public is in fact misled or that disclaimers are insufficient to prevent deception, then the matter would come to the Court in an entirely different posture. The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be "inherently" misleading, the Court must take such experience into account. Cf. *Bates* v. *State Bar of Arizona*, 433 U. S., at 372 ("We are not persuaded that restrained professional advertising . . . will be misleading").

[12] See *Friedman* v. *Rogers*, 440 U. S. 1, 11, n. 9 (1979) ("When dealing with restrictions on commercial speech we frame our decisions narrowly, 'allowing modes of regulation [of commercial speech] that might be impermissible in the realm of noncommercial expression'" (quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978)); *Virginia Pharmacy*

omitted). The Court suggested that claims as to quality or in-person solicitation might be so likely to mislead as to warrant restriction. And the Court noted that a warning or disclaimer might be appropriately required, even in the context of advertising as to price, in order to dissipate the possibility of consumer confusion or deception.[13] "[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less." *Id.*, at 375.[14]

Board v. *Virginia Citizens Consumer Council*, 425 U. S., at 771–772, and n. 24 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely") (citations and footnote omitted).

[13] In addition, the *Bates* Court noted that reasonable restrictions on the time, place, and manner of advertising would still be permissible, while "the special problems of advertising on the electronic broadcast media will warrant special consideration." 433 U. S., at 384.

[14] The Model Rules of Professional Conduct proposed by the American Bar Association Commission on Evaluation of Professional Standards provide that "a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact." Rule 7.2(a). Rule 7.1 prohibits misleading advertising in the following terms:

"A lawyer shall not make any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

"(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

"(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

"(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."

[Footnote 14 is continued on p. 202]

In short, although the Court in *Bates* was not persuaded that price advertising for "routine" services was necessarily or inherently misleading, and although the Court was not receptive to other justifications for restricting such advertising, it did not by any means foreclose restrictions on potentially or demonstrably misleading advertising. Indeed, the Court recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the "product" renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.

Thus, the Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. In *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462 (1978), the Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" was so likely in the context of in-person solicitation, that such solicitation could be prohibited. And in *Friedman* v. *Rogers*, 440 U. S. 1 (1979), we held that Texas could prohibit the use of trade names by optometrists, particularly in view of the considerable history in Texas of deception and abuse worked upon the consuming public through the use of trade names.

Commentary following the Rule suggests that the Rule would prohibit "advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."

It is understood that the format of the proposed new Rules will be considered by the House of Delegates of the American Bar Association at its 1982 midyear meeting and that the substance of the Rules will be considered at the 1982 annual meeting. We, of course, imply no view as to these proposals.

Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e. g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U. S., at 375. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 563–564 (1980).[15] Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest. Thus, in *Bates*, the Court found that the potentially adverse

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[15] See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S., at 566:

"In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both

effect of advertising on professionalism and the quality of legal services was not sufficiently related to a substantial state interest to justify so great an interference with speech.[16] 433 U. S., at 368–372, 375–377.

IV

We now turn to apply these generalizations to the circumstances of this case.[17]

The information lodged against appellant charged him with four separate kinds of violation of Rule 4: listing the areas of his practice in language or in terms other than that provided by the Rule, failing to include a disclaimer, listing the courts and States in which he had been admitted to practice, and mailing announcement cards to persons other than "lawyers, clients, former clients, personal friends, and relatives." Appellant makes no challenge to the constitutionality of the disclaimer requirement,[18] and we pass on to the remaining three infractions.

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inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

As the discussion in the text above indicates, the *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public. See n. 10, *supra*.

[16] We recognize, of course, that the generalizations summarized above do not afford precise guidance to the bar and the courts. They do represent the general principles that may be distilled from our decisions in this developing area of the law. As they are applied on a case-by-case basis—as in Part IV of this opinion—more specific guidance will be available.

[17] We note that the restrictions placed upon appellant's speech by Rule 4 imposed a restriction only upon commercial speech—"expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n, supra*, at 561. By describing his services and qualifications, appellant's sole purpose was to encourage members of the public to engage him for personal profit.

[18] At oral argument counsel for appellant stated that the constitutionality of the disclaimer requirement was not before the Court, and that "[t]he dis-

Appellant was reprimanded for deviating from the precise listing of areas of practice included in the Advisory Committee addendum to Rule 4. The Advisory Committee does not argue that appellant's listing was misleading. The use of the words "real estate" instead of "property" could scarcely mislead the public. Similarly, the listing of areas such as "contracts" or "securities," that are not found on the Advisory Committee's list in any form, presents no apparent danger of deception. Indeed, as Chief Justice Bardgett explained in dissent, in certain respects appellant's listing is more informative than that provided in the addendum. Because the listing published by the appellant has not been shown to be misleading, and because the Advisory Committee suggests no substantial interest promoted by the restriction, we conclude that this portion of Rule 4 is an invalid restriction upon speech as applied to appellant's advertisements.

Nor has the Advisory Committee identified any substantial interest in a rule that prohibits a lawyer from identifying the jurisdictions in which he is licensed to practice. Such information is not misleading on its face. Appellant was licensed to practice in both Illinois and Missouri. This is factual and highly relevant information particularly in light of the geography of the region in which appellant practiced.

Somewhat more troubling is appellant's listing, in large capital letters, that he was a member of the Bar of the Supreme Court of the United States. See Appendix to this opinion. The emphasis of this relatively uninformative fact is at least bad taste. Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court. Yet there is no finding to this effect by the Missouri Supreme Court. There

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ciplinary action was not based on a failure to include the disclaimer." Tr. of Oral Arg. 16.

Although, the Supreme Court of Missouri did not explicitly indicate whether appellant was in violation of each and every one of the charges made against him, that is the implication of the opinion particularly when read in light of the more detailed dissenting opinions.

is nothing in the record to indicate that the inclusion of this information was misleading. Nor does the Rule specifically identify this information as potentially misleading or, for example, place a limitation on type size or require a statement explaining the nature of the Supreme Court Bar.

Finally, appellant was charged with mailing cards announcing the opening of his office to persons other than "lawyers, clients, former clients, personal friends and relatives." Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings.[19] There is no indication in the record of a failed effort to proceed along such a less restrictive path.[20] See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S., at 566 ("we must determine whether the regulation . . . is not more extensive than is necessary to serve" the governmental interest asserted).

In sum, none of the three restrictions in the Rule upon appellant's First Amendment rights can be sustained in the circumstances of this case. There is no finding that appellant's speech was misleading. Nor can we say that it was inher-

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[19] Rule 7.2(b) of the proposed Model Rules of Professional Conduct of the American Bar Association requires that "[a] copy or recording of an advertisement or written communication shall be kept for one year after its dissemination."

[20] The Advisory Committee argues that a general mailing from a lawyer would be "frightening" to the public unaccustomed to receiving letters from law offices. If indeed this is likely, the lawyer could be required to stamp "This is an Advertisement" on the envelope. See *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 541–542 (1980) (billing insert is not a significant intrusion upon privacy, and privacy interest can be protected through means other than a general prohibition).

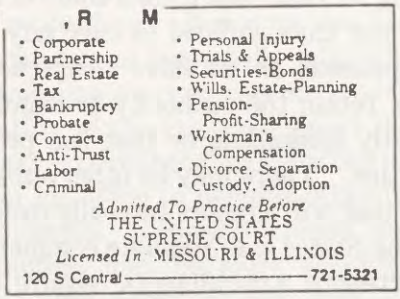
ently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception. We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.

Accordingly, the judgment of the Supreme Court of Missouri is

Reversed.

APPENDIX TO OPINION OF THE COURT

The advertisement above appeared in the January/February 1978 issue of the West End Word and was the basis for Count I of the Information.



The advertisement above appeared in the yellow pages of the Southwestern Bell Telephone Co. telephone directory for St. Louis Suburban West issued in February 1978, and was the basis for Count II of the Information.

SMITH, CORRECTIONAL SUPERINTENDENT *v.* PHILLIPS

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

No. 80–1082. Argued November 9, 1981—Decided January 25, 1982

After being convicted of murder at a jury trial in a New York court, respondent moved to vacate his conviction on the ground that a juror in his case submitted during the trial an application for employment as an investigator in the District Attorney's Office, and that the prosecuting attorneys, upon being informed of the juror's application, withheld the information from the trial court and respondent's defense counsel until after the trial. At a hearing on the motion before the same judge who had presided at the trial, the motion was denied, the judge finding "beyond a reasonable doubt" that the events giving rise to the motion did not influence the verdict. The Appellate Division of the New York Supreme Court affirmed the conviction, and the New York Court of Appeals denied leave to appeal. Subsequently, respondent sought habeas corpus relief in Federal District Court, alleging that he had been denied due process of law under the Fourteenth Amendment by the conduct of the juror in question. While finding insufficient evidence to demonstrate that the juror was actually biased, the District Court nevertheless imputed bias to him and, accordingly, ordered respondent released unless the State granted him a new trial. The United States Court of Appeals, without considering whether the juror was actually or impliedly biased, affirmed on the ground that the prosecutors' failure to disclose their knowledge about the juror denied respondent due process.

Held: Respondent was not denied due process of law either by the juror's conduct or by the prosecutors' failure to disclose the juror's job application. Pp. 215–221.

(a) Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that held in this case. *Remmer* v. *United States*, 347 U. S. 227. Moreover, this being a federal habeas action, the state trial judge's findings are presumptively correct under 28 U. S. C. § 2254(d). Federal courts in such proceedings must not disturb the state courts' findings unless the federal habeas

court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence. Here, neither the District Court nor the Court of Appeals took issue with the state trial judge's findings. Pp. 215–218.

(b) The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Here, the prosecutors' failure to disclose the juror's job application, although requiring a post-trial hearing on juror bias, did not deprive respondent of the fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. Pp. 218–221.

(c) Absent a violation of some right guaranteed respondent by the Fourteenth Amendment, it was error for the lower courts to order a new trial. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. P. 221.

632 F. 2d 1019, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 221. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 224.

Robert M. Pitler argued the cause for petitioner. With him on the briefs were *Mark Dwyer* and *Vivian Berger*.

William M. Kunstler argued the cause for respondent. With him on the briefs was *C. Vernon Mason*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was convicted in November 1974 by a New York state-court jury on two counts of murder and one count of attempted murder. After trial, respondent moved to vacate his conviction pursuant to § 330.30 of the N.Y. Crim. Proc. Law (McKinney 1971) (CPL),[1] and a hearing on his mo-

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**Charles S. Sims*, *Bruce J. Ennis, Jr.*, and *Richard M. Zuckerman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] Section 330.30 provides in pertinent part:

"At any time after rendition of a verdict of guilty and before sentence,

tion was held pursuant to CPL § 330.40.[2] The hearing was held before the justice who presided at respondent's trial, and the motion to vacate was denied by him in an opinion concluding "beyond a reasonable doubt" that the events giving rise to the motion did not influence the verdict. *People* v. *Phillips*, 87 Misc. 2d 613, 614, 630, 384 N. Y. S. 2d 906, 907–908, 918 (1975). The Appellate Division of the Supreme Court, First Judicial Department, affirmed the conviction without opinion. 52 App. Div. 2d 758, 384 N. Y. S. 2d 715 (1976). The New York Court of Appeals denied leave to appeal. 39 N. Y. 2d 949, 352 N. E. 2d 894 (1976).

Some four years after the denial of leave to appeal by the Court of Appeals, respondent sought federal habeas relief in the United States District Court for the Southern District of New York on the same ground which had been asserted in the state post-trial hearing. The District Court granted the writ, 485 F. Supp. 1365 (1980), and the United States Court of Appeals for the Second Circuit affirmed on a somewhat different ground. 632 F. 2d 1019 (1980). We granted certiorari to consider the important questions of federal constitutional law in relation to federal habeas proceedings raised by these decisions. 450 U. S. 909 (1981). We now reverse.

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the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

. . . . .

"2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict . . . ."

[2] CPL § 330.40 provides that motions to set aside the verdict under CPL § 330.30 must be decided by hearing if they allege disputed facts sufficient to grant the motion. At the hearing, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion." CPL § 330.40(g).

I

A

Respondent's original motion to vacate his conviction was based on the fact that a juror in respondent's case, one John Dana Smith, submitted during the trial an application for employment as a major felony investigator in the District Attorney's Office.[3] Smith had learned of the position from a friend who had contacts within the office and who had inquired on Smith's behalf without mentioning Smith's name or the fact that he was a juror in respondent's trial. When Smith's application was received by the office, his name was placed on a list of applicants but he was not then contacted and was not known by the office to be a juror in respondent's trial.

During later inquiry about the status of Smith's application, the friend mentioned that Smith was a juror in respondent's case. The attorney to whom the friend disclosed this fact promptly informed his superior, and his superior in turn informed the Assistant District Attorney in charge of hiring investigators. The following day, more than one week before the end of respondent's trial, the assistant informed the two attorneys actually prosecuting respondent that one of the jurors had applied to the office for employment as an investigator.

The two prosecuting attorneys conferred about the application but concluded that, in view of Smith's statements during *voir dire*,[4] there was no need to inform the trial court or de-

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[3] Smith's letter of application was addressed to the District Attorney and stated:

"I understand that a federally funded investigative unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator."

The letter did not mention that Smith was a juror in respondent's trial. Appended to the letter was a resumé containing biographical information about Smith. *People* v. *Phillips*, 87 Misc. 2d 613, 616, 384 N. Y. S. 2d 906, 909 (1975).

[4] The trial judge described the *voir dire* in respondent's case as "ten days of meticulous examination." *Id.*, at 614, 384 N. Y. S. 2d, at 907. During

fense counsel of the application. They did instruct attorneys in the office not to contact Smith until after the trial had ended, and took steps to insure that they would learn no information about Smith that had not been revealed during *voir dire*. When the jury retired to deliberate on November 20th, three alternate jurors were available to substitute for Smith, and neither the trial court nor the defense counsel knew of his application. The jury returned its verdict on November 21st.

The District Attorney first learned of Smith's application on December 4th. Five days later, after an investigation to verify the information, he informed the trial court and defense counsel of the application and the fact that its existence was known to attorneys in his office at some time before the conclusion of the trial. Respondent's attorney then moved to set aside the verdict.

At the hearing before the trial judge, Justice Harold Birns, the prosecuting attorneys explained their decision not to disclose the application and Smith explained that he had seen nothing improper in submitting the application during the trial. Justice Birns, "[f]rom all the evidence adduced" at the hearing, 87 Misc. 2d, at 621, 384 N. Y. S. 2d, at 912, found that "Smith's letter was indeed an indiscretion" but that it "in no way reflected a premature conclusion as to the [respondent's] guilt, or prejudice against the [respondent], or an inability to consider the guilt or innocence of the [respondent]

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his *voir dire*, Smith stated that he intended to pursue a career in law enforcement and that he had applied for employment with a federal drug enforcement agency. He also disclosed that his wife was interested in law enforcement, an interest which arose out of an incident in which she was assaulted and seriously injured. Smith stated that he had previously worked as a store detective for Bloomingdale's Department Store, and, in that capacity, had made several arrests which led to contact with the District Attorney's Office. In response to close inquiry by defense counsel, Smith declared his belief that he could be a fair and impartial juror in the case. This assurance apparently satisfied defense counsel, for Smith was permitted to take his seat among the jurors even though the defense had several unused peremptory challenges.

solely on the evidence." *Id.*, at 627, 384 N. Y. S. 2d, at 915. With respect to the conduct of the prosecuting attorneys, Justice Birns found "no evidence" suggesting "a sinister or dishonest motive with respect to Mr. Smith's letter of application." *Id.*, at 618–619, 384 N. Y. S. 2d, at 910.

B

In his application for federal habeas relief, respondent contended that he had been denied due process of law under the Fourteenth Amendment to the United States Constitution by Smith's conduct. The District Court found insufficient evidence to demonstrate that Smith was actually biased. 485 F. Supp., at 1371. Nonetheless, the court imputed bias to Smith because "the average man in Smith's position would believe that the verdict of the jury would directly affect the evaluation of his job application." *Id.*, at 1371–1372. Accordingly, the court ordered respondent released unless the State granted him a new trial within 90 days.

The United States Court of Appeals for the Second Circuit affirmed by a divided vote. The court noted that "it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact 'impartial,'" but the court did not consider whether Smith was actually or impliedly biased. 632 F. 2d, at 1022. Rather, the Court of Appeals affirmed respondent's release simply because "the failure of the prosecutors to disclose their knowledge denied [respondent] due process." *Ibid.* The court explained: "To condone the withholding by the prosecutor of information casting substantial doubt as to the impartiality of a juror, such as the fact that he has applied to the prosecutor for employment, would not be fair to a defendant and would ill serve to maintain public confidence in the judicial process." *Id.*, at 1023.[5]

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[5] This conclusion was based upon the majority's reading of our decision in *United States* v. *Agurs*, 427 U. S. 97 (1976), a reading by which it concluded that due process is violated when the prosecutor's actions treat a

II

In argument before this Court, respondent has relied primarily on reasoning adopted by the District Court.[6] He contends that a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question. Given the human propensity for self-justification, respondent argues, the law must impute bias to jurors in Smith's position. We disagree.

This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. For example, in *Remmer* v. *United States*, 347 U. S. 227 (1954), a juror in a federal criminal trial was approached by someone offering money in exchange for a favorable verdict. An FBI agent was assigned to investigate the attempted bribe, and the agent's report was reviewed by the trial judge and the prosecutor without disclosure to defense counsel. When they learned of the incident after trial, the defense attorneys moved that the verdict be vacated, alleging that "they would have moved for a mistrial and requested that the juror in question be replaced by an alternate juror" had the incident been disclosed to them during trial. *Id.*, at 229.

This Court recognized the seriousness not only of the attempted bribe, which it characterized as "presumptively prejudicial," but also of the undisclosed investigation, which was "bound to impress the juror and [was] very apt to do so

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defendant unfairly or impugn the integrity of the judicial process, even if the defendant is not thereby prejudiced. 632 F. 2d 1019, 1023 (1980). As will be seen in Part III of this opinion, the Court of Appeals misread *Agurs*.

[6] Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted. *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977); *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970); *Ryerson* v. *United States*, 312 U. S. 405, 408 (1941).

unduly." *Ibid.* Despite this recognition, and a conviction that "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions," *ibid.*, the Court did not require a new trial like that ordered in this case. Rather, the Court instructed the trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to participate." *Id.*, at 230 (emphasis added). In other words, the Court ordered precisely the remedy which was accorded by Justice Birns in this case.

Even before the decision in *Remmer*, this Court confronted allegations of implied juror bias in *Dennis* v. *United States*, 339 U. S. 162 (1950). Dennis was convicted of criminal contempt for failure to appear before the Committee on Un-American Activities of the House of Representatives. He argued that the jury which convicted him, composed primarily of employees of the United States Government, was inherently biased because such employees were subject to Executive Order No. 9835, 3 CFR 627 (1943–1948 Comp.), which provided for their discharge upon reasonable grounds for belief that they were disloyal to the Government. Dennis contended that such employees would not risk the charge of disloyalty or the termination of their employment which might result from a vote for acquittal. The Court rejected this claim of implied bias, noting that Dennis was "free to show the existence of actual bias" but had failed to do so. 339 U. S., at 167. The Court thus concluded: "A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.*, at 171–172. See also *Frazier* v. *United States*, 335 U. S. 497 (1948); *United States* v. *Wood*, 299 U. S. 123 (1936).

Our decision last Term in *Chandler* v. *Florida*, 449 U. S. 560 (1981), also treated a claim of implied juror bias. Appellants in *Chandler* were convicted of various theft crimes at a

jury trial which was partially televised under a new Canon of Judicial Ethics promulgated by the Florida Supreme Court. They claimed that the unusual publicity and sensational courtroom atmosphere created by televising the proceedings would influence the jurors and preclude a fair trial. Consistent with our previous decisions, we held that "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly." *Id.*, at 575. Because the appellants did "not [attempt] to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them," we refused to set aside their conviction. *Id.*, at 581.

These cases demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.[7]

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[7] Respondent correctly notes that determinations made in *Remmer*-type hearings will frequently turn upon testimony of the juror in question, but errs in contending that such evidence is inherently suspect. As we said in *Dennis* v. *United States*, 339 U. S. 162 (1950), "[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Id.*, at 171. See also *United States* v. *Reid*, 12 How. 361, 366 (1852).

The District Court and the Court of Appeals disregarded this doctrine: they held that a post-trial hearing comporting with our decisions in *Remmer* and other cases prosecuted in the *federal* courts was constitutionally insufficient in a state court under the Due Process Clause of the Fourteenth Amendment. It seems to us to follow "as the night the day" that if in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system.[8]

Of equal importance, this case is a federal habeas action in which Justice Birns' findings are presumptively correct under 28 U. S. C. § 2254 (d). We held last Term that federal courts in such proceedings must not disturb the findings of state courts unless the federal habeas court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence. *Sumner* v. *Mata*, 449 U. S. 539, 551 (1981). Here neither the District Court nor the Court of Appeals took issue with the findings of Justice Birns.

III

As already noted, the Court of Appeals did not rely upon the District Court's imputation of bias. Indeed, it did not even reach the question of juror bias, holding instead that the prosecutors' failure to disclose Smith's application, without more, violated respondent's right to due process of law. Respondent contends that the Court of Appeals thereby cor-

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[8] In connection with his argument that due process was denied by the prosecutors' withholding of Smith's application, respondent notes that had the prosecutors disclosed the application, the trial court could have replaced Smith with an alternate juror. Thus, respondent argues, not only was the prosecutors' action itself a denial of due process, but it also prevented respondent from availing himself of the process available under New York law for correcting juror bias. See N. Y. CPL § 270.35 (McKinney 1971). This argument proves too much. If the hearing and deter-

rectly preserved "the appearance of justice." Brief for Respondent 7. This contention, too, runs contrary to our decided cases.

Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. In *Brady* v. *Maryland*, 373 U. S. 83 (1963), for example, the prosecutor failed to disclose an admission by a participant in the murder which corroborated the defendant's version of the crime. The Court held that a prosecutor's suppression of requested evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. Applying this standard, the Court found the undisclosed admission to be relevant to punishment and thus ordered that the defendant be resentenced. Since the admission was not material to guilt, however, the Court concluded that the trial itself complied with the requirements of due process despite the prosecutor's wrongful suppression.[9] The Court thus recognized that the aim of due process "is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." *Ibid.*

This principle was reaffirmed in *United States* v. *Agurs*, 427 U. S. 97 (1976). There, we held that a prosecutor must disclose unrequested evidence which would create a reasonable doubt of guilt that did not otherwise exist. Consistent

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mination to replace a juror during trial would have adequately protected respondent's right to due process of law, and would not have been rendered impossible by necessary reliance on the juror's own testimony, we see no reason why a post-trial hearing and determination would be any less protective or possible.

[9] As we said of *Brady* in *United States* v. *Agurs*, 427 U. S., at 106: "[T]he confession could not have affected the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not on the former. And since it was not material on the issue of guilt, the entire trial was not lacking in due process."

with *Brady*, we focused not upon the prosecutor's failure to disclose, but upon the effect of nondisclosure on the trial:

> "Nor do we believe the constitutional obligation [to disclose unrequested information] is measured by the moral culpability, or willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of the evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U. S., at 110 (footnote and citation omitted).[10]

In light of this principle, it is evident that the Court of Appeals erred when it concluded that prosecutorial misconduct alone requires a new trial. We do not condone the conduct of the prosecutors in this case. Nonetheless, as demonstrated in Part II of this opinion, Smith's conduct did not impair his ability to render an impartial verdict. The trial judge expressly so found. 87 Misc. 2d, at 627, 384 N. Y. S. 2d, at 915.

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[10] Even in cases of egregious prosecutorial misconduct, such as the knowing use of perjured testimony, we have required a new trial only when the tainted evidence was material to the case. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972); *Napue* v. *Illinois*, 360 U. S. 264, 272 (1959). This materiality requirement implicitly recognizes that the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes.

We note, of course, that nothing in this case suggests that the prosecutors' conduct was undertaken in bad faith. As the trial court found, "there is no evidence which to any degree points to a conclusion that any member of the District Attorney's staff, . . . or any court officer, had a sinister or dishonest motive with respect to Mr. Smith's letter of application, or sought to gain thereby an unfair advantage over the defendant." 87 Misc. 2d, at 618–619, 384 N. Y. S. 2d, at 910.

Therefore, the prosecutors' failure to disclose Smith's job application, although requiring a post-trial hearing on juror bias, did not deprive respondent of the fair trial guaranteed by the Due Process Clause.

IV

A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution. As we said in *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973):

> "Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Absent such a constitutional violation, it was error for the lower courts in this case to order a new trial. Even if the Court of Appeals believed, as the respondent contends, that prosecutorial misbehavior would "reign unchecked" unless a new trial was ordered, it had no authority to act as it did. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. *Chandler* v. *Florida*, 449 U. S., at 570, 582–583; *Cupp* v. *Naughten*, *supra*, at 146. No such wrongs occurred here. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion, but write separately to express my view that the opinion does not foreclose the use of "implied bias" in appropriate circumstances.

I

Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an inter-

est in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.

Nevertheless, I believe that in most instances a postconviction hearing will be adequate to determine whether a juror is biased. A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.

I am concerned, however, that in certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice. While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.*

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*In the exceptional situations that may require application of an "implied bias" doctrine, the lower federal courts need not be deterred by 28 U. S. C. § 2254(d), which provides that in a federal habeas proceeding

"a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .

. . . . . .

II

None of our previous cases preclude the use of the conclusive presumption of implied bias in appropriate circumstances. *Remmer* v. *United States*, 347 U. S. 227 (1954), on which the Court heavily relies, involved not juror misconduct, but the misconduct of a third party who attempted to bribe a juror. Under those circumstances, where the juror has not been accused of misconduct or has no actual stake in the outcome of the trial, and thus has no significant incentive to shield his biases, a postconviction hearing could adequately determine whether or not the juror was biased. In *Dennis* v. *United States*, 339 U. S. 162 (1950), the Court rejected a claim that a juror's employment with the Federal Government was a ground to find implied bias, but did not foreclose a finding of implied bias in more serious situations. Justice Reed, who concurred in the Court's opinion, wrote that he read "the Court's decision to mean that Government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case." *Id.*, at 172–173.

Moreover, this Court has used implied bias to reverse a conviction. In *Leonard* v. *United States*, 378 U. S. 544 (1964) *(per curiam)*, the Court held that prospective jurors who had heard the trial court announce the defendant's guilty

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"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

. . . . . .

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding. . . ."

In those extraordinary situations involving implied bias, state-court proceedings resulting in a finding of "no bias" are by definition inadequate to uncover the bias that the law conclusively presumes.

verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges.

III

Because there may be circumstances in which a postconviction hearing will not be adequate to remedy a charge of juror bias, it is important for the Court to retain the doctrine of implied bias to preserve Sixth Amendment rights. I read the Court's opinion as not foreclosing the use of implied bias in appropriate situations, and, therefore, I concur.

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

Juror John Smith vigorously pursued employment with the office of the prosecutor throughout the course of his jury service in respondent's state criminal trial. The prosecutors learned of Smith's efforts during the trial, but improperly failed to disclose this information until after the jury had returned a verdict of guilty against respondent. The state court conducted a post-trial evidentiary hearing and determined that the juror was not actually biased. Thus, it ruled that respondent was not prejudiced, and refused to set aside the conviction. Respondent subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that he was denied his constitutional right to an impartial jury. The District Court ruled that the conviction should be set aside, and the United States Court of Appeals for the Second Circuit affirmed. A majority of this Court now reverses, holding that the post-trial evidentiary hearing provided sufficient protection to respondent's right to an impartial jury. Because I find the majority's analysis completely unpersuasive, I dissent.

I

The right to a trial by an impartial jury lies at the very heart of due process. *Irvin* v. *Dowd*, 366 U. S. 717, 721–722

(1961).[1] "[O]ur common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt." *Estes* v. *Texas*, 381 U. S. 532, 565 (1965) (Warren, C. J., with whom Douglas and Goldberg, JJ., joined, concurring). That purpose simply cannot be achieved if the jury's deliberations are tainted by bias or prejudice. Fairness and reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial. Thus, time and time again, in a broad variety of contexts, the Court has adopted strong measures to protect the right to trial by an impartial jury.

The Court has insisted that defendants be given a fair and meaningful opportunity during *voir dire* to determine whether prospective jurors are biased—even if they have no specific prior knowledge of bias. In *Ham* v. *South Carolina*, 409 U. S. 524 (1973), the Court held that a trial court may not deny a Negro defendant the opportunity to question prospective jurors on the subject of racial prejudice when the circumstances suggest the need for such questioning. Even when questions about racial prejudice are not required, a generalized and thorough inquiry into prejudice is necessary. *Ristaino* v. *Ross*, 424 U. S. 589 (1976).

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[1] In *Irvin* v. *Dowd*, the Court stated:

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U. S. 257; *Tumey* v. *Ohio*, 273 U. S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." 366 U. S., at 722.

The Court has also insisted that the jury be selected from a representative cross-section of the community. Selection procedures that exclude significant portions of the population, and thus increase the risk of bias, are invalid. For example, in *Peters* v. *Kiff*, 407 U. S. 493 (1972), the Court invalidated a selection procedure that resulted in the systematic exclusion of Negroes.[2] Similarly, in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), the Court struck down a state rule excluding women from compulsory jury service.[3] And in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), the Court ruled that a defendant in a capital case was denied his right to an impartial jury on the issue of sentence when the trial judge automatically excluded jurors who had scruples against capital punishment.

The right to a jury drawn from a fair cross-section of the community extends even to defendants who are not members of the excluded class. In *Peters* v. *Kiff*, *supra*, the defendant challenging the exclusion of blacks was white; in *Taylor* v. *Louisiana*, *supra*, the defendant challenging the exclusion of women was male. Exclusion is impermissible, not simply because jurors who are not members of the defendant's class may be prejudiced against the defendant, but also because the jury would be deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff*, *supra*, at 503–504 (opinion announcing judgment). See also *Taylor* v. *Louisiana*, *supra*, at 531.[4]

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[2] In *Peters* v. *Kiff*, the opinion announcing the judgment of the Court stated that such procedures were unacceptable even when there is no proof of actual bias. 407 U. S., at 504 (MARSHALL, J., joined by Douglas and Stewart, JJ.). The opinion explained that actual bias is virtually impossible to prove. *Ibid.* Thus, it is necessary to "decide on principle which side shall suffer the consequences of unavoidable uncertainty." *Ibid.* Given the great potential for harm, and the importance of the right to an impartial jury, doubts should be resolved in favor of the defendant. *Ibid.*

[3] See also *Ballard* v. *United States*, 329 U. S. 187 (1946).

[4] In *Taylor* v. *Louisiana*, the Court stated that "'a flavor, a distinct quality is lost if either sex is excluded,'" and that "'exclusion of one may indeed

The Court has also acted to protect defendants from the possibility that jurors might be prejudiced by extensive pretrial publicity. In *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), it ruled that the trial court should have granted a request for a change in venue, when the entire community had seen the defendant confess to the crime in a police interrogation broadcast on television. The Court did not require a particularized showing that the confession actually prejudiced the jurors against the defendant. Later, in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), the Court reversed a conviction where widespread and inflammatory publicity had preceded the trial, even though each of the jurors had insisted that he would remain impartial.

Similarly, the Court has stated that defendants must be protected from the impact on jurors of publicity during trial. Although an absolute constitutional ban on news coverage of trials by the print or broadcast media cannot be justified, the defendant must be given an opportunity to demonstrate that the media's coverage of his case compromised the ability of the particular jury that heard the case to weigh the evidence fairly. *Chandler* v. *Florida*, 449 U. S. 560, 575 (1981); see also *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 563–565 (1976); *Estes* v. *Texas*, *supra*.

The Court has guarded against other conduct by third parties that might affect the jury's impartiality. In *Remmer* v. *United States*, 347 U. S. 227 (1954), it ruled that any communication with a juror during a trial about the matter pending before the jury "is, for obvious reasons, deemed presumptively prejudicial." *Id.*, at 229. Although this presumption is not conclusive, "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Ibid.* See also *Turner* v. *Louisiana*, 379 U. S. 466 (1965) (jury could not try a case after it had been placed

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make the jury less representative of the community than would be true if an economic or racial group were excluded.'" 419 U. S., at 532 (quoting *Ballard* v. *United States*, *supra*, at 194).

in protective custody of deputy sheriffs who had been the principal prosecution witnesses, even though jurors might not have been influenced by the association).

To summarize, the Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased; has regarded the absence of a balanced perspective, and not simply the existence of bias against defendant, as a cognizable form of prejudice; has not always required a particularized showing of prejudice; and has strongly presumed that contact with a juror initiated by a third party is prejudicial. In this case, where there was evidence that juror Smith had a serious conflict of interest, and where that conflict would inevitably distort his perspective on the case, the majority nevertheless holds that the juror's simple assertion, after the verdict, that he was not biased sufficiently protects respondent's right to trial by an impartial jury. This holding is utterly inconsistent with the Court's historical recognition of this "most priceless" right. *Irvin*, *supra*, at 721.

II

A

The majority concedes the importance of the right to a trial by an impartial jury. It claims, however, that respondent's right was adequately protected here, because the state trial judge conducted a postverdict evidentiary hearing and concluded that Smith was not actually biased. According to the majority, the Constitution requires only that the defendant be given an opportunity to prove actual bias. Indeed, it would apparently insist on proof of actual bias, not only when a juror had applied for employment with the prosecutor's office, but also when the juror was already employed in the prosecutor's office, or when he served as a prosecuting attorney. The majority relies on the premise that an evidentiary hearing provides adequate assurance that prejudice does not exist. This premise, however, ignores basic human psychology. In cases like this one, an evidentiary hearing can never adequately protect the right to an impartial jury.

Despite the majority's suggestions to the contrary, juror Smith was not a passive, indifferent job applicant.[5] He began pursuing employment as an investigator in the Office of the District Attorney on September 23, 1974, the same day he was sworn in. He asked a friend, Criminal Court Officer Rudolph Fontaine, to determine the proper method of applying for employment. Once he had completed his application, he gave it to Fontaine for hand delivery to the District Attorney's Office, apparently because he assumed that the court officer had a personal contact in the office. In addition, after the application had been filed, he met regularly with Fontaine and Jury Warden Mario Piazza in order to determine the progress of his application. On November 21, 1974, the jury returned a verdict of guilt and the trial ended. The very next day, Smith phoned the District Attorney's Office to check on the status of his application. When he was unable to get in touch with anyone who knew about his application, he asked his former supervisor to make inquiries in his behalf.

When a juror vigorously and actively pursues employment in the prosecutor's office throughout the course of a trial, the probability of bias is substantial. This bias may be conscious, part of a calculated effort to obtain a job. The juror may believe that his application will be viewed favorably if the defendant is found guilty. Thus, he may decide to vote for a verdict of guilty regardless of the evidence, and he may attempt to persuade the other jurors that acquittal is not justified. There is also a very serious danger of unconscious bias. Only individuals of extraordinary character would not be affected in some way by their interest in future employ-

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[5] The majority notes that during *voir dire*, the defense chose not to challenge Smith, even though he had stated that he had a strong interest in a law enforcement career. *Ante*, at 212–213, n. 4. However, since the defendant was himself a law enforcement officer, such an interest would not necessarily have been unfavorable to the defense. I think it clear that a general career interest in law enforcement is very different from an application for a job with the prosecutor in a particular case.

ment. Subconsciously, the juror may tend to favor the prosecutor simply because he feels some affinity with his potential employer. Indeed, the juror may make a sincere effort to remain impartial, and yet be unable to do so.

Not only is the probability of bias high, it is also unlikely that a post-trial evidentiary hearing would reveal this bias. As the Court of Appeals stated, given the human propensity for self-justification, it is very difficult "to learn from a juror's own testimony after the verdict whether he was in fact 'impartial.'" 632 F. 2d 1019, 1022 (CA2 1980). Certainly, a juror is unlikely to admit that he had consciously plotted against the defendant during the course of the trial. Such an admission would have subjected juror Smith to criminal sanctions.[6] It would also have damaged his prospects for a career in law enforcement. A law enforcement agency is unlikely to hire an investigator whose credibility could always be impeached by an admission that he had disregarded his juror's oath in a criminal trial.

Even when the bias was not part of an affirmative course of misconduct, however, but was unconscious, a juror is unlikely to admit that he had been unable to weigh the evidence fairly. If he honestly believes that he remained impartial throughout the trial, no amount of questioning will lead to an admission. Rather, the juror will vehemently deny any accusations of bias.[7]

In the past, the Court has recognized that the question whether a juror is prejudiced poses substantial problems of proof.

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[6] If Smith were found to have engaged in a course of conscious misconduct, he might have been prosecuted under N. Y. Penal Law § 195.05 (obstructing governmental administration); § 215.20 (bribe receiving by a juror); or § 215.20 (misconduct by a juror) (McKinney 1975). He might also have been found guilty of criminal contempt. See § 215.20.

[7] The petitioner emphasizes that during the evidentiary hearing, the trial judge had an opportunity to observe the juror's demeanor. Thus, argues the petitioner, even where the juror denies that he was biased, the trial judge will be able to measure the juror's integrity, and decide whether

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence." *Crawford* v. *United States*, 212 U. S. 183, 196 (1909).

Similarly, in *Irvin* v. *Dowd*, 366 U. S., at 728, the Court stated that although a juror may be sincere when he says that he was fair and impartial to the defendant, the "psychological impact requiring such a declaration before one's fellows is often its father." And in *Peters* v. *Kiff*, the opinion announcing the judgment stated: "It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce." 407 U. S., at 504 (MARSHALL, J., joined by Douglas and Stewart, JJ.).

I believe that in cases like this one, where the probability of bias is very high, and where the evidence adduced at a hearing can offer little assurance that prejudice does not exist, the juror should be deemed biased as a matter of law. Specifically, where a juror pursues employment with the office of the prosecutor, under circumstances highly suggestive of misconduct or conflict of interest, bias should be "implied," and he should be automatically disqualified, despite the absence of proof of actual bias. If the juror's efforts to secure employment are not revealed until after the trial, the conviction must be set aside.[8] The right to a trial by an impartial

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to credit his claim that he fairly weighed the evidence. It may be true that the opportunity to observe the juror will be of assistance in some cases. However, it will be of little value where the juror honestly but falsely believes that he was impartial.

[8] Although the concurring opinion would not use an implied-bias rule in this case, it agrees that in some circumstances, such a rule is appropriate. It suggests, for example, that a finding of implied bias might be justified where "the juror is an actual employee of the prosecuting agency." *Ante*,

jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality.

B

Adoption of a conclusive presumption of bias in these limited circumstances would not be without precedent; such presumptions of juror bias have ancient historical roots. At English common law, prospective jurors could be challenged not only when the defendant could prove actual bias, but also when the circumstances were such that bias could be implied.[9] Blackstone states that exclusion of a prospective juror for implied bias is appropriate when it is shown:

> "that [he] is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him." 3 W. Blackstone, Commentaries 480–481 (W. Hammond ed. 1890).

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at 222. In my view, it is impossible to draw meaningful distinction between a juror who is an actual employee of the prosecuting agency, and a juror who has applied for employment with that agency. Indeed, there may be a greater danger of bias where the juror is pursuing a job. An individual who has not yet obtained employment and who believes that his job prospects are at stake may be very anxious to please.

[9] In *United States* v. *Wood*, 299 U. S. 123 (1936), the Court described the common law regarding challenges to prospective jurors as follows:

"Challenges at common law were to the array, that is, with respect to the constitution of the panel, or to the polls, for disqualification of a juror. Challenges to the polls were either 'principal' or 'to the favor,' the former being upon grounds of absolute disqualification, the latter for actual bias." *Id.*, at 134–135.

See also 3 W. Blackstone, Commentaries 480–481 (W. Hammond ed. 1890).

Similarly, Bracton states that if the defendant "suspects any of the twelve jurors he may remove him for just cause . . . as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land . . . ; if there is ground for suspicion all are to be removed, that the inquiry may proceed free from all doubts." 2 S. Thorne, Bracton on the Laws and Customs of England 405 (1968).

The States also employ rules of implied bias. Most jurisdictions have statutes that set forth conduct or status that will automatically disqualify prospective jurors, without regard to whether that person is actually biased. These statutes frequently exclude persons related to the prosecution, defense counsel, a witness, or the defendant.[10] The New York statute, which would have been applied here if juror Smith's intention to apply for a job had come to light during *voir dire*, is especially broad; it disqualifies any person who has a relationship to a party or witness to the action which is likely to preclude that person from rendering an impartial verdict. N. Y. Crim. Proc. Law § 270.20(1)(c) (McKinney 1971). This provision, added to the statute in 1971, calls for the application of an "average person" standard and does not require proof that the particular potential juror would be biased. See, *e. g.*, *People* v. *Provenzano*, 50 N. Y. 2d 420, 424, 407 N. E. 2d 408, 410 (1980).[11]

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[10] See, *e. g.*, Cal. Penal Code Ann. § 1074 (West Supp. 1981); Idaho Code § 19–2020 (1979); Minn. Rule Crim. Proc. 26.02(5); N. Y. Crim. Proc. Law § 270.20(1) (McKinney 1971); N. D. Cent. Code § 29–17–36 (Supp. 1981); Okla. Stat., Tit. 22, § 660 (1971); Ore. Rev. Stat. § 136.220 (1979); S. D. Comp. Laws Ann. § 23A–20–13 (1979); Utah Code Ann. § 77–35–18(e) (1980).

[11] At the time of *voir dire*, Smith had not yet applied for a job with the office of the District Attorney. It seems likely, however, that if he had filed an application at this point, and this fact came to light during *voir dire*, he would have been automatically disqualified pursuant to N. Y. Crim. Proc. Law § 270.20(1)(c) (McKinney 1971).

Some state courts have also permitted challenges for implied bias on a case-by-case basis.[12] In fact, at least one court has presumed bias in circumstances very similar to those presented here. In *Haak* v. *State*, —— Ind. ——, 417 N. E. 2d 321 (1981), the Indiana Supreme Court held that a woman whose husband was offered a position on the prosecutor's staff on the day that she was selected as a juror in a rape case was impliedly biased. The court stated that the juror's bias could not be "avoided or dissolved by admonitions from the court or by the juror's assertion that she believed she could judge the case impartially." *Id.*, at ——, 417 N. E. 2d, at 326. It was unrealistic to "expect a juror in this situation to act with an even hand toward both parties." *Ibid.* Thus, the trial judge erred in refusing to grant defendant's motion for a mistrial.[13] See also *Tableporter* v. *Urist*, 157 Misc. 347, 283 N. Y. S. 350 (Mun. Ct. 1935) (conviction set aside where juror's son applied to defendant for a job).

Of course, the fact that many States employ rules of implied bias in situations similar to those presented here does not necessarily imply that such rules are constitutionally mandated.[14] The widespread state practice does, however,

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[12] See, *e. g.*, *State* v. *West*, 157 W. Va. 209, 210, 200 S. E. 2d 859, 861 (1973) (reversible error where trial court denies challenge for cause to juror who is employee of prosecutorial agency); *State* v. *Kokoszka*, 123 Conn. 161, 163, 193 A. 210, 211 (1937); *State* v. *Howard*, 17 N. H. 171 (1845), overruled on other grounds, *Shulinsky* v. *Boston & M. R. Co.*, 83 N. H. 86, 89, 139 A. 189, 191 (1927).

[13] Cf. *Block* v. *State*, 100 Ind. 357 (1885) (juror who is deputy prosecutor should be disqualified); *Barnes* v. *State*, 263 Ind. 320, 330 N. E. 2d 743 (1975) (juror whose relative is a member of the prosecutor's staff should be disqualified).

[14] A decision to endorse rules of implied bias would not lead to the constitutionalization of a wide variety of state disqualification rules. As I stated above, I believe that an implied-bias rule is constitutionally mandated only when the probability of bias is particularly great, and when an evidentiary hearing is particularly unlikely to reveal that bias. Measured against this standard, many state rules would not be constitutionally required.

support that conclusion. The States would not adopt such rules at the expense of their strong interest in efficiently procuring convictions if they were not committed to safeguarding the right to trial by an impartial jury, and if they did not believe that this right was seriously threatened.

C

In concluding that an implied-bias rule is not appropriate, and that a post-trial evidentiary hearing is an adequate remedy, the majority relies heavily on this Court's decision in *Remmer* v. *United States*, 347 U. S. 227 (1954). The defendant in that case was being tried for income tax evasion. During the course of the trial, an unnamed person attempted to bribe a juror. The juror reported this incident to the trial judge, who asked the Federal Bureau of Investigation (FBI) to conduct an investigation. After interviewing the juror, the FBI concluded that the bribery attempt had been made "in jest," *id.*, at 228, and had not had a prejudicial impact. The trial judge decided not to take any action. The defense learned of the incident after the jury returned a verdict of guilty. It moved for a new trial, complaining that the bribery attempt and the FBI investigation were likely to have influenced the jury's deliberations. The Court held that any private communication with a juror during trial about the matter pending before the jury is presumptively prejudicial. It stated, however, that this presumption is not conclusive, and that the Government should be given an opportunity to show that the contact was harmless. The Court then remanded the case to the District Court with directions to hold a hearing to determine whether the incident was harmful, and if so, to grant a new trial.

According to the majority, *Remmer* establishes that a postverdict inquiry will always be the appropriate remedy where claims of jury prejudice are raised after the conclusion of the trial. The holding of *Remmer* is not nearly so broad, however. The Court did not purport to address instances of

serious juror misconduct in which bias could be implied. An examination of the facts of that case reveals that the danger of bias was much less substantial in that case than in this one. The defendant claimed only that the jury might have been influenced by the unsuccessful bribery attempt and the FBI investigation. There were no allegations that the jurors themselves were guilty of misconduct. Moreover, even if the jurors were influenced by the bribery attempt made "in jest" or the contact with the FBI, an evidentiary hearing was more likely to reveal that impact. A juror will be less reluctant to admit that he was disturbed or upset by the misconduct of a third party, than to admit that he himself acted improperly.

The majority also relies upon this Court's decisions in *Dennis* v. *United States*, 339 U. S. 162 (1950); *Frazier* v. *United States*, 335 U. S. 497 (1948); and *United States* v. *Wood*, 299 U. S. 123 (1936).[15] In these cases, the Court indicated that the fact that a juror was employed by the Federal Government did not by itself require a finding of implied bias in cases in which the Government was a party.[16] The Court was not persuaded by "vague conjectures" that Government employees are "peculiarly vulnerable" to a "miasma of fear," or are "so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors." *Dennis*, *supra*, at 172. However,

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[15] It further relies on this Court's decision in *Chandler* v. *Florida*, 449 U. S. 560 (1981), which held that the appropriate safeguard against the possibility that news coverage of a defendant's trial influenced the jurors is the defendant's opportunity to show that the coverage compromised the ability of the jury to adjudicate fairly. However, that case certainly does not hold that automatic disqualification rules would never be appropriate.

[16] *United States* v. *Wood* upheld the constitutionality of a District of Columbia statute that permitted Federal Government employees to serve on juries in which the United States was a party. *Dennis* v. *United States* ruled that Government employees need not be excused from serving as jurors in the prosecution of the General Secretary of the Communist Party, U. S. A. *Frazier* v. *United States* refused to uphold a challenge to a jury that consisted entirely of Government employees.

these cases do not hold that an implied-bias rule would never be appropriate. In all three decisions the Court stressed that trial judges would retain power to safeguard the interests of the defendant where circumstances suggest a real danger of bias. This power surely includes the application of a *per se* rule where necessary. *Dennis*, *supra*, at 168; *Frazier*, *supra*, at 511; *Wood*, *supra*, at 150.[17]

Indeed, in *Leonard* v. *United States*, 378 U. S. 544 (1964) *(per curiam)*, this Court explicitly endorsed the application of an implied-bias rule.[18] The petitioner in that case was con-

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[17] There is language in each of the three opinions that might be interpreted to suggest that a hearing to determine actual bias will always be a sufficient remedy. See, *e. g.*, *Dennis* v. *United States*, 339 U. S., at 171–172 ("[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury"); *Frazier* v. *United States*, 335 U. S., at 510 (in ordinary circumstances jurors are subject to challenge only for "actual bias"); *United States* v. *Wood*, 299 U. S., at 150 (courts should conduct full inquiry into "actual bias" where circumstances suggest such inquiry is appropriate). In these cases, however, the Court regarded "actual bias" as including "not only prejudice in the subjective sense but also such as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise.' " *Frazier* v. *United States*, *supra*, at 510–511, n. 19 (quoting *United States* v. *Wood*, *supra*, at 133–134).

[18] Cf. *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927) (judge with financial interest in outcome is disqualified from hearing case, even though he might not actually have been affected by financial interest, because average man in that position would be subject to "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused"); *In re Murchison*, 349 U. S. 133 (1955) (judge may not conduct grand jury inquiry and then adjudicate charges against defendant because his impartiality might reasonably be questioned); *Peters* v. *Kiff*, 407 U. S. 493 (1972) (opinion of MARSHALL, J., joined by Douglas and Stewart, JJ.) (possibility that jury selection procedures that exclude Negroes might result in bias against defendant is sufficient to justify invalidation of those procedures); see also n. 2, *supra*.

It is relevant to note that if a judge had an application pending with a litigant while he was trying a case, he would be presumed biased, no matter how vigorously he protested that he was actually impartial. See *Tumey*, *supra*; *Murchison*, *supra*.

victed in separate trials of forging Government checks and of transporting forged instruments in interstate commerce. The two cases were tried in succession. The jury in the first case announced its guilty verdict in open court in the presence of the jury panel from which the jurors who were to try the second case were selected. Petitioner objected, but the objection was overruled. This Court reversed, holding that prospective jurors who have sat in the courtroom and heard a verdict returned against an individual immediately prior to that individual's trial on a similar charge should be automatically disqualified.[19]

In short, this Court's cases do not establish that an automatic disqualification rule is never appropriate. To the contrary, *Leonard* reveals that the Court has employed such a rule in those limited circumstances presenting an unusually high probability that a juror is biased and a similarly high probability that a hearing will not reveal that bias.

D

The majority also emphasizes that federal courts exercising habeas corpus jurisdiction must ordinarily defer to state-court findings of fact. It points to 28 U. S. C. § 2254(d),

[19] A number of lower federal courts have also suggested that implied-bias rules may be appropriate in some circumstances. See, *e. g.*, *McCoy* v. *Goldston*, 652 F. 2d 654 (CA6 1981) (bias should be implied and new trial granted where juror conceals information that would have resulted in disqualification for cause); *United States* v. *Allsup*, 566 F. 2d 68, 71–72 (CA9 1977) (new trial should be granted in robbery trial where two of jurors worked for bank that had been robbed); *Deschenes* v. *United States*, 224 F. 2d 688 (CA10 1955) (dictum) (in some circumstances prejudice must be presumed and court, as matter of law, must grant a new trial); *Cavness* v. *United States*, 187 F. 2d 719 (CA5 1951) (dictum) (same). See also *United States* v. *Kyle*, 152 U. S. App. D. C. 141, 145, 469 F. 2d 547, 551 (1972) (Bazelon, J., dissenting) (defendant claims that juror who had been castigated by judge when serving as a juror in another trial would be prejudiced against him; "[a] Procrustean demand for a showing of prejudice is ill-suited to a case where the very integrity of the judicial process is at stake and where the inability to demonstrate prejudice offers little assur-

which provides that state-court factfinding should be presumed correct. Of course, federal courts have limited power of review in habeas corpus proceedings. I think it clear, however, that deference is not appropriate under the circumstances of this case.

As I have already explained, I do not believe that it was possible for the state court to determine, on the basis of an evidentiary hearing, whether Smith was biased. The state factfinding was inherently unreliable. Section 2254(d) recognizes that deference is not appropriate in such cases. It provides that the presumption in favor of state factfinding may be overcome when "the applicant did not receive a full, fair, and adequate hearing in the state court proceeding," or when "he was otherwise denied due process of law." §§ 2254(d)(6), (7). The evidentiary hearing conducted here was not fair and adequate. Furthermore, because the hearing could not protect sufficiently the right to an impartial jury, respondent was denied due process. Under the circumstances, § 2254(d) does not bar review of the state-court decision.

III

I would also affirm the decision of the Court of Appeals on an alternative ground. Respondent was prejudiced by the

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ance that prejudice did not exist"), cert. denied, 409 U. S. 1117 (1973). But see *United States* v. *Brown*, 644 F. 2d 101, 104–105 (CA2 1981) (court refuses to " 'create a set of unreasonably constricting presumptions that jurors be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where . . . there is no showing of actual bias or prejudice' ") (quoting *Mikus* v. *United States*, 433 F. 2d 719, 724 (CA2 1970)).

Almost 200 years ago, in *United States* v. *Burr*, 25 Fed. Cas. 49, 50 (No. 14,692g) (CC Va. 1807), Chief Justice Marshall indicated that he believed implied-bias rules were appropriate in some circumstances. A person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it supposes prejudice, because in general persons in a similar situation would feel prejudice." *Ibid.*

prosecutors' failure to disclose during the trial their knowledge that juror Smith had applied for a job with the Office of the District Attorney. If the prosecutors had informed the court in a timely fashion, an alternate juror would almost certainly have been selected, thus ending any danger of bias.

The prosecutors' conduct in withholding the information was clearly improper. At the evidentiary hearing, they claimed that they failed to disclose the fact that Smith had applied for a job with their office in part because they were caught up in preparations for the final stages of trial. This explanation is not convincing. At the close of the evidence, the prosecutors revealed that another juror, Bethel, had been arrested on a narcotics charge prior to trial and had agreed to cooperate with the District Attorney's Office in exchange for dismissal of the charges. After this disclosure, and an *in camera* hearing, the parties consented to the discharge of this juror, and his replacement by one of four alternates. The fact that the prosecutors were willing to disclose information concerning Bethel suggests that they failed to reveal Smith's conduct, not because of time pressures, but because they believed that Smith's presence on the jury would be valuable.[20] Even the petitioner now concedes that the prosecutors should have informed the trial judge and the defense as soon as they learned of Smith's application, and that their failure to do so was inexcusable.

The majority argues that prosecutorial misconduct, by itself, is not sufficient to justify reversal of a conviction in ha-

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[20] The state trial judge, the District Court, and the Court of Appeals all condemned the prosecuting attorneys' conduct. The trial judge stated that the failure to inform the court and defense counsel of Smith's application was "a serious error in judgment," *People* v. *Phillips*, 87 Misc. 2d 613, 628, 384 N. Y. S. 2d 906, 916 (1975), and "unique misjudgment," *id.*, at 631, 384 N. Y. S. 2d, at 918. See also 485 F. Supp. 1365, 1369–1370 (SDNY 1980); 632 F. 2d 1019, 1023 (CA2 1980).

beas corpus proceedings.[21] It relies primarily on this Court's decisions in *United States* v. *Agurs*, 427 U. S. 97, 110, 112 (1976), and *Brady* v. *Maryland*, 373 U. S. 83, 87, 92 (1963), which suggest that the constitutional obligation to disclose material evidence is not measured simply by the moral culpability of the prosecutor, and that relief is ordinarily appropriate only when the defendant was prejudiced by the prosecutor's actions.[22] Even if the majority is correct in holding that prejudice is also required where the prosecutor fails to disclose information suggesting that a juror might be biased, I think it clear that respondent was prejudiced here. If the fact that Smith had applied for a job had been promptly disclosed, respondent's jury trial right could have been protected.

If disclosure had been made during trial, the parties might simply have agreed that Smith should be replaced with one of

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[21] The majority also points out that federal courts do not have supervisory power over state courts, and that as a result, habeas corpus review of a state-court conviction based on prosecutorial misconduct must focus on possible due process violations. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974).

[22] Depending on the nature of the prosecutor's misconduct, the prejudice requirement may be easily satisfied. If the prosecutor knowingly presents perjured testimony, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States* v. *Agurs*, 427 U. S., at 103–104. After all, presentation of perjured testimony is "a corruption of the truth-seeking function of the trial process." *Id.*, at 104. Where the prosecutor fails to comply with a request for specific evidence, and if there is a substantial basis for claiming that the evidence was material, the failure to disclose is rarely excused. *Brady* v. *Maryland*, 373 U. S., at 87. The defendant faces a substantial burden only if the prosecutor fails to disclose material evidence, when no specific request for the evidence was ever made. In this circumstance, the verdict may be set aside if the evidence creates a reasonable doubt that did not otherwise exist. *United States* v. *Agurs*, *supra*, at 112.

the alternates. Such an agreement was reached with respect to juror Bethel. The trial judge might also have exercised his power under N. Y. Crim. Proc. Law § 270.35 (McKinney 1971), which provides that "[i]f at any time after the trial jury has been sworn and before its rendition of a verdict the court is satisfied, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve . . . , or that a juror has engaged in misconduct of a substantial nature . . . , the court may, if an alternative juror . . . is available for service, discharge such trial juror and order that he be replaced."[23] Both of these simple remedies would have eliminated the possibility of juror bias.

At the very least, as the trial judge himself stated, if disclosure had been made during trial he would have conducted a hearing to determine whether Smith had engaged in misconduct or whether he was actually biased. As I have already suggested, I have serious doubts whether an evidentiary hearing of this nature could ever be reliable. However, a hearing during trial is far more likely to reveal evidence of bias than a post-trial hearing. The pressures on a juror in Smith's position would be much less substantial. After trial, he would have to admit that he had been unable to obey his oath as a juror, and that he had been unfair in evaluating the evidence. During trial, on the other hand, he would only have to state that his pending application for a job with the prosecutor's office might affect his ability to weigh the evidence fairly.

Just as important, the pressures on the judge are much less substantial where the hearing is held during the course of a trial. During trial, if the judge finds that a juror is biased, he can simply replace the juror with an alternate.

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[23] The failure to disclose possible juror bias can be analogized to a prosecutor's knowing use of perjured testimony. Both forms of prosecutorial misconduct result in corruption of the truth-seeking function of the trial process. See *United States* v. *Agurs*, *supra*, at 105; see also n. 20, *supra*. Thus, in this context also, the conviction should be set aside if there is any

After trial, if actual bias is found, the only remedy is to set aside the conviction and begin a new trial. Any judge would hesitate before taking such action. The pressures must have been particularly great in this case. Respondent was first tried in 1972. When the jury was unable to reach a verdict, a mistrial was declared. Respondent's second trial did not begin until two years later. The second trial lasted nine weeks, and 44 witnesses were called to testify. Under these circumstances, where a third trial would have led to even more expense and delay, a judge would be reluctant to set aside the conviction.

In short, if the prosecutors had not withheld the information about Smith's job application, it is quite likely that Smith would have been excused and replaced with an alternate. If a replacement had been made, the substantial danger of juror bias would have been eliminated. Thus, under the circumstances, respondent was prejudiced by the prosecutors' misconduct. Given the existence of this prejudice, and the fundamental importance of the right to an impartial jury, I would set aside the conviction.

The limited power of federal courts in habeas corpus proceedings poses no obstacle to this conclusion. Although the trial judge found during a post-trial hearing that Smith was not actually biased, deference to state-court factfinding is not required where the evidentiary hearing on which the factfinding is based is inherently unreliable. See *supra*, at 238–239. The prosecutors' misconduct in this case deprived respondent of a hearing during trial, and of the opportunity to substitute an alternate juror. Where the prosecutors' conduct acted to deprive respondent of this alternative, the State cannot, consistent with due process, relegate respondent's right to an impartial jury to a belated, inadequate post-trial hearing.

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reasonable likelihood that the material omission could have affected the judgment of the jury. See 427 U. S., at 103–104; n. 20, *supra*. Here, clearly, such a reasonable likelihood does exist.

IV

The majority adopts a completely unrealistic view of the efficacy of a post-trial hearing, and thus fails to accord any meaningful protection to the right to an impartial jury, one of the most valuable rights possessed by criminal defendants. I would affirm the judgment of the Court of Appeals on the ground that a juror who applies for employment with the office of the prosecutor and vigorously pursues that employment throughout the course of the trial is impliedly biased. I would also affirm on the alternative ground that the prosecutors improperly failed to disclose during trial that the juror applied for a job, thereby prejudicing respondent by depriving him of the opportunity to substitute an unbiased alternate juror.

The majority concedes that due process means an unbiased jury, "capable and willing to decide the case solely on the evidence." *Ante*, at 217. All respondent has asked for is the opportunity to be tried by such a jury. If the prosecutors had taken the simple step of informing the trial judge that Smith had applied for employment with their office, Smith could have been replaced, and respondent would have received an opportunity to be tried by an impartial jury. Because the prosecutors intentionally failed to do so, however, a juror who was almost certainly prejudiced against respondent participated in the deliberations. If due process really does mean a full and fair opportunity to be tried by an unbiased jury, "capable and willing to decide the case solely on the evidence"—then in this case, due process has been denied.

TULLY ET AL. *v.* MOBIL OIL CORP. ET AL.

ON APPEAL FROM THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

No. 81–96. Decided February 22, 1982

Appellees, oil companies that are subject to New York State's gross receipts tax on their revenues derived from activities within the State, filed suit in Federal District Court challenging the provision of the tax statute that prohibits oil companies from passing on the cost of the tax in the prices of their products sold in the State. The statute also provides that the tax shall self-destruct if the antipassthrough provision is adjudged to be invalid or if its enforcement is enjoined. The court held that the antipassthrough provision was pre-empted by federal price control authority under the Emergency Petroleum Allocation Act and enjoined its enforcement. The Temporary Emergency Court of Appeals affirmed, but noted that the federal statute would expire by its own terms on September 30, 1981, and that expiration of the Act would signal the end of federal concern in the area.

Held: The judgment is vacated, and the case is remanded for reconsideration in light of the expiration of federal price control authority. Since the District Court's injunction did not terminate with the expiration of the federal statute, in its present form the declaration of the invalidity of the antipassthrough provision and the injunction against its enforcement have no current validity and must be set aside. The Temporary Emergency Court of Appeals should decide in the first instance what effect, if any, the expiration of federal price authority has on collateral matters raised by the parties concerning appellees' authority to pass through to consumers taxes that were paid or accrued prior to October 1, 1981, and the validity of the tax itself in view of the statute's "self-destruct" provisions.

653 F. 2d 497, vacated and remanded.

PER CURIAM.

In June 1980, New York State established a two percent tax on the gross receipts of oil companies limited to their revenues derived from their activities within the State. N. Y. Tax Law § 182, ch. 272 (McKinney Supp. 1980). Desiring that the tax actually be borne by the oil companies, its intended objects, rather than by consumers, the New York

Legislature prohibited the companies from passing on the cost of the tax in the prices of their products sold in New York. *Ibid.* The passthrough prohibition was sufficiently vital that the law provided that if the prohibition was "adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review" the tax would cease to exist on the 10th day thereafter. Ch. 272, § 12(a). All tax liabilities accrued to that day, however, would remain in full force and effect. It was also provided that the tax would self-destruct 10 days after any court "issues any order, judgment, injunction or stay prohibiting" the enforcement of the antipassthrough provision. Ch. 272, § 12(b).

The appellees are 10 oil companies subject to the tax who instituted suit to enjoin the antipassthrough provision, claiming that it was in conflict with and therefore pre-empted by federal price control authority under the Emergency Petroleum Allocation Act (EPAA), 15 U. S. C. § 751 *et seq.* The District Court agreed with that position and enjoined enforcement of the provision. 499 F. Supp. 888 (NDNY 1980). The Court of Appeals for the Second Circuit held that appellate consideration of the pre-emption issue was a matter for the Temporary Emergency Court of Appeals (TECA). 639 F. 2d 912, cert. denied *sub nom. Tully* v. *New England Petroleum Corp.*, 452 U. S. 967 (1981). That court, in turn, affirmed the District Court's decision, but noted that the federal statute would expire by its own terms in September 1981, and that expiration of the Act "will signal the end of federal concern in this area." 653 F. 2d 497, 502 (1981).

New York State tax officials then appealed TECA's decision to this Court. We now vacate the judgment and remand the case to TECA for reconsideration in light of the expiration of federal price control authority.[1]

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[1] We find that this is a proper appeal under 28 U. S. C. § 1254(2). The appellees argue that this Court only has jurisdiction to review TECA deci-

The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision. *Kremens* v. *Bartley*, 431 U. S. 119, 129 (1977); *Fusari* v. *Steinberg*, 419 U. S. 379, 387 (1975). The expiration date for the federal statute has come and gone; the only barrier to the enforcement of the antipassthrough provision no longer exists. However, the injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area. Thus, in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside.[2]

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sions by writ of certiorari. They point to the jurisdictional provisions incorporated in the Act which provide that "[w]ithin thirty days after entry of any judgment or order by the [TECA], a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in [28 U. S. C. § 1254]." § 211(g) of the Economic Stabilization Act of 1970 (ESA), 84 Stat. 800, note following 12 U. S. C. § 1904, incorporated by reference in the EPAA, 15 U. S. C. § 754(a). There is no indication that this provision, obviously directed at expediting review, was intended to substitute for § 1254(2)'s general grant of appellate jurisdiction over decisions from the "courts of appeals" invalidating state statutes on federal constitutional grounds. Congress has granted TECA "the powers of a circuit court of appeals with respect to the jurisdiction conferred upon it." ESA § 211(b)(1). It is logical that Congress intended its exercise of such powers to be subject to the same review.

[2] To be sure, the expiration provision contained in the EPAA states that "such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date." 15 U. S. C. § 760g.

Whatever bearing this saving clause may have upon other aspects of the case, it surely cannot mean that, despite the expiration of the pre-empting federal law, New York should be permanently enjoined from enforcing its antipassthrough provision.

Ordinarily, the determination that the law has so changed as to eliminate a conflict between federal and state law would conclude the dispute. In this case, however, both parties insist that an important controversy continues over the appellees' legal authority to pass through to consumers taxes that were paid or accrued prior to October 1. They also suggest that the validity of the New York tax itself is in question because of the "self-destruct" provisions of the statute. These matters are relevant to this litigation because, being predicated on the declaration of invalidity of the New York statute with respect to the period prior to October 1, 1981, they may constitute "remaining live issues [which] supply the constitutional requirement of a case or controversy." *Powell* v. *McCormack*, 395 U. S. 486, 497 (1969). Now that the operation of the passthrough prohibition is not blocked by conflicting federal law, a question arises as to the degree to which the resolution of these secondary issues will turn on the earlier finding of pre-emption, even if correct. Is there, for example, any federal interest that would prevent the State of New York from now enforcing its law so as to prevent appellees from passing through taxes which accrued prior to October 1?

We express no opinion on the ultimate merit of these contentions. We leave to TECA, a court intimately familiar with the intricacies of federal energy regulation, the task of deciding in the first instance what effect, if any, the expiration of federal price authority has on these collateral matters.[3]

Regardless of what TECA may decide with respect to those issues, it is clear that the judgment and injunction are not appropriately framed for this Court to review. There-

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[3] One question which arises is whether the saving clause in the federal statute, see n. 2, *supra*, applies here or whether it should be read as concerned only with administrative or judicial proceedings brought under the EPAA to enforce or otherwise adjudicate liabilities under that statute.

fore, the judgment of the Court of Appeals is vacated, and the case is remanded to TECA for reconsideration in light of the expiration of federal price control authority under the EPAA.

So ordered.

JUSTICE BRENNAN would set the case for oral argument.

JUSTICE STEVENS, dissenting.

Federal price control authority under the Emergency Petroleum Allocation Act, 15 U. S. C. § 751 *et seq.*, pre-empted the authority of the State of New York to control prices of petroleum products. In this case, the Temporary Emergency Court of Appeals held that the antipassthrough provision of N. Y. Tax Law § 182 (McKinney Supp. 1980) was "clearly a price control measure"[1] that could not be enforced while the federal authority was effective. The court recognized, however, that the federal bar would expire on September 30, 1981, and that the import of its decision was limited to the period prior to that date.[2]

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[1] "The anti-passthrough provision is clearly a price control measure in exercise of the State's police power. The stated purpose of the provision is to prevent 'further increases in the price of petroleum products to consumers,' and to prevent the tax from 'fueling inflation by prohibiting pass through of such tax to the consumers of this state.' N. Y. Act, Ch. 272, § 1. As the Court of Appeals noted in another context, '[t]his objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products.' *Mobil Oil Corp.* v. *Tully*, *supra*, at 918. We agree with this observation." 653 F. 2d 497, 501 (TECA 1981).

[2] "Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPCA [Energy Policy Conservation Act, which added 15 U. S. C. § 760g to the EPAA] expires by its terms on September 30, 1981. 15 U. S. C. § 760g. In the meantime, the goals to control the impact of OPEC determinations regarding production and prices are viable. At the present time price decontrol has been determined by the President to be the best method to achieve an enunciated goal. The state statute under attack here is an instrument of price control and in con-

In its appeal to this Court, the New York State Tax Commission does not ask us to consider any question concerning the meaning or enforceability of its laws during the period after the expiration of federal price control authority. Such questions are not our business and are not presented by this litigation. Rather, the appeal by the Commission presents the question whether the then-existing federal price control authority prevented the State from fixing the economic burden of a tax imposed upon companies that sell petroleum products.[3] The Temporary Emergency Court of Appeals

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flict with the objectives of the program. See *Ray* v. *Atlantic Richfield*, 435 U. S. 151, 178 . . . (1978).

"When the statute expires in September 1981, it will signal the end of federal concern in this area. Until that time the state statute is in conflict with the federal statute and regulations." *Id.*, at 502.

[3] The three questions presented in the jurisdictional statement read as follows:

"1. Does the Tax Injunction Act, 28 U. S. C. § 1341, deprive federal district courts of jurisdiction to enjoin enforcement of a provision of a New York State tax law when the effect of the injunction would be to terminate the assessment, levy, and collection of the tax?

"2. Did the Energy Policy and Conservation Act of 1975 and the revocation, pursuant to its terms, by the Department of Energy of regulations that had set maximum allowable prices for certain petroleum products, prohibit the states from fixing the economic burden of a tax imposed upon companies that sell petroleum products?

"3. Did those federal regulations, when they were effective, prevent the states from exercising such a power?" Juris. Statement ii.

I am satisfied that the Court of Appeals for the Second Circuit correctly answered the first question when it held that the antipassthrough provision of the New York statute was an exercise of the State's police power and not its taxing power. 639 F. 2d 912, 917–918, cert. denied *sub nom. Tully* v. *New England Petroleum Corp.*, 452 U. S. 967 (1981). The injunction entered by the District Court did not enjoin New York from collecting the tax; it merely enjoined the enforcement of the antipassthrough provision. Unless that injunction is construed to have expired by its terms, it will, of course, be subject to modification, on the Commission's motion, to eliminate any federal objection to the enforcement of the antipassthrough provision subsequent to the expiration of federal price control authority.

correctly answered that question. Since the subsequent expiration of the federal authority has no bearing on that question, I simply would affirm its judgment.[4]

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[4] I agree with the Court that our appellate jurisdiction has properly been invoked. See *ante*, at 246–247, n. 1.

UNITED STATES *v.* LEE

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

No. 80–767. Argued November 2, 1981—Decided February 23, 1982

Appellee, a farmer and carpenter, is a member of the Old Order Amish, who believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. During certain years when he employed other Amish to work on his farm and in his carpentry shop, appellee failed to withhold social security taxes from his employees or to pay the employer's share of such taxes because he believed that payment of the taxes and receipt of benefits would violate the Amish faith. After the Internal Revenue Service assessed him for the unpaid taxes, appellee paid a certain amount and then sued in Federal District Court for a refund, claiming that imposition of the taxes violated his First Amendment free exercise of religion rights and those of his employees. The District Court held the statutes requiring appellee to pay social security taxes unconstitutional as applied, basing its holding on both 26 U. S. C. § 1402(g), which exempts from social security taxes, on religious grounds, self-employed Amish and others, and the First Amendment.

Held:

1. The exemption provided by § 1402(g), being available only to self-employed individuals, does not apply to employers or employees, and hence appellee and his employees are not within its provisions. P. 256.

2. The imposition of social security taxes is not unconstitutional as applied to such persons as appellee who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. Pp. 256–261.

(a) While there is a conflict between the Amish faith and the obligations imposed by the social security system, not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. Pp. 256–258.

(b) Widespread individual voluntary coverage under social security would undermine the soundness of the social security system, and would make such system almost a contradiction in terms and difficult, if not impossible, to administer. Pp. 258–259.

(c) It would be difficult to accommodate the social security system with myriad exceptions flowing from a wide variety of religious beliefs such as the Amish. *Wisconsin* v. *Yoder*, 406 U. S. 205, distinguished. There is no principled way for purposes of this case to distinguish between general taxes and those imposed under the Social Security Act. The tax system could not function if denominations were allowed to challenge it because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax. Pp. 259–260.

(d) Congress in § 1402(g) has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress explicitly provides otherwise. Pp. 260–261.

497 F. Supp. 180, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 261.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, *Acting Assistant Attorney General Murray*, *Stuart A. Smith*, and *Gary R. Allen*.

Francis X. Caiazza argued the cause and filed a brief for appellee.*

**William Bentley Ball* and *Phillip J. Murren* filed a brief for the National Committee for Amish Religious Freedom as *amicus curiae* urging affirmance.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to determine whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. 450 U. S. 993 (1981). The District Court concluded that the Free Exercise Clause prohibits forced payment of social security taxes when payment of taxes and receipt of benefits violate the taxpayer's religion. We reverse.

I

Appellee, a member of the Old Order Amish, is a farmer and carpenter. From 1970 to 1977, appellee employed several other Amish to work on his farm and in his carpentry shop. He failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes.[1]

In 1978, the Internal Revenue Service assessed appellee in excess of $27,000 for unpaid employment taxes; he paid $91—

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[1] The Social Security Act and its subsequent amendments provide a system of old-age and unemployment benefits. 26 U. S. C. § 3101 *et seq.* (1976 ed. and Supp. III). These benefits are supported by various taxes, including, relevant to this appeal, the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) taxes. The FICA tax is a tax paid in part by employees through withholding, 26 U. S. C. § 3101 (1976 ed., Supp. III), and in part by employers through an excise tax. 26 U. S. C. § 3111 (1976 ed., Supp. III). The FUTA tax is an excise tax imposed only on employers. 26 U. S. C. § 3301. Both taxes are based on the wages paid to employees, and the recordkeeping and transmittal of funds are obligations of the employer. Only the FICA tax is collected from self-employed individuals.

In this case appellee failed to pay the employer's portion of FICA and FUTA taxes and failed to withhold his employee's contributions to the FICA taxes. An employer is liable for payment of the employee's share of FICA taxes whether or not he withholds the required amount of the employee's contribution. 26 U. S. C. § 3102(b).

the amount owed for the first quarter of 1973—and then sued in the United States District Court for the Western District of Pennsylvania for a refund, claiming that imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees.[2]

The District Court held the statutes requiring appellee to pay social security and unemployment insurance taxes unconstitutional as applied. 497 F. Supp. 180 (1980). The court noted that the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system.[3] The court also accepted appellee's contention that the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system. The District Court observed that in light of their beliefs, Congress has accommodated self-employed Amish and self-employed members of other religious groups with similar beliefs by providing exemptions from social security taxes. 26 U. S. C. § 1402(g).[4] The court's holding was based on both

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[2] Appellee also requested injunctive relief to prevent the Commissioner of Internal Revenue from attempting to collect the unpaid balance of the assessments. Under the Internal Revenue Code, injunctive relief is to be granted sparingly and only in exceptional circumstances. 26 U. S. C. § 7421(a) (1976 ed., Supp. III). The District Court therefore denied injunctive relief, but noted that should the Government attempt to collect the remaining payments "further Court relief could be requested." 497 F. Supp. 180, 184 (1980).

[3] Appellee indicates that his scriptural basis for this belief was: "But if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel." (I Timothy 5: 8.)

[4] Title 26 U. S. C. § 1402(g) provides, in part:

"(1) Exemption

Any individual may file an application . . . for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes

the exemption statute for the self-employed and the First Amendment; appellee and others "who fall within the carefully circumscribed definition provided in 1402(g) are relieved from paying the employer's share of [social security taxes] as it is an unconstitutional infringement upon the free exercise of their religion."[5] 497 F. Supp., at 184.

Direct appeal from the judgment of the District Court was taken pursuant to 28 U. S. C. § 1252.

II

The exemption provided by § 1402(g) is available only to self-employed individuals and does not apply to employers or employees. Consequently, appellee and his employees are not within the express provisions of § 1402(g). Thus any exemption from payment of the employer's share of social security taxes must come from a constitutionally required exemption.

A

The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment

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payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act)."

In order to qualify for the exemption, the applicant must waive his right to all social security benefits and the Secretary of Health and Human Services must find that the particular religious group makes sufficient provision for its dependent members.

[5] The precise basis of the District Court opinion is not clear. The court recognized that on its face § 1402(g) does not apply to appellee because he is not a self-employed individual. The District Court nonetheless used the language of § 1402(g) to provide an exemption for appellee. The court's decision to grant appellee an exemption, however, appears to be based on its view that the statute was unconstitutional as applied. Consequently, this Court has jurisdiction under 28 U. S. C. § 1252 to hear the appeal. See also *United States* v. *American Friends Service Committee*, 419 U. S. 7, 9, n. 4 (1974).

of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish. The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. Although the Government does not challenge the sincerity of this belief, the Government does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 716 (1981).[6] We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional. See, *e. g.*, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Reynolds* v. *United States*, 98 U. S. 145 (1879). The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental inter-

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[6] This is not an instance in which the asserted claim is "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S., at 715. At least one other religious organization has sought an exemption under § 1402(g). See also *Henson* v. *Commissioner*, 66 T. C. 835 (1976) (member of Sai Baba denied exemption because although opposed to insurance on religious grounds, the faith did not provide for its dependent members).

est. *Thomas, supra; Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Gillette* v. *United States*, 401 U. S. 437 (1971); *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

B

Because the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees.[7] The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans.[8] The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965). Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the Government's interest in as-

[7] The Social Security Act was enacted in 1935 to provide supplementary retirement benefits. Over the following 45 years coverage has broadened, and the cost of the system has increased dramatically. See A. Abraham & D. Kopelman, Federal Social Security (1979). In 1939 the Act was amended to provide insurance benefits for retired workers, auxiliaries of retired workers, and survivors of deceased workers. In 1950 coverage was extended to self-employed workers and to select other employees previously excluded. In 1954 and 1956 disability benefits were added and in 1965 Medicare benefits were made available to participants in the system.

[8] National Commission on Social Security, Social Security in America's Future 5 (1981).

suring mandatory and continuous participation in and contribution to the social security system is very high.[9]

C

The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest. In *Braunfeld* v. *Brown*, 366 U. S. 599, 605 (1961), this Court noted that "to make accommodation between the religious action and an exercise of state authority is a particularly delicate task . . . because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing . . . prosecution." The difficulty in attempting to accommodate religious beliefs in the area of taxation is that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld, supra*, at 606. The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see, *e. g.*, *Thomas, supra; Sherbert, supra*, but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld, supra*, at 606.[10]

Unlike the situation presented in *Wisconsin* v. *Yoder*, *supra*, it would be difficult to accommodate the comprehen-

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[9] The fiscal soundness of the social security system has been the subject of several studies and of congressional concern. See, *e. g.*, Congressional Budget Office, Paying for Social Security: Funding Options for the Near Term (1981).

[10] See, *e. g.*, *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944) (preacher not entitled to be free from taxes); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943) (same).

sive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference—in theory at least—is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. See, *e. g.*, *Lull* v. *Commissioner*, 602 F. 2d 1166 (CA4 1979), cert. denied, 444 U. S. 1014 (1980); *Autenrieth* v. *Cullen*, 418 F. 2d 586 (CA9 1969), cert. denied, 397 U. S. 1036 (1970). Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

III

Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others.[11] Confining the § 1402(g) exemption to the self-

[11] The District Court read this as extending to the present claims. We need not decide whether the Free Exercise Clause compelled an exemption as provided by § 1402(g); Congress' grant of the exemption was an effort toward accommodation. Nor do we need to decide whether, if Congress had, as the District Court believed, intended § 1402(g) to reach this case, conflicts with the Establishment Clause would arise.

employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from the generality of wage earners employed by others.

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.[12]

Accordingly, the judgment of the District Court is reversed, and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE STEVENS, concurring in the judgment.

The clash between appellee's religious obligation and his civic obligation is irreconcilable. He must violate either an Amish belief or a federal statute. According to the Court, the religious duty must prevail unless the Government shows

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[12] We note that here the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits. Indeed, it would be possible for an Amish member, upon qualifying for social security benefits, to receive and pass them along to an Amish fund having parallel objectives. It is not for us to speculate whether this would ease or mitigate the perceived sin of participation.

that enforcement of the civic duty "is essential to accomplish an overriding governmental interest." *Ante*, at 257–258. That formulation of the constitutional standard suggests that the Government always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objectors. In my opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability.

Congress already has granted the Amish a limited exemption from social security taxes. See 26 U. S. C. § 1402(g). As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case. As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits. In view of the fact that the Amish have demonstrated their capacity to care for their own, the social cost of eliminating this relatively small group of dedicated believers would be minimal. Thus, if we confine the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case, the constitutional standard as formulated by the Court has not been met.

The Court rejects the particular claim of this appellee, not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process. The Court overstates the magnitude of this risk because the Amish claim applies only to a small religious community with an established welfare system of its own.[1]

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[1] The Amish claim is readily distinguishable from the typical claim to an exemption from general tax obligations on the ground that the taxpayer objects to the government's use of his money; in the typical case the taxpayer is not in any position to supply the government with an equivalent substitute for the objectionable use of his money.

Nevertheless, I agree with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim.[2] I believe, however, that this reasoning supports the adoption of a different constitutional standard than the Court purports to apply.

The Court's analysis supports a holding that there is virtually no room for a "constitutionally required exemption" on religious grounds from a valid tax law that is entirely neutral in its general application.[3] Because I agree with that holding, I concur in the judgment.

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[2] In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

[3] Today's holding is limited to a claim to a tax exemption. I believe, however, that a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this Court's holdings than does the standard articulated by the Court today. See, *e. g.*, *Gillette* v. *United States*, 401 U. S. 437 (selective service laws); *Braunfeld* v. *Brown*, 366 U. S. 599 (Sunday closing laws); *Prince* v. *Massachusetts*, 321 U. S. 158 (child labor laws); *Jacobson* v. *Massachusetts*, 197 U. S. 11 (compulsory vaccination laws); *Reynolds* v. *United States*, 98 U. S. 145 (polygamy law). The principal exception is *Wisconsin* v. *Yoder*, 406 U. S. 205, in which the Court granted the Amish an exemption from Wisconsin's compulsory school-attendance law by actually applying the subjective balancing approach it purports to apply today. The Court's attempt to distinguish *Yoder* is unconvincing because precisely the same religious interest is implicated in both cases, and Wisconsin's interest in requiring its children to attend school until they reach the age of 16 is surely not inferior to the federal interest in collecting these social security taxes.

There is also tension between this standard and the reasoning in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, and

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Sherbert v. *Verner*, 374 U. S. 398. Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability. Cf. *Harris* v. *McRae*, 448 U. S. 297, 349–357 (STEVENS, J., dissenting). A tax exemption entails no cost to the claimant; if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects. No comparable economic motivation could explain the conduct of the employees in *Sherbert* and *Thomas*. In both of those cases changes in work requirements dictated by the employer forced the employees to surrender jobs that they would have preferred to retain rather than accept unemployment compensation. In each case the treatment of the religious objection to the new job requirements as though it were tantamount to a physical impairment that made it impossible for the employee to continue to work under changed circumstances could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect. In all events, the decision in *Thomas* was clearly compelled by *Sherbert*.

HERWEG ET VIR *v.* RAY, GOVERNOR OF IOWA, ET AL.

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

No. 80–60. Argued January 13, 1982—Decided February 23, 1982

Section 1902(a)(17)(D) of the Social Security Act (Act) provides that, in calculating benefits, state Medicaid plans must not "take into account the financial responsibility of any individual for any applicant or recipient under the plan unless such applicant or recipient is such individual's spouse." Section 1902(a)(17)(B) provides that participating States must grant benefits to eligible individuals "taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of Health and Human Services (HHS)], available to the applicant or recipient." Section 1902(a)(10)(A) requires States that have not exercised the so-called § 209(b) option, to provide Medicaid assistance to all recipients of benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program. A federal regulation governing the "optional categorically needy" provides that if only one spouse is eligible for Medicaid, the States must "deem" income of the other spouse, *i. e.*, consider the latter's income as "available" to the Medicaid applicant, for one month after the spouses cease to live together, following which period only the income actually contributed may be considered. After petitioner wife, as a result of cerebral hemorrhages, was placed in a long-term care facility in Iowa, which has not exercised the § 209(b) option, her petitioner husband applied for Medicaid assistance on her behalf. She is part of the optional categorically needy since she is eligible for, but does not receive, SSI benefits. Iowa, in calculating the wife's Medicaid benefits, "deemed" or attributed income earned by the husband to the wife in a manner inconsistent with the federal regulation. Petitioners then filed suit in Federal District Court, challenging Iowa's "deeming" of the husband's income. After certifying a class of plaintiffs which included SSI recipients as well as the optional categorically needy, the District Court held that § 1902(a)(17) required Iowa's procedures to "provide for a factual determination in each instance of the amount of the spouse's income which is in fact reasonably available for the support of the institutionalized spouse," and that the federal time-limitation regulation was inconsistent with § 1902(a)(17), because it disabled the States in certain instances from considering the spouse's income as available to the applicant. In response to this order, Iowa adopted a procedure for making individualized factual determinations of the amount of income available to an institu-

tionalized spouse, and the District Court approved the plan. On petitioners' appeal, the Court of Appeals affirmed.

Held:

1. With regard to SSI recipients, the District Court's order conflicts with § 1902(a)(10)(A) of the Act, because it permits Iowa to deny Medicaid benefits to SSI recipients. To the extent that the order forbids "deeming" under any circumstances, it conflicts with the holding in *Schweiker* v. *Gray Panthers*, 453 U. S. 34, that Congress intended to permit a state Medicaid plan to deem the income from the applicant's spouse as part of the available income that the state plan may consider in determining eligibility. Pp. 272–273.

2. Section 1902(a)(17)(D) does not preclude the Secretary of HHS from promulgating regulations that impose time limitations upon the States' ability to "deem" income between spouses who do not share the same household. In imposing such time limitations, the Secretary has done nothing more than define what income is "available," pursuant to § 1902(a)(17)(B). There is nothing in § 1902(a)(17)(D) that precludes the Secretary from imposing these limitations or that either disables him from defining the term "available" in circumstances where the applicant and spouse no longer live together or gives the States authority to "deem" income unimpeded by the Secretary's broad authority under § 1902(a)(17)(B) to determine what income should be considered available to the Medicaid applicant. The Secretary has not exceeded his authority in promulgating the time-limitation regulation applicable in this case, and such regulation is neither arbitrary nor capricious. Pp. 273–278.

619 F. 2d 1265, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in part, *post*, p. 278. BURGER, C. J., filed a dissenting opinion, *post*, p. 279.

Neal S. Dudovitz argued the cause for petitioners. With him on the briefs were *Christine M. Luzzie* and *Gill Deford*.

Brent R. Appel, First Assistant Attorney General of Iowa, argued the cause for respondents. With him on the brief were *Thomas J. Miller*, Attorney General, *John Black*, Special Assistant Attorney General, and *Stephen C. Robinson*, Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee*, *Deputy Solicitor General Geller*, and *Robert P. Jaye* for the United States; and by *Silvia Drew Ivie* for the Gray Panthers.

JUSTICE REHNQUIST delivered the opinion of the Court.

Last Term in *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 49–50 (1981), we upheld the validity of federal Medicaid regulations that permit "deeming" of income between spouses in those States that have exercised the so-called "§ 209(b) option" provided for in the Social Security Act, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. III). "Deeming," in the parlance of the Social Security laws and regulations, means that a State determines eligibility by assuming that a portion of the spouse's income is "available" to the applicant. Because an individual's eligibility for Medicaid benefits depends in part on the financial resources that are "available" to him, "[d]eeming . . . has the effect of reducing both the number of eligible individuals and the amount of assistance paid to those who qualify." *Schweiker* v. *Gray Panthers*, *supra*, at 36. We rejected contentions that these regulations were arbitrary or capricious and that the regulations were inconsistent with § 1902(a)(17) of the Social Security Act, 42 U. S. C. § 1396a(a)(17).[1] 453 U. S., at 43. In

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[1] Section 1902(a)(17) provides that a state plan for medical assistance must

"include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any

the present case, we are called upon to decide to what extent the State of Iowa, an "SSI State," may consider the income of the institutionalized Medicaid applicant's noninstitutionalized spouse in determining eligibility for Medicaid.

As we explained in greater detail in *Gray Panthers*, *supra*, Medicaid as originally enacted "required participating States to provide medical assistance to 'categorically needy' individuals who received cash payments under one of four welfare programs established elsewhere in the [Social Security] Act." *Id.*, at 37. This program was restructured in 1972 by Congress, when it replaced three of the four categorical programs with Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U. S. C. § 1381 *et seq.* (1976 ed. and Supp. III). Fearing that some States might withdraw from the Medicaid program rather than bear the increased costs imposed by the restructuring, Congress offered the States the "§ 209(b) option." 42 U. S. C. § 1396a(f). Under the § 209(b) option, the States may elect to provide Medicaid assistance only to those individuals who would have been eligible under the State's Medicaid plan in effect on January 1, 1972. In other words, the § 209(b) option allows the States to avoid the effect of the link between the SSI and Medicaid programs: States may become either "§ 209(b) States" or "SSI States."

If a State participates in the Medicaid program without exercising the § 209(b) option, the State is required to make Medicaid assistance available to all recipients of SSI benefits. 42 U. S. C. § 1396a(a)(10)(A); 42 CFR § 435.120 (1980).[2] SSI States, however, are not limited to providing Medicaid benefits to SSI recipients. The Medicaid program offers participating States the option of providing Medicaid assist-

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other type of remedial care recognized under State law." 42 U. S. C. § 1396a(a)(17).

[2] The SSI program, in turn, has its own eligibility requirements, which include "deeming" provisions. See 42 U. S. C. §§ 1382, 1382c(b), (f)(1).

ance to certain other groups of individuals, see 42 U. S. C. § 1396a(a)(10)(C), one of which is the "optional categorically needy." See 42 CFR §§ 435.200–435.231 (1980).[3] Included among the "optional categorically needy," are (1) individuals who would be eligible for, but for some reason are not receiving, SSI benefits and (2) individuals who would be eligible for SSI benefits but for their institutionalized status. 42 CFR §§ 435.210–435.211 (1980).

With regard to the "optional categorically needy," the Secretary's regulations require the States to "deem" the income and resources of spouses who share the same household. 42 CFR § 435.723(b) (1980). Where both spouses are eligible for Medicaid, the States must "deem" income for the first six months after the spouses cease to live together. After this 6-month period, the States may consider only the income and resources actually contributed by one spouse to the other. § 435.723(c). If only one spouse is eligible for Medicaid, a similar rule applies but the time period is one month instead of six. § 435.723(d).[4] In effect, § 435.723 places time limita-

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[3] The States, if they choose to do so, may extend Medicaid coverage to the "medically needy." 42 U. S. C. § 1396a(a)(10)(C); 42 CFR §§ 435.300–435.325, 435.800–435.845 (1980). Since Iowa does not extend Medicaid assistance to the medically needy, the Secretary's deeming regulations applicable to this optional program are not at issue in this case. See 42 CFR § 435.822 (1980).

[4] Title 42 CFR § 435.723 (1980) provides:

"(a) If the agency provides Medicaid to SSI recipients, it must meet the requirements of this section in determining eligibility of aged, blind, and disabled individuals under the optional coverage provisions of §§ 435.210, 435.211, and 435.231.

"(b) The agency must consider income and resources of spouses living in the same household as available to each other, whether or not they are actually contributed.

"(c) If both spouses apply or are eligible as aged, blind, or disabled and cease to live together, the agency must consider their income and resources as available to each other for the first 6 months after the month they cease to live together. After this 6-month period, the agency must

tions on the States' ability to consider the spouse's income as "available" to the applicant after the spouses cease to live together. The question addressed by the lower courts, and now presented for our decision, is whether this regulation is a permissible exercise of the Secretary's authority under the Act to define what income is "available."

I

Petitioner Elvina Herweg has been in a comatose state since August 1976 as a result of two cerebral hemorrhages. When she was placed in a long-term care facility, her husband, petitioner Darrell Herweg, applied for Medicaid assistance on Elvina's behalf. Elvina does not receive SSI benefits, although the parties and the United States as *amicus curiae* agree that she is eligible to receive such benefits.[5] Iowa applied its own formula to determine Elvina's eligibility for Medicaid and to ascertain the amount Darrell would be required to contribute toward his wife's care. This formula was based on the income Darrell earned as a butcher and on standard living allowances allowed Darrell and his three children living at home. In other words, Iowa was "deeming," or attributing, income earned by one spouse to the other.

Iowa, however, was deeming in a manner inconsistent with the Secretary's regulations, which place time limitations upon the States' ability to consider as available to the applicant his spouse's income where the spouses do not share the same household. *Supra*, at 269 and this page, and n. 4. Because Elvina was institutionalized and because Darrell is not

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consider only the income and resources that are actually contributed by one spouse to the other.

"(d) If only one spouse in a couple applies or is eligible and they cease to live together, the agency must consider only the income and resources of the ineligible spouse that are actually contributed to the eligible spouse after the month in which they cease to live together."

[5] Elvina, therefore, is considered part of the optional categorically needy. 42 CFR § 435.210 (1980).

eligible for Medicaid, the Secretary's regulations prohibit Iowa from considering Darrell's income after one month from the time the couple ceased to live together. See 42 CFR § 435.723(d) (1980).

Petitioners filed the instant suit in the United States District Court for the Southern District of Iowa challenging Iowa's "deeming" of the income of a Medicaid applicant's spouse.[6] After certifying a class of plaintiffs,[7] the District Court held that § 1902(a)(17) of the Social Security Act, 42 U. S. C. § 1396a(a)(17), required Iowa's procedures to "provide for a factual determination in each instance of the amount of the spouse's income which is in fact reasonably available for the support of the institutionalized spouse. . . . Such determination must give due consideration to the individual obligations and the particular needs of each spouse and family." 443 F. Supp. 1315, 1319 (1978). In interpreting § 1902(a)(17), the District Court concluded that "'deeming' is contrary to congressional intent whether income of the non-institutionalized spouse is deemed available or unavailable." *Id.*, at 1320. The District Court noted that the predecessor to 42 CFR 435.723 (1980)[8] was inconsistent with its interpretation of § 1902(a)(17). In the District Court's view, therefore, the Secretary's regulation was inconsistent with

[6] Petitioners' challenge was based both on statutory and constitutional grounds. Petitioners contended that Iowa's procedures were in conflict with § 1902(a)(17) of the Social Security Act and with the Secretary's regulations, now codified at 42 CFR § 435.723 (1980). Petitioners also contended that Iowa's procedures violated the Equal Protection Clause and the Due Process Clause. Petitioners' constitutional claims were not considered either by the District Court or by the Court of Appeals and are not before this Court.

[7] The District Court certified a class consisting of "all married couples residing in Iowa of which: (1) one spouse is eligible for Medicaid and requires institutionalization; and (2) the other spouse is not institutionalized; and (3) the non-institutionalized spouse has income which is, under current state procedures, being deemed available to the institutionalized spouse." 443 F. Supp. 1315, 1320 (1978).

[8] 45 CFR § 248.3 (1976).

§ 1902(a)(17) because the regulation disabled the States in certain instances from considering the spouse's income as available to the applicant.

In response to this order, Iowa adopted a procedure for making individualized factual determinations of the amount of income available to an institutionalized spouse. The District Court approved this plan and petitioners appealed. The Court of Appeals for the Eighth Circuit affirmed by an equally divided Court. 619 F. 2d 1265 (1980) (en banc). We reverse.

II

Although Elvina Herweg does not receive SSI benefits, the class certified without objection by the District Court includes SSI recipients. We therefore construe the order entered by the District Court, and the plan adopted by Iowa in response, as applying both to SSI recipients and to the optional categorically needy.

A

With regard to recipients of SSI benefits, the District Court's order clearly conflicts with § 1902(a)(10)(A) of the Social Security Act, 42 U. S. C. § 1396a(a)(10)(A), which requires States not having exercised the § 209(b) option to provide Medicaid assistance to all SSI recipients.[9] 42 CFR § 435.120 (1980). See *Beltran* v. *Myers*, 451 U. S. 625, 626, n. 3 (1981). The SSI program, contained in Title XVI of the Social Security Act, 42 U. S. C. § 1382 *et seq.* (1976 ed. and Supp. III), contains its own eligibility provisions. See, *e. g.*, 42 U. S. C. §§ 1382(a)(1), 1382c(b), (f)(1). Pursuant to the District Court's order, however, Iowa is permitted to deny

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[9] Section 1902(a)(10)(A) requires a state Medicaid plan to provide "for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, *or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter* . . . ." 42 U. S. C. § 1396a(a)(10)(A) (emphasis added).

Medicaid benefits to institutionalized SSI recipients if, after making an individualized factual determination, Iowa concludes that the income of the SSI recipient's spouse should be considered available even though it was not actually contributed. Because Congress has clearly spoken in this regard, to the extent it permits Iowa to deny Medicaid assistance to SSI recipients, the District Court's order cannot stand.[10]

In requiring individualized determinations of income available to the Medicaid applicant, the District Court held that the Secretary has exceeded his authority in permitting any "deeming" whatsoever. In *Schweiker* v. *Gray Panthers*, 453 U. S., at 45, however, we held that Congress intended to permit a state Medicaid plan to deem the income from the applicant's spouse as part of the available income which the state plan may consider in determining eligibility. Thus, to the extent that the District Court's order forbids deeming under any circumstances, the order conflicts with our decision in *Gray Panthers*.

B

The issue that remains, therefore, is whether § 1902(a)(17) precludes the Secretary from promulgating regulations that impose time limitations upon the States' ability to consider the income of the institutionalized applicant's spouse.

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[10] Although we do not believe that § 1902(a)(10)(A) can be characterized as ambiguous in this regard, the legislative history of the original Medicaid statute is rather explicit in requiring the participating States to provide medical assistance to recipients under the four categorical welfare programs then in existence. "[A] State plan to be approved must include provision for medical assistance for all individuals receiving aid or assistance under State plans approved under titles I, IV, X, XIV, and XVI. It is only if this group is provided for that States may include medical assistance to the less needy." S. Rep. No. 404, 89th Cong., 1st Sess., 77 (1965). Titles I, X, and XVI were respectively Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled, the three categorical welfare programs replaced by SSI. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 37–38, and nn. 1, 3 (1981). We find nothing in the adoption of the SSI program that would alter the meaning of § 1902(a)(10)(A).

Relying on § 1902(a)(17)(D),[11] respondents argue that the Secretary has exceeded his authority in placing time limitations upon the States' authority to consider the financial responsibility of spouses. Subsection (17)(D), respondents argue, evidences Congress' intent to permit the States to consider the financial responsibility of spouses and parents. Nothing in the statute or the legislative history,[12] respondents contend, suggests that Congress intended to prevent the States from enforcing their financial responsibility policies simply because the Medicaid applicant is institutionalized.

We think, however, that respondents overemphasize the effect of subsection (17)(D). That provision may not be read independently of subsection (17)(B). Subsection (17)(B) provides that participating States must grant benefits to eligible individuals "taking into account only such income and resources as are, *as determined in accordance with standards prescribed by the Secretary*, available to the applicant." 42 U. S. C. § 1396a(a)(17)(B) (emphasis added). In *Gray Panthers*, we recognized that subsection (17)(B) delegates to the Secretary broad authority to prescribe standards setting eligibility requirements for state Medicaid plans. In view of Congress' explicit delegation of authority to give substance to the meaning of "available," the Secretary's definition of the term is "'entitled to more than mere deference or weight.'"

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[11] Section 1902(a)(17)(D) provides that the States' standards for determining eligibility for, and the extent of, Medicaid assistance may "not take into account the financial responsibility of any individual for any applicant or recipient under the plan unless such applicant or recipient is such individual's spouse or such individual's child . . . ." 42 U. S. C. § 1396a(a)(17)(D).

[12] Respondents rely in particular on a portion of the 1965 Senate Report we quoted in *Gray Panthers:*

"The committee believes it is proper to expect spouses to support each other and parents to be held accountable for the support of their minor children and their blind or permanently and totally disabled children." S. Rep. No. 404, 89th Cong., 1st Sess., 78.

Schweiker v. *Gray Panthers*, *supra*, at 44, quoting *Batterton* v. *Francis*, 432 U. S. 416, 426 (1977). Because Congress has entrusted the primary responsibility of interpreting a statutory term to the Secretary rather than to the courts, his definition is entitled to "'legislative effect.'" *Schweiker* v. *Gray Panthers*, *supra*, at 44; *Batterton* v. *Francis*, *supra*, at 426. As in *Gray Panthers* and *Batterton*, our review is limited to determining whether the Secretary has exceeded his statutory authority and whether the regulation is arbitrary and capricious.

Although Congress has approved of some deeming of income between Medicaid applicants and their spouses, *Schweiker* v. *Gray Panthers*, *supra*, at 48, we cannot agree with respondents that Congress intended the States to enforce their spousal responsibility policies wholly unimpeded by the Secretary's congressionally authorized power to give substance to the term "available." In placing time limitations upon the States' ability to consider the spouse's income where the Medicaid applicant and his spouse no longer live together, the Secretary has done nothing more than define what income is "available." Although Congress intended that a spouse's income *could be* part of the income which the Secretary may determine should be considered by the States as available to the Medicaid applicant, *Schweiker* v. *Gray Panthers*, *supra*, at 45, we see nothing in subsection (17)(D) that precludes the Secretary from imposing upon the States the time limits at issue in the instant case. We find nothing in subsection (17)(D) either that disables the Secretary from defining the term "available" in such circumstances, or that gives the States authority to "deem" income unimpeded by the Secretary's authority under subsection (17)(B).[13] Subsection (17)(D) cannot

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[13] Contrary to the dissent, we do not interpret subsection (17)(D) as "authorizing" the States to deem, without any limitation, income between spouses. That subsection simply prohibits the States from considering the financial responsibility of any individual for the Medicaid applicant *unless* that individual is the applicant's spouse or parent. See nn. 1, 11, *supra*.

be read to *require* the Secretary to permit the States to consider the income of a spouse no longer living with the applicant as available to the applicant for an unlimited duration.

Although we do not agree with the contention of the United States, and apparently that of petitioners, that the time limitations in 42 CFR § 435.723 (1980) are *compelled* by the relationship between the Medicaid and SSI programs, we do agree that the Secretary may acknowledge this relationship in defining "availability" of income with regard to Medicaid applicants within the optional categories. As we have explained, the optional categorically needy consists in part of those individuals who are eligible for, but are not receiving, SSI benefits and those individuals who, but for their institutionalization, would be eligible for SSI benefits. *Supra*, at 269. Since these groups are defined in part with regard to SSI income limitations, it is reasonable that the Secretary should determine that States electing to provide Medicaid assistance to the optional categorically needy should apply a similar method for calculating income as that employed in the SSI program. The 1-month and 6-month limitations in 42 CFR § 435.723 (1980) are virtually identical to the SSI requirements. See 42 U. S. C. §§ 1382(a)(1), 1382c(b), (f)(1). We cannot say that it is either arbitrary or capricious for the Secretary to conclude that SSI recipients and the optional categorically needy should be treated similarly with respect to the method used for calculating income in determining whether the State is entitled to receive federal financial assistance under the Medicaid program.

In upholding the Secretary's limitation on deeming, we do not thereby render subsection (17)(D) meaningless. That provision, however, may not be read in isolation from the other provisions of the Social Security Act. We have no doubt that some tension exists between the Secretary's congressionally authorized power under subsection (17)(B) to determine what income is "available" to the applicant and Congress' intent in subsection (17)(D) to permit the States to

enforce their spousal responsibility policies.[14] Because Congress in subsection (17)(B) has delegated broad authority to the Secretary to set eligibility standards for the Medicaid program, however, we cannot say that the Secretary's regulations placing time limitations on the States' ability to deem income between spouses who do not share the same household are unreasonable or contrary to law. A reviewing court may not set aside the Secretary's regulations "simply because it would have interpreted the statute in a different manner." *Batterton* v. *Francis*, *supra*, at 425. *A fortiori*, Iowa may not ignore federal regulations simply because it interprets § 1902(a)(17) in a manner it considers preferable to the Secretary's interpretation.

This would be a different case, and respondents' arguments more compelling, if the Secretary had sought to use his authority under subsection (17)(B) to foreclose entirely the States' ability to consider the income of the institutionalized applicant's spouse. Such a reading of the statute could well render subsection (17)(D) superfluous. See *Schweiker* v. *Gray Panthers*, 453 U. S., at 45. The Secretary's regulations, however, impose no such across-the-board limitation on the States' ability to implement their spousal responsibility policies. The challenged regulation applies only to those SSI States that have decided to extend Medicaid benefits to the optional categorically needy, and it prohibits deeming only after the spouses have ceased to live together for prescribed periods of time.

On the contrary, 42 CFR § 435.723 (1980) is simply an exception to the general rule that the spouse's income may be considered available to the applicant. With regard to the optional categorically needy, SSI States are *required* to deem

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[14] As conceded by petitioners at oral argument, Tr. of Oral Arg. 9, Iowa is free to obtain reimbursement from the noninstitutionalized spouse in a lawsuit brought under its family responsibility laws. We recognize that such lawsuits may not be a uniformly practical alternative. See *Schweiker* v. *Gray Panthers*, 453 U. S., at 46.

the income and resources of spouses living in the same household. § 435.723(b). States exercising the § 209(b) option are *required* to deem income to the extent required in SSI States and may deem to the full extent they did before 1972. § 435.734. See *Schweiker* v. *Gray Panthers*, *supra*, at 40.[15] Finally, the SSI applicant is considered to a similar extent to have available to him his spouse's income and financial resources. See n. 2, *supra*.

We conclude that the Secretary need not interpret § 1902 (a)(17) to require an individualized factual determination in each instance as to the amount of income of an applicant's spouse that may reasonably be considered available to the applicant. With regard to SSI recipients in SSI States, such an interpretation would be contrary to § 1902(a)(10)(A), 42 U. S. C. § 1396a(a)(10)(A). With regard to the optional categorically needy, we find that the Secretary has not exceeded his authority in promulgating 42 CFR § 435.723 (1980), and that this regulation is neither arbitrary nor capricious. Accordingly, we reverse the judgment of the Court of Appeals for the Eight Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part.

The Court speculates that subsection 17(D) might well be superfluous if subsection 17(B) were read to permit the Secretary to foreclose entirely the States' ability to consider the income of the spouse of an institutionalized applicant. *Ante*,

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[15] To a certain extent, therefore, the barriers Iowa faces in implementing its spousal responsibility policies are attributable to the choices it has made with regard to the Medicaid options available. Iowa has decided to become an SSI State rather than a § 209(b) State. The Secretary permits SSI States to opt for "'§ 209(b) status' at any time." *Schweiker* v. *Gray Panthers*, *supra*, at 39, n. 6. In addition, Iowa is subject to 42 CFR § 435.723 (1980) only because it has decided to extend Medicaid assistance to the optional categorical needy. § 435.700.

at 277. This speculation apparently is predicated on the belief that subsection 17(D) *requires* the States to deem certain income of an applicant's spouse to be available to the applicant.[1] The Court's observation is both unnecessary and misleading.[2] Subsection 17(D), like subsection 17(B), places a limit on the extent to which an applicant's income may be deemed to include contributions from other sources. Nothing in the language of either subsection requires that any spousal income be deemed to be available to an applicant.

Apart from the Court's speculation concerning a regulation that does not exist, I join its opinion.

CHIEF JUSTICE BURGER, dissenting.

Although the Medicaid program is a morass of bureaucratic complexity, I do not believe it is nearly so difficult to apply the Social Security Act in this case as the Court makes it seem. Iowa is an "SSI State." This means that, under § 1902(a)(10)(A) of the Act, 42 U. S. C. § 1396a(a)(10)(A), it must develop a plan "for making medical assistance available to all individuals receiving . . . supplemental security income benefits . . . ." As part of the plan Iowa developed, a noninstitutionalized spouse must contribute toward the care of an institutionalized spouse. This is explicitly authorized by § 1902(a)(17)(D), 42 U. S. C. § 1396a(a)(17)(D), which prohibits a state from reducing the amount of Medicaid assistance to be made available to a recipient because of the financial responsibility of another person, *unless the other person is the recipient's spouse* or parent. See *ante*, at 267–268, n. 1.

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[1] In *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 45, the Court noted that subsection 17(D) might be superfluous if the statute were not read to *permit* certain deeming, see also 453 U. S., at 52 (STEVENS, J., dissenting); the Court did not suggest that any amount of deeming was required by the statute.

[2] As THE CHIEF JUSTICE notes in his dissenting opinion, it also is more consistent with his analysis of the case than with the Court's. See *post*, at 280–281, n. 2.

What could be more clear in words and purpose? Any doubt vanishes when we look at what Congress spelled out in the legislative history: "The committee believes it is proper to expect spouses to support each other . . . ." S. Rep. No. 404, 89th Cong., 1st Sess., 78 (1965).[1] In short, I conclude that Iowa's "deeming" procedure is authorized by subsection 17(D).

The Court apparently believes that Iowa overemphasizes the importance of subsection (17)(D). See *ante*, at 274. It bases its conclusion on subsection (17)(B), which delegates to the Secretary of Health and Human Services the task of determining what income is "available" to an institutionalized spouse. The applicable regulation promulgated by the Secretary goes 180 degrees contrary to the expressed will of Congress and prohibits states from taking the income of a noninstitutionalized spouse into account after the month in which the SSI recipient is institutionalized. 42 CFR § 435.723(d) (1980); see *ante*, at 269–270, n. 4. In *Schweiker* v. *Gray Panthers*, 453 U. S. 34 (1981), and *Batterton* v. *Francis*, 432 U. S. 416 (1977), we held that the Secretary's definition of "available" is entitled to great weight. I do not believe, however, that the Secretary may by regulation practically rewrite a portion of the statute. The statute is entitled to greater weight than the regulation, which was promulgated by the Secretary's staff, which apparently regarded the statute as too rigid.[2]

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[1] As applied to the tragic facts of this case, Iowa's plan required Mr. Herweg to contribute $234.80 each month toward the care of his wife in 1976. His gross monthly income was $1,350 at that time, and her monthly medical expenses were approximately $1,374.

[2] The Court admits that this would be a different case if the Secretary issued a regulation totally foreclosing states from "deeming" a noninstitutionalized spouse's income available to an institutionalized spouse. Such a regulation would "render subsection 17(D) superfluous." *Ante*, at 277. Yet the Court approves the prohibition of "deeming" after a prescribed period of institutionalization, in this case a period of one month. Moreover, although the Secretary interprets his regulation to prohibit "deeming"

All the parties agree that Iowa may enforce its family responsibility laws despite the Secretary's regulation. See *ante*, at 277, n. 14. This means that Iowa may sue a noninstitutionalized spouse for partial reimbursement for Medicaid payments under its laws. All Iowa may not do is "deem" a noninstitutionalized spouse's income available to support an institutionalized spouse. We compared the practicality of family responsibility laws and "deeming" in the 1980 Term, and concluded:

> "It is not 'an answer to say that the state can take action against the spouse to recover that which the spouse was legally obligated to pay. [It is] unrealistic to think that the state will engage in a multiplicity of continuing individual lawsuits to recover the money that it should not have had to pay out in the first place. [Because States cannot practically do so, there would be] an open invitation for the spouse to decide that he or she does not wish to make the excess payment.' *Brown* v. *Stanton*, 617 F. 2d 1224, 1234 (CA7 1980) (Pell, J., dissenting in part and concurring in part) . . . ." *Schweiker* v. *Gray Panthers*, *supra*, at 46.

There is nothing in the difference between "SSI states" and "§ 209(b) states" that makes enforcement of family responsibility laws more practical in one than in the other.

The effect of the Court's decision will be to reduce the amount of Medicaid assistance available to those most in need. As we noted in *Gray Panthers*, some spouses will accept this open invitation of the "regulators" not to support an institutionalized spouse. In many cases, noncontributing spouses will get away with not contributing because the

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after one month of institutionalization, as written it appears to prohibit "deeming" even sooner. The regulation prohibits "deeming" "after the month in which" a spouse is institutionalized. See *ante*, at 270, n. 4. Thus, a literal interpretation of the regulation would prohibit "deeming" on February 1 in the case of a spouse institutionalized on January 31.

states will decide that it is not worth the effort to attempt to enforce their state laws. In other cases, funds that could go to those most in need will be diverted to pay the salaries of the lawyers and others needed to enforce the family responsibility laws. In both cases, a diversion of funds from those most in need will occur.

The Court's approach also undermines the states' role as partners in this cooperative federal-state program. By deciding to become an "SSI state" rather than a "§ 209(b) state," Iowa has chosen to allocate its resources to cover a greater number of people. By deciding to "deem" a portion of a noninstitutionalized spouse's income available to an institutionalized spouse, Iowa can reduce the cost of the additional coverage. In enacting subsection 17(D), Congress determined that the responsibility of a noninstitutionalized spouse for an institutionalized spouse is a matter best left to the judgment of the states. Yet the Court today moves the determination of spousal responsibility from the states to a federal agency.

In sum, the Court gets lost in the Medicaid maze, and ends up overruling a statute by giving greater weight to a regulation prepared by an agency staff than to the law as drafted by Congress. Subsection 17(D) was enacted expressly to permit the states to choose to require that spouses support each other. The Court seems to overlook that Congress intended to leave these choices to the states, since the regulation for all practical purposes prohibits states from making their own decisions based on their own perceptions of local needs. Since the regulation conflicts with subsection 17(D), it should be held invalid.

CITY OF MESQUITE *v.* ALADDIN'S CASTLE, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–1577. Argued November 10, 1981—Decided February 23, 1982

Section 6 of appellant Texas city's licensing ordinance governing coin-operated amusement establishments directs the Chief of Police to consider whether a license applicant has any "connections with criminal elements." After receiving recommendations from the Chief of Police, the Chief Building Inspector, and the City Planner, the City Manager decides whether to grant a license. If he denies the license, the applicant may appeal to the City Council. If the City Manager denied the application because of the Chief of Police's adverse recommendation as to the applicant's character, the applicant must show to the City Council that he or it is of good character. Section 5 of the ordinance prohibits a licensee from allowing children under 17 years of age to operate amusement devices unless accompanied by a parent or legal guardian. After appellant had been ordered in Texas state-court proceedings to issue appellee amusement center operator a license (its license application having been initially denied under the predecessor to § 6), and after appellant had repealed appellee's exemption from the predecessor to § 5, appellee brought suit in Federal District Court, praying for an injunction against enforcement of the ordinance. The District Court held that § 6 was unconstitutionally vague, but upheld § 5. The Court of Appeals affirmed as to § 6, basing its holding solely on the Due Process Clause of the Fourteenth Amendment, but reversed as to § 5, basing its holding on the Texas Constitution as well as on the Fourteenth Amendment.

Held:

1. The fact that the phrase "connections with criminal elements" was eliminated from the ordinance while the case was pending in the Court of Appeals does not render the case moot. A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Here, appellant's repeal of the objectionable language would not preclude it from reenacting the same provision if the District Court's judgment were vacated. Pp. 288–289.

2. The Court of Appeals erred in holding that § 6 is unconstitutionally vague. It is clear from the procedure to be followed when an application for a license is denied by the City Manager based on the Chief of Police's recommendation, that the phrase "connections with criminal elements" is

not the standard for approval or disapproval of the application. Rather, the applicant's possible connection with criminal elements is merely a subject that § 6 directs the Chief of Police to investigate before he makes a recommendation to the City Manager. The Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations. Pp. 289–291.

3. Because Congress has limited this Court's jurisdiction to review questions of state law and because there is ambiguity in the Court of Appeals' holding as to § 5, a remand for clarification of that holding is necessary. This Court will not decide the federal constitutional question connected with § 5, where (a) the relevant language of the Texas constitutional provisions is different from, and arguably significantly broader than, the language of the corresponding federal provisions; (b) it is unclear whether this Court would apply as a matter of federal law the same standard applied as a matter of state law by the Court of Appeals in reviewing § 5; and (c) it is this Court's policy to avoid unnecessary adjudication of federal constitutional questions, there being no need for decision of the federal issue here if Texas law provides independent support for the Court of Appeals' judgment. Pp. 291–295.

630 F. 2d 1029, reversed in part and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., *post*, p. 296, and POWELL, J., *post*, p. 297, filed opinions concurring in part and dissenting in part.

Elland Archer argued the cause and filed briefs for appellant.

Philip W. Tone argued the cause for appellee. With him on the brief were *Louis P. Bickel, Thomas L. Case, Don R. Sampen,* and *Christopher L. Varner.**

JUSTICE STEVENS delivered the opinion of the Court.

The United States Court of Appeals for the Fifth Circuit declared unconstitutional two sections of a licensing ordi-

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*Briefs of *amici curiae* urging affirmance were filed by *Lawrence Gunnels, James A. Klenk,* and *Rufus King* for the Amusement Device Manufacturers Association; and by *Philip F. Herrick* for the Amusement and Music Operators Association, Inc.

Robert H. Bork and *David E. Springer* filed a brief for Atari, Inc., as *amicus curiae.*

nance governing coin-operated amusement establishments in the city of Mesquite, Texas.[1] Section 6 of Ordinance 1353, which directs the Chief of Police to consider whether a license applicant has any "connections with criminal elements,"[2] was

[1] 630 F. 2d 1029 (1980).

[2] Section 6 of Ordinance 1353 of the Code of the city of Mesquite provided in pertinent part:

"Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review.

"Upon approval by each of the parties and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferable.

"The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

"The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

"When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector and City Planner, he shall review such application together with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

"Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

"In the event of appeal from the City Manager's decision the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant.

"Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305, V. A. C. S. to show to the Council that he or it is of good character as a law abiding citizen to such extent that a license should be issued.

[Footnote 2 is continued on page 286]

held to be unconstitutionally vague. Section 5, which prohibits a licensee from allowing children under 17 years of age to operate the amusement devices unless accompanied by a parent or legal guardian,[3] was held to be without a rational basis. The first holding rests solely on the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals stated that its second holding rested on two provisions of the Texas Constitution as well as the Fourteenth Amendment to the Federal Constitution. Because Congress has limited our jurisdiction to review questions of state law, and because there is ambiguity in the Court of Appeals' second holding, we conclude that a remand for clarification of that holding is necessary. There is, however, no impediment to our review of the first holding.

On April 5, 1976, to accommodate the proposal of Aladdin's Castle, Inc. (Aladdin), to open an amusement center in a shopping mall, the city exempted from the prohibition against operation of amusement devices by unattended children certain amusement centers, the features of which were defined in terms of Aladdin's rules, as long as children under the age of *seven* were accompanied by an adult.[4] Thereafter, Aladdin entered into a long-term lease and made other arrangements to open a center in the mall. In August, how-

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"Upon hearing the Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

"An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

"For violation of any of the requirements of this ordinance the City Manager may upon three (3) days notice of Licensee revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application." App. to Juris. Statement 9–10.

[3] Section 5 provides:

"It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian." *Id.*, at 8.

[4] See Ordinance 1310.

ever, its application for a license was refused because the Chief of Police had concluded that Aladdin's parent corporation was connected with criminal elements. Aladdin then brought suit in a Texas state court and obtained an injunction requiring the city to issue it a license forthwith. The Texas court found that neither Aladdin nor its parent corporation had any connection with criminal elements and that the vagueness in the ordinance contravened both the Texas and the Federal Constitutions.[5]

On February 7, 1977, less than a month after the city had complied with the state-court injunction by issuing the license to Aladdin, the city adopted a new ordinance repealing Aladdin's exemption, thereby reinstating the 17-year age requirement, and defining the term "connections with criminal elements" in some detail.[6] Aladdin then commenced this ac-

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[5] The judgment of the trial court was affirmed by the Texas Court of Civil Appeals, 559 S. W. 2d 92 (1977), and the Texas Supreme Court refused an application for a writ of error, 570 S. W. 2d 377 (1978), finding no reversible error in the conclusion that the denial of the license was not supported by substantial evidence, but declining to reach the vagueness question.

[6] Section 9 of Ordinance 1353 defined terms used in § 6 of the ordinance (quoted in n. 2, *supra*), which had been reenacted without change. Section 9 provided in pertinent part:

"*Connection With Criminal Elements* is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procuring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.

"A determination by the United States Department of Justice that a party is a member of the 'mafia' or 'Cosa Nostro' family or that such party is engaged in or affiliated with a nationwide crime organization, whether for-

tion in the United States District Court for the Northern District of Texas, praying for an injunction against enforcement of the new ordinance. After a trial, the District Court held that the language "connections with criminal elements," even as defined, was unconstitutionally vague, but the District Court upheld the age restriction in the ordinance.[7] As already noted, the Court of Appeals affirmed the former holding and reversed the latter.

Invoking our appellate jurisdiction under 28 U. S. C. § 1254(2), the city now asks us to reverse the judgment of the Court of Appeals. After we noted probable jurisdiction, 451 U. S. 981, Aladdin advised us that the ordinance reviewed by the Court of Appeals had been further amended in December 1977 by eliminating the phrase "connections with criminal elements." The age restriction, however, was retained.[8]

I

A question of mootness is raised by the revision of the ordinance that became effective while the case was pending in the Court of Appeals. When that court decided that the term "connections with criminal elements" was unconstitutionally vague, that language was no longer a part of the ordinance. Arguably, if the court had been fully advised, it would have regarded the vagueness issue as moot.[9] It is clear to us, however, that it was under no duty to do so.

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mally or informally, shall be prima facia evidence, so far as the issuance of a license hereunder, that such person has 'connections with criminal elements' and constitute, within the meaning of this ordinance, 'criminal elements'." App. to Juris. Statement 12–13.

[7] 434 F. Supp. 473 (1977), aff'd in part, rev'd and remanded in part, 630 F. 2d 1029 (1980).

[8] See Ordinance 1410, App. to Brief for Appellee A1–A11.

[9] If it becomes apparent that a case has become moot while an appeal is pending, the judgment below normally is vacated with directions to dismiss the complaint. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36.

It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power.[10] In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.[11] The city followed that course with respect to the age restriction, which was first reduced for Aladdin from 17 to 7 and then, in obvious response to the state court's judgment, the exemption was eliminated. There is no certainty that a similar course would not be pursued if its most recent amendment were effective to defeat federal jurisdiction. We therefore must confront the merits of the vagueness holding.

"It is a basic principle of due process that an enactment is void for vagueness if its *prohibitions* are not clearly defined." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (emphasis

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[10] "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953); see, *e. g.*, *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. . . . Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. [345 U. S.] at 633–636. This is a matter for the trial judge. But this case is not technically moot, an appeal has been properly taken, and we have no choice but to decide it." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203–204.

[11] Indeed, the city has announced just such an intention. See Tr. of Oral Arg. 18–20.

added).[12] We may assume that the definition of "connections with criminal elements" in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection; we may even assume, without deciding, that such a standard is also too vague to support the denial of an application for a license to operate an amusement center. These assumptions are not sufficient, however, to support a holding that this ordinance is invalid.

After receiving recommendations from the Chief of Police, the Chief Building Inspector, and the City Planner, the City Manager decides whether to approve the application for a license; if he disapproves, he must note his reasons in writing. The applicant may appeal to the City Council. If the City Manager disapproved the application because of the Chief of Police's adverse recommendation as to the applicant's character, then the applicant must show to the City Council that "he or it is of good character as a law abiding citizen," which is defined in the ordinance to "mean substantially that standard employed by the Supreme Court of the State of Texas in the

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[12] The Court of Appeals summarized the relevant authorities as follows:

"A law is void for vagueness if persons 'of common intelligence must necessarily guess at its meaning and differ as to its application . . . .' *Smith* v. *Goguen*, 415 U. S. 566, 572 n. 8, quoting *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). The offense to due process lies in both the nature and consequences of vagueness. First, vague laws do not give individuals fair notice of the conduct proscribed. *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162. *Accord Grayned* v. *City of Rockford*, 408 U. S. 104, 108 & n. 3. Second, vague laws do not limit the exercise of discretion by law enforcement officials; thus they engender the possiblity of arbitrary and discriminatory enforcement. *Grayned* v. *City of Rockford*, 408 U. S. at 108–09 & n. 4; *Papachristou* v. *City of Jacksonville*, 405 U. S. at 168–70. Third, vague laws defeat the intrinsic promise of, and frustrate the essence of, a constitutional regime. We remain 'a government of laws, and not of men,' *Marbury* v. *Madison*, 5 U. S. (1 Cranch.) 137, 163, only so long as our laws remain clear." 630 F. 2d, at 1037 (citations abbreviated).

licensing of attorneys as set forth in [the Texas statutes]." § 9 of Ordinance 1353, App. to Juris. Statement 13. An applicant may further appeal to the state district court. It is clear from this summary [13] that the phrase "connections with criminal elements," as used in this ordinance, is not the standard for approval or disapproval of the application.

The applicant's possible connection with criminal elements is merely a subject that the ordinance directs the Chief of Police to investigate before he makes a recommendation to the City Manager either to grant or to deny a pending application. The Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations. There would be no constitutional objection to an ordinance that merely required an administrative official to review "all relevant information" or "to make such investigation as he deems appropriate" before formulating a recommendation. The judgment of the Court of Appeals was therefore incorrect insofar as it held that the directive to the Chief of Police is unconstitutionally vague.

II

The Court of Appeals stated that its conclusion that the age requirement in the ordinance is invalid rested on its interpretation of the Texas Constitution as well as the Federal Constitution:

> "We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law, and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law." 630 F. 2d 1029, 1038–1039 (1980) (footnotes omitted).

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[13] The ordinance is quoted in pertinent part in n. 2, *supra*.

In the omitted footnotes the court quoted two provisions of the Texas Constitution that are similar, but by no means identical, to parts of the Federal Constitution.[14]

Because our jurisdiction of this appeal is based on 28 U. S. C. § 1254(2), we are precluded from reviewing the Court of Appeals' interpretation of the Texas Constitution. For the federal statute provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
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> . . . . . .
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented . . . ."

If the Texas Constitution provides an independent ground for the Court of Appeals' judgment, our possible disagreement with its exposition of federal law would not provide a sufficient basis for reversing its judgment. If that be so, we should simply dismiss the appeal insofar as the city seeks review of the invalidation of the age requirement. Cf. *United States* v. *Hastings*, 296 U. S. 188, 193.[15]

The city contends, however, that the Court of Appeals did not place independent reliance on Texas law but merely

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[14] Article 1, § 19, of the Texas Constitution provides:

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Article 1, § 3, of the Texas Constitution provides in pertinent part:

"All free men, when they form a social compact, have equal rights . . . ."

[15] "Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly."

treated the Texas constitutional protections as congruent with the corresponding federal provisions.[16] Under this reading of the Court of Appeals' opinion, our correction of any federal error automatically would result in a revision of the Court of Appeals' interpretation of the Texas Constitution. Instead of providing independent support for the judgment below, the Texas law, as understood by the Court of Appeals, would be dependent on our reading of federal law. Although the city's contention derives support from the Court of Appeals' greater reliance on federal precedents than on Texas cases, we nevertheless decline, for the reasons that follow, to decide the federal constitutional question now.

It is first noteworthy that the language of the Texas constitutional provision is different from, and arguably significantly broader than, the language of the corresponding federal provisions. As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977), and cases cited therein. Because learned members of the Texas Bar sit on the Court of Appeals for the Fifth Circuit, and because that court confronts questions of Texas law in the regular course of its judicial business, that court is in a better position than are we to recognize any special nuances of state law. The fact that the Court of Appeals cited only four Texas cases is an insufficient

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[16] If this contention is correct, we may review the Court of Appeals' interpretation of federal law. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568; *Mental Hygiene Dept.* v. *Kirchner*, 380 U. S. 194, 198; *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5; *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 554–555; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 514.

basis for concluding that it did not make an independent analysis of Texas law.

Second, it is important to take note of the Court of Appeals' interpretation of the Texas "requirement of legislative rationality." That interpretation seems to adopt a standard requiring that a legislative classification rests " '"upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."' " 630 F. 2d, at 1039.[17] This formulation is derived from this Court's opinion in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415. But it is unclear whether this Court would apply the *Royster Guano* standard to the present case. See *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166; *Craig* v. *Boren*, 429 U. S. 190. Therefore, it is surely not evident that the Texas standard and the federal standard are congruent.

Finally, and of greater importance, is this Court's policy of avoiding the unnecessary adjudication of federal constitutional questions. As we recently have noted, see *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, this self-imposed limitation on the exercise of this Court's jurisdiction has an importance to the institution that transcends the significance of particular controversies. No reason for hasty decision of the constitutional question presented by this case has been advanced. If Texas law provides independent sup-

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[17] In a section of its opinion entitled "Rational Basis," the Court of Appeals twice set forth a rational-basis test. See 630 F. 2d, at 1039. In the first paragraph, the court stated that "[t]he test requires that legislative action be rationally related to the accomplishment of a legitimate state purpose," and cited both federal and state decisions in support of that formulation. In the second paragraph, the court stated that "[t]he test requires that legislation constitute a means that is 'reasonable, not arbitrary and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ,"' " quoting from a decision of the Texas Supreme Court, *Texas Woman's University* v. *Chayklintaste*, 530 S. W. 2d 927, 928 (1975), which in turn quoted from *Reed* v. *Reed*, 404 U. S. 71, 76. A number of this Court's decisions were cited as in accord with this formulation. Although we cannot be sure, we might reasonably infer that the second formulation of the test represents the Court of Appeals' interpretation of Texas law.

port for the Court of Appeals' judgment, there is no need for decision of the federal issue.[18] On the other hand, if the city is correct in suggesting that the Court of Appeals' interpretation of state law is dependent on its federal analysis, that court can so advise us and we can then discharge our responsibilities free of concern that we may be unnecessarily reaching out to decide a novel constitutional question.[19]

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

It is so ordered.

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[18] Our dissenting Brethren suggest that our "view allows federal courts overruling state statutes to avoid appellate review here simply by adding citations to state cases when applying federal law," *post*, at 300 (POWELL, J., concurring in part and dissenting in part). We are unwilling to assume that any federal judge would discharge his judicial responsibilities in that fashion. In any event, in this case we merely hold that the Court of Appeals must explain the basis for its conclusion, if there be one, that the state ground is adequate and independent of the federal ground.

[19] Cf. *Mental Hygiene Dept.* v. *Kirchner*, *supra*, at 196–197 (footnotes omitted):

"The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provisions of the California Constitution, or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case. Were we to assume that the federal question was the basis for the decision below, it is clear that the California Supreme Court, either on remand or in another case presenting the same issues, could inform us that its opinion was in fact based, at least in part, on the California Constitution, thus leaving the result untouched by whatever conclusions this Court might have reached on the merits of the federal question. For reasons that follow we conclude that further clarifying proceedings in the California Supreme Court are called for under the principles stated in *Minnesota* v. *National Tea Co.*, 309 U. S. 551."

JUSTICE WHITE, concurring in part and dissenting in part.

I concur in the Court's holding that Mesquite's ordinance directing the Chief of Police to consider whether a license applicant has any "connections with criminal elements" is not void for vagueness.*

Like JUSTICE POWELL, however, I dissent from the Court's remand of the challenge to the age requirements in § 5 of the Mesquite ordinance. The sentiment to avoid unnecessary constitutional decisions is wise, but there is no reason in this case to suspect that the Fifth Circuit's standard for evaluating appellee's due process and equal protection claims under the Texas Constitution differed in any respect from federal constitutional standards. I agree with JUSTICE POWELL that "the inclusion of three cursory state-law citations in a full discussion of federal law by a federal court is neither a reference to nor an adoption of an *independent* state ground." *Post*, at 299–300 (concurring in part and dissenting in part).

I refrain from joining JUSTICE POWELL's detailed discussion in support of this position only because I would prefer not to engage in debate over the present health of "the *Roys-*

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*I agree that this issue has not been mooted by the city's revision of the ordinance. This conclusion is not inconsistent with our recent disposition of *Princeton University* v. *Schmid*, *ante*, p. 100 *(per curiam)*. In that case, Princeton University's regulations governing solicitation and similar activity on University property were held invalid by the New Jersey Supreme Court. While the case was pending before the New Jersey court, Princeton substantially amended the contested regulations. On appeal to this Court, we held that the validity of the old regulations had become a moot issue. Unlike the city of Mesquite, Princeton gave no indication that it desired to return to the original regulatory scheme and would do so absent a judicial barrier. In this case, as noted in the Court's opinion, Mesquite "has announced just such an intention." *Ante*, at 289, n. 11. Because the test of whether the cessation of allegedly illegal action moots a case requires that we evaluate the likelihood that the challenged action will recur, *County of Los Angeles* v. *Davis*, 440 U. S. 625 (1979), it is on this basis that our disposition of the two cases is consistent.

ter Guano standard." As I understand it, and as expressed in the opinion of the Court, *ante*, at 292 and 294, the rationale for inquiring into the presence of independent and adequate state grounds is to avoid an unnecessary "abstract opinion," *United States* v. *Hastings*, 296 U. S. 188, 193 (1935), and to refrain from "unnecessary adjudication of federal constitutional questions." *Ante*, at 294. This is the sole justification for remanding the case to the Court of Appeals. To justify that disposition, however, the Court finds it necessary to speculate as to whether a formulation of the rational-basis test initially stated in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920), and reiterated in *Reed* v. *Reed*, 404 U. S. 71, 76 (1971), remains good law in light of more recent decisions. *Ante*, at 294. JUSTICE POWELL, in response, declares that "[t]his Court has never rejected either *Royster Guano* or *Reed* v. *Reed*." *Post*, at 301, n. 6.

I fear that we have lost sight of the fact that our reason for pursuing this inquiry is to avoid rendering advisory opinions on federal constitutional law. It is ironic that in seeking to skirt a relatively narrow issue of whether the Mesquite age requirement is constitutional, an issue decided by the Court of Appeals and fully briefed, the Court has instead entered into highly abstract, totally advisory, speculation as to the continuing validity of one of our earlier statements on a matter of no small constitutional importance. If it is necessary to interpret a case twice removed and totally unrelated to the matter before us in order to justify a remand to the Court of Appeals, I would think it clear that no independent nonfederal basis for the decision is present. *Delaware* v. *Prouse*, 440 U. S. 648, 652 (1979).

JUSTICE POWELL, concurring in part and dissenting in part.

I concur in the Court's holding that Mesquite Ordinance 1353, § 6, is not void for vagueness. I dissent, however, from the Court's remand of the challenge to § 5.

I

The jurisdictional basis for the Court's review of this case is 28 U. S. C. § 1254(2), which provides for mandatory Supreme Court review of federal appellate decisions overturning state statutes on federal constitutional grounds. Rather than exercising this jurisdiction, the Court remands the case to the Court of Appeals to clarify whether its decision is based on Texas law. In the past, the Court has not automatically required clarification when the record reveals that the lower court's decisional basis is federal law. In this case, the opinion of the Court of Appeals contains no analysis of state law independent of its clear application of federal law. In my view there is no justification for a remand.

The city of Mesquite, Tex., adopted an ordinance stating that owners of coin-operated pinball machines should not allow their operation by youths under the age of 17 years. In the decision below, the Court of Appeals held that this ordinance violated equal protection and due process as well as First Amendment rights of free speech and association. The court's opinion referred to the Texas Constitution's Due Process and Equal Protection Clauses,[1] and quoted the relevant Texas constitutional provisions in the margin.[2] The court then, at some length, applied the Fourteenth Amendment's rational-relationship test to the Mesquite ordinance, citing, quoting, and discussing a total of 18 federal cases in this analysis. In the two initial paragraphs defining the

[1] 630 F. 2d 1029, 1038–1039 (CA5 1980):

"We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law, and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law" (footnotes omitted).

[2] Tex. Const., Art. I, § 3 ("All free men, when they form a social compact, have equal rights . . .") and § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land").

broad principles applied in that analysis, the court cited two Texas cases and quoted briefly from another. 630 F. 2d 1029, 1035 (CA5 1980).

These Texas cases do not suggest an adequate and independent state ground for overruling the Mesquite ordinance. In the quoted case, the Texas court was describing *federal*, not Texas, law. *Texas Woman's University* v. *Chayklintaste*, 530 S. W. 2d 927, 928 (Tex. 1975) (citing *Reed* v. *Reed*, 404 U. S. 71, 76 (1971)). Of the two other Texas cases cited, one involves an unsuccessful challenge to a zoning ordinance, and in it the Supreme Court of Texas applied the rule that a challenger to a zoning ordinance bears a heavy burden of showing that the exercise of police power is not lawful. *City of University Park* v. *Benners*, 485 S. W. 2d 773, 778–779 (1972). This case actually supports the validity of the Mesquite ordinance under Texas law.

In the other case, *Falfurrias Creamery Co.* v. *City of Laredo*, 276 S. W. 2d 351 (Tex. Civ. App. 1955), the State had established an inspection program for dairies. One municipality then passed an ordinance under which milk could be sold within its borders only if inspected by a local inspector. The Texas Court of Civil Appeals concluded that this requirement was arbitrary, since the local inspector could easily determine whether other inspectors were "[making] inspect[ions] in accordance with the standard ordinance contemplated by the State law." *Id.*, at 355. This single case dealing with a dairy-inspection requirement designed to favor local dairies cannot be the basis for a serious allegation that Texas law would not allow Mesquite to exercise its police power by keeping youths out of pinball parlors.

On the basis of an inference as weak as that afforded by *Falfurrias Creamery*, I would not remand to any court, state or federal. But even if the cited case law provided some support for appellee's challenge, the inclusion of three cursory state-law citations in a full discussion of federal law by a fed-

eral court is neither a reference to nor an adoption of an *independent* state ground. The Court's view allows federal courts overruling state statutes to avoid appellate review here simply by adding citations to state cases when applying federal law.

Nor is the Court's rigid approach today required by earlier decisions. In *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 256–258 (1957), for example, California argued that the California Supreme Court's order dismissing the petitioner's prayer for relief was based on an independent and adequate state ground: the requirements of a state procedural rule. The Court nevetheless proceeded to the merits of the federal question without remanding for clarification of the dismissal order's basis. This Court found the proffered sources of the alleged state procedural rule unconvincing and "conclu[ded] that the constitutional issues are before us and we must consider them." *Id.*, at 258 (footnote omitted).[3]

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[3] See also *Delaware* v. *Prouse*, 440 U. S. 648 (1979) (reaching federal issues when interpretation of State Constitution depends on federal law); *Cicenia* v. *Lagay*, 357 U. S. 504, 507, n. 2 (1958) (After looking at record and opinion below, Court concludes that State Supreme Court's dismissal appears to be based on federal ground); *Williams* v. *Kaiser*, 323 U. S. 471 (1945) (The only cited sources for an independent state ground are considered insubstantial by the Court; Court proceeds to merits of federal issue); *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 69 (1928) (Given that State Constitution has no Equal Protection Clause, Court concludes that federal law must have been determinative).

In *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), the lower court dismissed complaints with no indication of whether the dismissal was based on state or federal law. The Court continued the cases pending clarification of the lower court's decisional basis. In announcing this outcome, the Court stated that it would not review a judgment of a state court "until the fact that [the decision] does not [rest on an adequate and independent state ground] appears of record." *Id.*, at 128. *Pitcairn* did not, however, adopt the rigid rule the Court apparently adopts today. The Court continued to be willing to look at available record evidence (none was available in *Pitcairn*) to determine whether the decision below was based on an ade-

II

The Court gives three reasons for remanding. First, it observes that the language of the State Constitution, quoted in n. 2, *supra*, differs from that in the Federal Constitution and Texas may afford broader protection to individual rights than does the Federal Government. The relevant question is not, however, whether state law could be, or even is, different from federal law, but whether the Court of Appeals decided the case before it on state or federal grounds. In deciding this question, the citation of only three[4] state cases is not, of course, determinative. Here, however, the Court of Appeals failed to discuss, explain, describe, or even state Texas law despite extensive discussion of federal law and cases.

The Court's second point is at least imaginative. It focuses on one sentence from *Reed* v. *Reed*, 404 U. S., at 76, quoted in the Texas case of *Texas Woman's University* v. *Chayklintaste*, 530 S. W. 2d, at 928, *ante*, at 294, and n. 17. That sentence reiterated a formulation of rational-basis analysis that was stated in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). The Court today then implies that "the *Royster Guano* standard" may no longer be good law, citing *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166 (1980).[5] From this implication,[6] the Court further

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quate and independent state ground. See *Cicenia* v. *Lagay*, *supra*; *Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1957).

[4] The Court reports that the Court of Appeals cited four Texas cases, but one case was cited as procedural history in the dispute between these parties, not as relevant to any question of Texas law. See 630 F. 2d, at 1034, n. 8.

[5] *Fritz* was decided on December 9, 1980; as the Court of Appeals had decided this case on November 17, 1980, it could not have been influenced by *Fritz*.

[6] This Court has never rejected either *Royster Guano* or *Reed* v. *Reed*. As stated in *Fritz*, "[t]he most arrogant legal scholar would not claim that all [Supreme Court] cases appl[y] a uniform or consistent test under equal

infers that "the Texas standard and the federal standard" may not be congruent. The best answer to this speculative syllogism is found in the discussion of rational-basis analysis by the Court of Appeals. In an Appendix hereto I include the three paragraphs of the opinion that discuss the rational-relationship standard of review. It will be noted that nine United States Supreme Court cases were cited. Although three Texas cases were cited also, there is not the slightest indication that the Court of Appeals was distinguishing between federal and state law. Moreover, in the subsequent pages applying rational-relationship review, the court did not cite or discuss a single Texas case or any aspect of Texas law, though 11 federal cases were cited and discussed. 630 F. 2d, at 1039–1040 (not included in Appendix).

Finally, the Court relies on our traditional reluctance to decide a constitutional question unnecessarily. But we noted jurisdiction to consider the validity of the Mesquite ordinance, and this question is squarely presented. As a general matter, the Court should avoid unnecessary remands; this is particularly true when the Court's mandatory jurisdiction has been invoked under § 1254(2). Neither the Court of Appeals nor appellee has presented any substantial reason for thinking that the Mesquite ordinance is invalid under Texas law independently of federal law that clearly was the basis for the decision below. In these circumstances, we have a duty to decide the substantive questions presented.

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protection principles." 449 U. S., at 177, n. 10. In view of the example we have set, there is no reason to perceive inferences of divergent federal- and state-court views because of the failure of the Court of Appeals or Texas courts to use entirely consistent terminology.

Moreover, after its generalizations as to rational-basis analysis, the Court of Appeals for the Fifth Circuit went on to say that even if "the challenged ordinance had a rational basis . . . we would nevertheless be compelled to strike it down" as an infringement of the fundamental right of association. 630 F. 2d, at 1041. No less than 29 federal cases were cited for this conclusion. No Texas case was cited. *Id.*, at 1041–1044.

APPENDIX TO OPINION OF JUSTICE POWELL*

"1. *Rational Basis*

"Assuming that the rational basis test is the appropriate standard of review, we conclude that no such rationality supports ordinance No. 1353. The test requires that legislative action be rationally related to the accomplishment of a legitimate state purpose. First, the challenged legislation must have a legitimate public purpose based on promotion of the public welfare, health or safety. *See, e. g., Rinaldi* v. *Yeager*, 384 U. S. 305, 309–10 . . . (1966); *Falfurrias Creamery Co.* v. *City of Laredo*, 276 S. W. 2d 351 (Tex. Civ. App. 1955, writ ref'd n.r.e.). Second, the act taken must bear a rational relation to the end it seeks to further. *See e. g., Griswold* v. *Connecticut*, 381 U. S. at 505–507 . . . (WHITE, J., concurring); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 . . . (1957); *City of University Park* v. *Benners*, 485 S. W. 2d 773, 778–79 (Tex. 1972), appeal dismissed 411 U. S. 901 . . . (1973).

"The requirement of legislative rationality in the service of legitimate purposes protects individuals and their liberties from official arbitrariness or unthinking prejudice. As one commentator noted, irrationality at least means 'patently useless in the service of any goal apart from whim or favoritism.' Michelman, *Politics and Values or What's Really Wrong with Rationality Review?* 13 Creighton Law Review 487, 499 (1979). The test requires that legislation constitute a means that is 'reasonable, not arbitrary and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation . . . "' *Texas Woman's University* v. *Chayklintaste*, 530 S. W. 2d 927, 928 (Tex.

*This includes the entire discussion of the rational-basis standard of review by the Court of Appeals. 630 F. 2d, at 1039. It is this portion of the Court of Appeals' opinion that the Court today relies on for saying that "it is surely not evident that the Texas standard and the federal standard are congruent." *Ante*, at 294. See *supra*, at 301–302, and n. 6.

1979), citing *Reed* v. *Reed*, 404 U. S. 71, 76 . . . (1971). *Accord*, *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528 . . . (1973); *James* v. *Strange*, 407 U. S. 128 . . . (1972); *Jackson* v. *Indiana*, 406 U. S. 715 . . . (1972); *Stanley* v. *Illinois*, 405 U. S. 645 . . . (1972); *Eisenstadt* v. *Baird*, 405 U. S. 438 . . . (1972).

"Examination of ordinance No. 1353 reveals two stated purposes. First, the ordinance seeks to prevent truancy. Second, it seeks to keep minors from being exposed to people 'who would promote gambling, sale of narcotics and other unlawful activities.' We conclude that the seventeen year old age requirement in no way rationally furthers these interests in regulating the associational activity of Mesquite's young citizens, even making the assumption that both of these goals are legitimate." 630 F. 2d, at 1039.

JEWETT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 80–1614. Argued December 1, 1981—Decided February 23, 1982

Held: The "transfer" referred to in the Treasury Regulation excepting from the federal gift tax a refusal to accept ownership of an interest in property transferred by will if such refusal is effective under local law and made "within a reasonable time after knowledge of the existence of the transfer," occurs, as indicated by both the text and history of the Regulation, when the interest is created and not at a later time when the interest either vests or becomes possessory. Hence, in this case where disclaimers of a contingent interest in a testamentary trust, though effective under local law, were not made until 33 years, and thus not "within a reasonable time," after the interest was created, the disclaimers were subject to a gift tax under §§ 2501(a)(1) and 2511(a) of the Internal Revenue Code, as indirect gifts to a successor in interest. Pp. 309–319.

638 F. 2d 93, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 319.

James D. St. Clair argued the cause for petitioners. With him on the briefs were *John G. Fabiano*, *Timothy H. Gailey*, and *Christopher T. Carlson*.

Stuart A. Smith argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Murray*, and *Jonathan S. Cohen*.*

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*Briefs of *amici curiae* urging reversal were filed by *Robert L. Stern* for Mayer, Brown & Platt; and by *Charles C. Parlin, Jr.*, and *Robert A. Bergquist* for Adelaide C. Griswold et al.

Coleman Burke, *Wallace B. Liverance, Jr.*, and *Geoffrey J. O'Connor* filed a brief for the Estate of Helen W. Halbach, John Poiner, Executor, as *amicus curiae*.

JUSTICE STEVENS delivered the opinion of the Court.

A trust beneficiary's refusal to accept ownership of property may constitute an indirect gift to a successor in interest subject to federal gift tax liability. 26 U. S. C. §§ 2501, 2511. Under Treasury Regulation § 25.2511–1(c), however, such a refusal is not subject to tax if it is effective under local law and made "within a reasonable time after knowledge of the existence of the transfer." The petitioner husband (hereafter petitioner) in this case executed disclaimers of a contingent interest in a testamentary trust 33 years after that interest was created, but while it was still contingent. The narrow question presented is whether the "transfer" referred to in the Regulation occurs when the interest is created, as the Government contends, or at a later time when the interest either vests or becomes possessory, as argued by petitioner.

Petitioner's grandmother, Margaret Weyerhaeuser Jewett, died in 1939 leaving the bulk of her substantial estate in a testamentary trust. Her will, executed in Massachusetts, provided that the trust income should be paid to petitioner's grandfather during his life, and thereafter to petitioner's parents. Upon the death of the surviving parent, the principal was to be divided "into equal shares or trusts so that there shall be one share for each child of my said son [petitioner's father] then living and one share for the issue then living representing each child of my said son then dead." App. 9. Petitioner's mother is the sole surviving life tenant. Thus, under the testamentary plan, if petitioner survived his mother, he would receive one share of the corpus of the trust; if he predeceased his mother, that share would be distributed to his issue. Since petitioner's parents had two children, his share of the trust amounted to one-half of the principal.

In 1972, when petitioner was 45 years old, he executed two disclaimers. The disclaimers each recognized that petitioner had "an interest in fifty percent (50%) of the trust estate . . . provided that he survives" his mother. *Id.*, at 15. In the

first disclaimer, petitioner renounced his right to receive 95% "of the aforesaid fifty percent (50%) of the remainder of the trust estate," *ibid.;* in the second he renounced his right to the remaining 5%. In 1972 the value of the trust exceeded $8 million.

Petitioner and his wife filed gift tax returns for the third and fourth quarters of 1972 in which they advised the Commissioner of the disclaimers, but did not treat them as taxable gifts.[1] The Commissioner assessed a deficiency of approximately $750,000. He concluded that the disclaimers were indirect transfers of property by gift within the meaning of §§ 2501(a)(1)[2] and 2511(a)[3] of the Internal Revenue Code, and that they were not excepted from tax under Treas. Reg. § 25.2511–1(c)[4] because they were not made "within a

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[1] Petitioner's wife, Lucille M. Jewett, elected to consent to treat the gifts made by her husband as having been made by both husband and wife to the extent allowed by law. App. to Pet. for Cert. A–20.

[2] "A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual resident or nonresident." 26 U. S. C. § 2501(a)(1).

[3] "Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States." 26 U. S. C. § 2511(a).

[4] "The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512–8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be

reasonable time after knowledge" of his grandmother's transfer to him of an interest in the trust estate. Petitioner then filed this action in the Tax Court seeking a redetermination of the deficiency.

In the Tax Court and in the Court of Appeals, petitioner argued that at the time the disclaimers were made he had nothing more than a contingent interest in the trust, and that the "reasonable time" in which a tax-free disclaimer could be made did not begin to run until the interest became vested and possessory upon the death of the last surviving life tenant.[5] Although a comparable argument had been accepted

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unequivocable *[sic]* and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devises shall go to B, the residuary beneficiary), and under local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D." Treas. Reg. § 25.2511–1(c), 26 CFR § 25.2511–1(c) (1981).

[5] As did the Tax Court, we assume that petitioner's interest in the trust is properly characterized as a contingent remainder. Although that interest is arguably a vested remainder subject to divestiture, the distinction is

by the Court of Appeals for the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F. 2d 57 (1973),[6] it was rejected by the Tax Court[7] and by the Ninth Circuit[8] in this case. We granted certiorari to resolve the conflict. 452 U. S. 904.

Petitioner relies heavily on the plain language of the Treasury Regulation and on early decisions that influenced its draftsmen. Before analyzing that language and its history, it is appropriate to review the statutory provisions that the Regulation interprets.

I

Section 2501(a)(1) of the Internal Revenue Code imposes a tax "on the transfer of property by gift." Section 2511(a) provides that the tax shall apply "whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." As the Senate[9] and House[10] Reports explain:

> "The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value."

In *Smith* v. *Shaughnessy*, 318 U. S. 176, 180, the Court noted that "[t]he language of the gift tax statute, 'property

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not one of substance for our purposes here. Cf. *Helvering* v. *Hallock*, 309 U. S. 106.

[6] In *Keinath*, the court applied "the prevailing common law rule" and held that the holder of a vested remainder interest subject to divestiture has a reasonable time after the death of the life beneficiary within which to renounce or disclaim the remainder without tax consequences. 480 F. 2d, at 64. The court emphasized that the holder of the remainder interest did not obtain a right to beneficial ownership and control of the property until the death of the life beneficiary. *Ibid.*

[7] 70 T. C. 430 (1978).

[8] 638 F. 2d 93 (1980).

[9] S. Rep. No. 665, 72d Cong., 1st Sess., 39 (1932).

[10] H. R. Rep. No. 708, 72d Cong., 1st Sess., 27 (1932).

. . . real or personal, tangible or intangible,' is broad enough to include property, however conceptual or contingent."

Our expansive reading of the statutory language in *Smith* unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust.[11] Congress enacted the gift tax as a "corollary" or "supplement" to the estate tax.[12] In *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 44, the Court explained that "[a]n important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death." Since the practical effect of petitioner's disclaimers was to reduce the expected size of his taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty, the treatment of the disclaimers as taxable gifts is fully consistent with the basic purpose of the statutory scheme.

II

The controlling Treasury Regulation provides that a refusal to accept ownership of property transferred from a decedent does not constitute a gift if two conditions are met. First, the refusal must be effective under the law governing the administration of the decedent's estate. Second, the re-

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[11] The actual value of the interest will be affected by the fact that it is not indefeasibly vested. As the Tax Court noted in this case:

"The value of petitioner's remainder interest was not, of course, equal to 50 percent of the value of the trust corpus. Rather, it depended upon actuarial factors reflecting the various contingencies." 70 T. C., at 435, n. 3.

[12] The Committee Reports state that the gift tax was designed "to impose a tax which measurably approaches the estate tax which would have been payable on the donor's death had the gifts not been made and the property given had constituted his estate at his death. The tax will reach gifts not reached, for one reason or another, by the estate tax." H. R. Rep. No. 708, *supra*, at 28; S. Rep. No. 665, *supra*, at 40.

fusal must be made "within a reasonable time after knowledge of the existence of the transfer."

There is no dispute in this case that the first requirement has been satisfied; the disclaimers were effective under Massachusetts law. The controversy arises from the second requirement; specifically, it is over the meaning of the word "transfer," which may be read to refer to the creation of petitioner's remainder interest by his grandmother's will, or to either the vesting of that interest or the distribution of tangible assets upon the death of the life tenant. Both positions find support in the language of the Regulation.

To a layman the word "transfer" would normally describe a change in ownership of an existing interest rather than the creation of a new interest. Moreover, the reference to a transfer of "ownership of a decedent's property" suggests that the transferee must acquire property that once had been owned by the decedent; petitioner's grandmother never owned the future interests that her will created, but she once did own the assets (or their equivalent) that the remaindermen will acquire when their interests become possessory in character. Thus, language in the Regulation implies that the relevant "transfer" had not yet occurred when petitioner renounced his interest in the trust.

Other language, however, indicates that the relevant "transfer" occurs at the time of the testator's death. The word "transfer" is the basic term used in the gift tax provisions to describe *any* passage of property without consideration that may have tax consequences. See 26 U. S. C. §§ 2501, 2511, quoted in nn. 2, 3, *supra*.[13] The Regulation

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[13] Petitioner does not contend that the creation of an irrevocable trust for the benefit of alternative contingent remaindermen is not a "transfer" when made; if the creation of such a trust is a "transfer" of property within the meaning of the statute, a "transfer" occurred in this case at Margaret Weyerhaeuser Jewett's death. In short, the use of the word "transfer" in Treas. Reg. § 25.2511–1(c) is not indicative of special meaning. To the

describes a transfer that "is effected by the decedent's will" (or by the law of descent and distribution of intestate property), not by a subsequent vesting event or distribution of property. The property must be transferred "from a decedent," not from an estate executor or trust administrator. The lack of any reference in the Regulation to future interests or contingent remainders, and the consistent focus on transfers effected by the decedent by will or through the laws of intestate distribution, undermine the suggestion that the relevant transfer occurs other than at the time of the testator's death. The Regulation also requires "knowledge of the existence of the transfer"; since a person to whom assets have actually been distributed would seldom, if ever, lack knowledge of the existence of such a transfer, it seems more likely that this provision was drafted to protect persons who had no knowledge of the creation of an interest.

On balance, we believe that the text of the Regulation supports the Commissioner's interpretation. Because that text is not entirely clear, however, it is appropriate to examine briefly the Regulation's history.

III

Treasury Regulation § 25.2511–1(c) has not been changed since it was promulgated on November 15, 1958. The form of the Regulation, however, is somewhat different from a draft that was first proposed on January 3, 1957. That draft required a renunciation to be made "within a reasonable time after knowledge of the existence of the interest," rather than

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contrary, Congress has specifically indicated that the term "transfer," at least as used in the statutory provisions defining the gift tax, is used "in the broadest and most comprehensive sense." See *supra*, at 309, and nn. 9, 10. It is not surprising that the draftsmen of the Regulation would choose the general term utilized by Congress to describe any passage of property with possible tax consequences.

after knowledge of the existence of the "transfer."[14] The word "interest" unquestionably would encompass a contingent remainder even if the word "transfer" arguably would not. Thus, if the initial draft had been adopted without change, petitioner's disclaimers certainly would be subject to tax. Petitioner contends that the drafting change must have been intended to avoid this consequence.

An assessment of petitioner's argument requires an examination of the reason for the change in the Regulation's language. The explanation of the change rendered by the Commissioner in 1958 indicates that it was intended to accomplish a purpose quite different from that suggested by petitioner.

A Memorandum from the Commissioner to the Secretary of the Treasury submitted on October 1, 1958, explained that the change in language was intended to capture "the proper distinction" between two early court decisions that the Regulation had attempted to codify.[15] In both of these cases the

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[14] The January 3, 1957, draft of the Regulation provided, in part:

"The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does not immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest." 22 Fed. Reg. 58 (1957).

[15] The Memorandum is published in Tax Notes, July 27, 1981, p. 204. In pertinent part, the Memorandum explains:

"In what was intended to be the application of the rules in *Brown* v. *Routzahn* (1933) 63 F. 2d 914, cert. denied 290 U. S. 641, and *Hardenbergh* v. *Commissioner* (1952) 198 F. 2d 63, cert. denied 344 U. S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir immediately upon the decedent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. . . . Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now

transferee had renounced a fee interest before the administration of the decedent's estate had been completed. In the earlier case, *Brown* v. *Routzahn*, 63 F. 2d 914 (CA6 1933), cert. denied, 290 U. S. 641, a husband refused to accept a bequest under his wife's will. Under Ohio law the disclaimer was effective because it preceded the distribution of his wife's estate. Since the husband had never acquired ownership of the property, his disclaimer was held not to constitute the transfer of an interest; rather, it was deemed an exercise of a right to refuse a gift of property. Accordingly, the renunciation was held not be a gift in contemplation of death for purposes of determining the husband's estate tax. In the second case, *Hardenbergh* v. *Commissioner*, 198 F. 2d 63 (CA8 1952), cert. denied, 344 U. S. 836, the decedent died intestate leaving a wife, a daughter, and a son by a prior marriage. To effectuate the decedent's intent to equalize the wealth of the three, the wife and daughter relinquished their rights to their intestate shares. Under Minnesota law, however, "title to an interest in decedent's estate vested in the taxpayers by operation of law which neither had the power to prevent." 198 F. 2d, at 66. Since local law denied them the power to renounce the interest, the taxpayers' disclaimers were not effective and constituted gifts subject to the federal gift tax.

As indicated in the Commissioner's Memorandum, Treas. Reg. § 25.2511–1(c) sought to preserve the distinction between these two cases. Originally, the Regulation tracked language in the *Hardenbergh* opinion and provided that a disclaimer was taxable only if title to the property had "vested" under state law. On consideration, however, the Commissioner recognized that this language did not capture "the

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believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of section 25.2511–1 to reflect this change of position."

proper distinction between these two court cases"; indeed, in *Brown* v. *Routzahn*, the property interest had fully "vested" at the time of the taxpayer's renunciation.[16] Thus, to incorporate the proper distinction, the Commissioner changed the "vesting" requirement to a requirement that "the law governing the administration of the decedent's estate" must give a right to "refuse to accept ownership of property transferred from a decedent." Having eliminated the "vested property interest" language from the first part of the Regulation, the Commissioner correspondingly changed the second part to read "within a reasonable time after knowledge of the existence of the transfer," rather than "within a reasonable time after knowledge of the existence of the interest."

Thus, the purpose of the change in the Regulation was not to exclude contingent remainders. Neither *Brown* nor *Hardenbergh* concerned contingent interests. Since the original draft of the Regulation supports the Commissioner's position in this case, and since the change in its form was made for a reason that is unrelated to the issue presented, the Regulation's history buttresses the Commissioner's position.

Petitioner also contends that the history of the Regulation demonstrates that its draftsmen merely intended to codify the rules of *Brown* v. *Routzahn* and *Hardenbergh* v. *Commissioner*, and that under those cases state law controlled both the "right" to renounce and the "timeliness" of the renunciation. Although petitioner accurately interprets

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[16] As the court stated in that case:

"The [taxpayer] was in possession of the estate from 1912 until it was transferred to the trustees in 1920. It was not, however, in his possession as donee, but as a coexecutor. Nevertheless, at any time within that period he could have taken the one-third or made a renunciation that would have estopped him from claiming it. He did neither. It may be conceded, too, we think, that, had he died at any time between 1912 and the date of the distribution, this property would have passed under a general devise in his will, or, leaving no will, would have passed under the laws of descent and distribution as a part of his estate." 63 F. 2d, at 916.

these two cases, his interpretation of the Regulation would render half of it superfluous. The Regulation explicitly imposes two requirements: (1) the disclaimer must be effective as a matter of local law; and (2) the disclaimer must be made within a reasonable time. If timeliness were governed solely by local law, the second requirement would be redundant. While it is possible that local law may require a disclaimer to be timely to be effective, such a requirement would not absolve the taxpayer from the separate timeliness requirement imposed by the federal Regulation. Otherwise, the Regulation would be complete with a single requirement that the disclaimer be effective under local law.[17]

IV

Petitioner's remaining arguments may be answered quickly. In the Tax Reform Act of 1976, Congress established specific standards for determining whether a disclaimer constitutes a taxable gift; those new standards would support the Commissioner's position in this case if the original transfers had occurred after the effective date of the Act.[18] Petitioner argues that the legislative decision not to

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[17] It is possible that the federal timeliness requirement was added in response to the particular facts presented by *Brown* v. *Routzahn*, in which the taxpayer waited eight years to renounce the interest and did so when he was 72 years old. Although the renunciation was timely as a matter of Ohio law, the Treasury Department may well have thought that such delay was unacceptable for federal tax purposes. In practical effect, the 8-year delay made it likely that the renunciation decision was part of the taxpayer's personal estate planning. As explained by the Tax Court in this case: "While a State court might be willing to accept a renunciation of a nonpossessory and not indefeasibly vested property interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the property, or whether he had better let it pass directly to the next generation." 70 T. C., at 437.

[18] See Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1893, § 2009(b), 26 U. S. C. § 2518(b).

apply those standards retroactively is evidence that a different rule was previously effective. It is clear, however, that Congress expressed no opinion on the proper interpretation of the Regulation at issue in this case; it merely established an unambiguous rule that should apply in the future.[19]

Petitioner also argues that it is unfair to apply the 1958 Regulation "retroactively" to an interest that had been created previously; petitioner asserts that, by the time the Regulation was adopted, it was already too late—according to the Commissioner's view—to disclaim the interest.[20] The argument lacks merit. It is based on an assumption that petitioner had a "right" to renounce the interest without tax consequences that was "taken away" by the 1958 Regulation. Petitioner never had such a right. Indeed, petitioner does not argue that taxation of the disclaimers is inconsistent with the statutory provisions imposing a gift tax, which were enacted long before petitioner's interest in the trust was created. The 1958 Regulation was adopted well in advance of the disclaimers in this case; we see no "retroactivity" problem.

Finally, petitioner argues that the disclaimer of a contingent remainder is not a taxable event by analogizing it to an

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[19] After noting the decision in *Keinath* v. *Commissioner*, 480 F. 2d 57 (CA8 1973), and the "reasonable" time requirement of the Regulation, the House Report states that Congress

"believe[d] that definitive rules concerning disclaimers should be provided for estate and gift tax purposes to achieve uniform treatment. In addition, [Congress] believe[d] that a uniform standard should be provided for determining the time within which a disclaimer must be made." H. R. Rep. No. 94–1380, pp. 66–67 (1976).

Nothing in the legislative history expresses an opinion on the proper interpretation of the previously controlling Regulation. Nor is such an opinion indicated by the mere enactment of the law; Congress may seek to clarify the future without affecting the past. Cf. *Knetsch* v. *United States*, 364 U. S. 361, 367–370.

[20] Petitioner's argument would have more appeal had he attempted to renounce the interest immediately after the adoption of the 1958 Regulation, rather than some 14 years later.

exercise of a special power of appointment, which generally is not considered a taxable transfer. 26 U. S. C. § 2514. As the Commissioner notes in response, however, a disclaimant's control over property more closely resembles a *general* power of appointment, the exercise of which is a taxable transfer. *Ibid.* Unlike the holder of a special power—but like the holder of a general power—a disclaimant may decide to retain the interest himself. It is this characteristic of the control exercised by a disclaimant that makes a disclaimer a "transfer" within the scope of the gift tax provisions.

V

The Commissioner's interpretation of the Regulation has been consistent over the years and is entitled to respect. This canon of construction, which generally applies to the Commissioner's interpretation of the Internal Revenue Code, see *Commissioner* v. *Portland Cement Co. of Utah*, 450 U. S. 156, 169, is even more forceful when applied to the Commissioner's interpretation of his own Regulation.

Since the relevant "transfer" in this case occurred when petitioner's grandmother irrevocably transferred her assets to a testamentary trust, petitioner's disclaimers of the rights created by that trust were not made within a reasonable time. Even accepting petitioner's argument that the clock did not begin to run until he reached the age of majority, the disclaimers were made after the passage of 24 years. As the Tax Court explained:

> "The petitioner possessed, for 24 years, the effective right to determine who should ultimately receive the benefits of a 50-percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of

> substantial means. In 1972, by the execution of two disclaimers, he elected to let the property pass according to the alternative provisions of his grandmother's will—to the natural objects of his bounty. This, we hold, was an exercise of control over the disposition of property subject to the gift tax imposed by section 2501." 70 T. C. 430, 438 (1978) (footnote omitted).

We agree. The Commissioner's assessment of a tax was proper, both under the statute and the Regulation.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

I do not find this case as easy or as clear on behalf of the Government as a reading of the Court's opinion would lead one to believe. While the issue could be described as somewhat close, I conclude that the petitioners have much the better of the argument, and I would reverse the judgment of the Court of Appeals.

I

Margaret Weyerhaeuser Jewett, grandmother of petitioner George F. Jewett, Jr., died testate on January 14, 1939. At her death she was a resident of Massachusetts. She left a will which was duly admitted to probate in that Commonwealth.

By her will the decedent created a trust for the benefit of her husband, James R. Jewett, during his lifetime, and thereafter for the benefit of her son, George F. Jewett, and his wife, Mary, for their respective lives. On the death of the survivor of the three life beneficiaries, the trust estate is to be distributed to the then living children of George F. Jewett and to the then living issue of any deceased child of George F. Jewett, in equal shares by right of representation.

Petitioner George F. Jewett, Jr., was born April 10, 1927; he thus was not yet 12 years old when his grandmother died. The testatrix' husband, James, and her son, George, died prior to 1972. Mary is still living; she was born March 7, 1901.

On August 30, 1972, petitioner[1] executed an instrument disclaiming and renouncing the major portion of any right to receive any remainder of the trust estate upon the death of his mother. On December 14 of that year, petitioner executed a second instrument disclaiming and renouncing the remaining portion of any such right. It is undisputed that these 1972 disclaimers were valid, timely, and effective under the applicable Massachusetts law.

Petitioner George F. Jewett, Jr., and his wife, petitioner Lucille M. Jewett, filed federal gift tax returns for the calendar quarters ended September 30 and December 31, 1972, respectively. Those returns notified respondent Commissioner of the disclaimers but did not acknowledge them as taxable transfers for federal gift tax purposes.[2]

On audit, the Commissioner determined that the disclaimers were *not* "made within a reasonable time after knowledge of the existence of the transfer," within the meaning of Treas. Reg. § 25.2511–1(c), 26 CFR § 25.2511–1(c) (1981), and thus were transfers subject to federal gift tax under §§ 2501(a)(1) and 2511(a) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 2501(a)(1) and 2511(a). Deficiencies of approximately $750,000 were determined.

Petitioners sought redetermination of the deficiencies in the United States Tax Court. That court, in a reviewed decision, ruled in favor of the Commissioner. 70 T. C. 430 (1978). In so doing, the court followed its earlier ruling in

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[1] For convenience, any reference made herein to "petitioner" in the singular, refers to George F. Jewett, Jr., alone.

[2] Petitioners, as they were entitled to do under § 2513 of the Internal Revenue Code of 1954, 26 U. S. C. § 2513, elected to treat any gift made by either as made equally by both.

Keinath v. *Commissioner*, 58 T. C. 352 (1972), an unreviewed decision that had been *reversed*, 480 F. 2d 57 (1973), by a unanimous panel of the United States Court of Appeals for the Eighth Circuit five years before. In the present case, a panel of the Ninth Circuit, by a divided vote, *affirmed* the Tax Court. 638 F. 2d 93 (1980). Because of the conflict, so created, between judgments of two Courts of Appeals, the case is here.

II

As the Court observes, *ante*, at 311, the language of the Regulation provides support for the petitioners as well as for the Commissioner. The Court also acknowledges that the Regulation has language that "implies that the relevant 'transfer' had not yet occurred when petitioner renounced his interest in the trust." *Ibid.* The Court, however, opts for the Commissioner's opposing interpretation. I am persuaded otherwise.

To be sure, certain factors lend colorable support to the Commissioner's position: (a) Although petitioner was not yet 12 years old when the testatrix died, he attained the age of 21 in 1948, 24 years before he executed the disclaimers in 1972. (b) Sections 2501(a)(1) and 2511(a) of the Code are broad and sweeping and were intended to reach every "transfer of property by gift," whether in trust or otherwise, and whether direct or indirect. (c) And to accept petitioners' position could mean, as a practical matter, that one who is a beneficiary of a trust, such as this testatrix created, may stand aside for a long period before disclaiming and thus, in a sense, may make that disclaimer a part of his own estate planning when actual possessory enjoyment of the property is nearer at hand and its desirability or a need for it is better evaluated than many years before.

The other side of the controversy, however, is not without substantial support. The federal gift tax does not deal with abstractions. It is concerned with "the transfer of property by gift." 26 U. S. C. § 2501(a)(1). With the development of

testamentary trusts—or, for that matter, of *inter vivos* trusts—legally recognized "interests" of various kinds, possessory and anticipatory, can be created by the trustor. The beneficiary of a contingent remainder or, as the Court seems to suggest here, *ante*, at 308, n. 5, of "a vested remainder subject to divestiture," however, may never realize anything by way of actual enjoyment of income or corpus. The contingencies upon which enjoyment depends may never ripen. In particular, the contingent beneficiary may die while the life beneficiary still lives.

These possibilities, accompanied by the monetary impact of gift and death taxes led courts and legislative bodies to recognize or develop common-law disclaimer and to enact preventive statutory provisions. Indeed, the Commissioner here, in the Regulation at issue, § 25.2511–1(c), recognizes a right to refuse, free of gift tax, acceptance of "ownership of property transferred from a decedent," provided that the right to refuse is effective under local law and the refusal is "made within a reasonable time after knowledge of the existence of the transfer." It is accepted that the disclaimers in the present case were effective under Massachusetts law. I search the statute in vain, however, for any statutory mention of, or provision for, the reasonable-time requirement. One might say, therefore, that the Commissioner in his wisdom acted as a matter of grace to relieve, upon the conditions specified, what could be difficult and potentially unfair and financially disastrous tax situations.

Be that as it may, I regard any "transfer" here, not as one from George F. Jewett, Jr. (the necessary predicate of the Commissioner's determination), but as a transfer from the testatrix. She is the one from whom the largess flows. Petitioner, of course, was in the line of designated beneficiaries, but he stepped from that line through the acts of disclaimer, and the transfer will pass him by.

There are other practical considerations that have appeal for me:

1. Accepting the Commissioner's Regulation and its "reasonable time" requirement, it seems to me that that time is to be measured, not from the death of the testatrix in 1939, but from the death of the preceding life beneficiary. That life beneficiary, petitioner's mother, is still alive. Petitioner has realized no benefit from the trust and never will have any benefit if he predeceases his mother. It is the contingency event that is important and makes sense in the consideration of any disclaimer.

2. A disclaimer is fundamentally different from a voluntary transfer of property. A disclaimer is a refusal to accept property *ab initio*. *Bel* v. *United States*, 452 F. 2d 683, 693 (CA5 1971), cert. denied, 406 U. S. 919 (1972); see Black's Law Dictionary 417 (5th ed. 1979). The law of disclaimer is founded on the basic property-law concepts that a transfer is not complete until its acceptance by the recipient, and that no person can be forced to accept property against his will. A transferor chooses the recipients of the transferred property; a disclaimant makes no such selection, for that selection has been made by the trustor. Petitioner's disclaimers merely renounced any future right to receive corpus of the trust; they did not direct or even purport to direct the future distribution of that corpus.

3. Until the Ninth Circuit, by its divided vote, decided the present case, the only Court of Appeals authority on the issue was *Keinath* v. *Commissioner*, *supra*. For reasons best known to him, the Commissioner did not seek certiorari in that case and the decision stood unmolested by any opposing appellate court authority for over seven years. Indeed, it was expressly reaffirmed by the Eighth Circuit sitting en banc in *Cottrell* v. *Commissioner*, 628 F. 2d 1127 (1980), a case decided just a few weeks before the Ninth Circuit decision.[3] In the interim, a substantial period as the tax law

[3] In *Cottrell*, three judges dissented because they felt that, in contrast with the factual situation in *Keinath*, the *Cottrell* taxpayer had "extensive" and "ultimate" control through a general testamentary power of appoint-

goes, taxpayers and their advisers have properly assumed that a disclaimer, valid under state law, was valid for federal tax purposes as well if it were timely made. Judge Harris, dissenting below, observed that "it is particularly important in matters of taxation that established precedent be followed." 638 F. 2d, at 96. He went on to say that if the case were one of first impression, he "might well join with the majority" but "[n]umerous tax practitioners have undoubtedly relied on this [the *Keinath*] opinion in advising as to the tax consequences of such acts as are involved in the instant case, and justifiably so." *Ibid.* I agree that stability in tax law is desirable. Except for the Tax Court, the pronounced law appeared to have achieved a level of stability after *Keinath*.

4. The Eighth Circuit's analysis of the legal issue, it seems to me, is sound. In *Keinath* the court stressed that the remainder beneficiary "at no time accepted any income or principal from the trust," 480 F. 2d, at 59, and that within eight weeks of the death of the testator's widow-life beneficiary, the remainderman executed his disclaimer. It was established that the disclaimer was valid and timely under applicable state law and that as a result thereof the trust estate passed to the disclaimant's children. The court noted that "reasonable time," as that term is used in the Regulation, is not defined either in the Code or the Regulation. The basic common-law requirements that the disclaimer must be made within a reasonable time and that it be effective under local law "are but a codification of common law principles applicable to the doctrine of disclaimers." *Id.*, at 61. A central

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ment. They would modify the *Keinath* approach "where the remainderman essentially controls the events which would cause divestiture of the interest." They agreed, however, with the "general rule as applied to the facts of *Keinath*," where an interest is "less than an indefeasibly vested remainder." 628 F. 2d, at 1132–1133.

It is of interest to note that the court in *Cottrell* observed: "The Commissioner has not asked us to overrule *Keinath*, and we are not inclined to do so on our own motion." *Id.*, at 1131.

factor is the interpretation of the word "transfer" in the Regulation. The remainderman "had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary." *Id.*, at 64. The court then held that, under the prevailing common law, the holder of a vested remainder interest subjected to divestiture has a reasonable time within which to disclaim after the death of the life beneficiary. *Ibid.* It distinguished *Fuller* v. *Commissioner*, 37 T. C. 147 (1961), upon which the Tax Court had relied, and did so on the factual grounds mentioned below.

In *Cottrell*, the Eighth Circuit, sitting en banc, adhered to its *Keinath* analysis. It felt the case was "indistinguishable in any material respect from *Keinath*." 628 F. 2d, at 1128. It was undisputed that the disclaimer in question was valid under state law, that it was unequivocal, and that the taxpayer accepted no property before she disclaimed. As in *Keinath*, if the "reasonable time" period began with the death of the testator, the disclaimer was untimely, but if the critical event was the death of the life beneficiary, the disclaimer "was unquestionably timely, having been executed 16 days, and filed two months, thereafter." 628 F. 2d, at 1129. There is nothing unfair or improper in allowing the remainderman to wait until the life beneficiary's death and then decide whether to accept the bequest.

What the Eighth Circuit said by way of analysis, and held, in *Keinath* and *Cottrell*, when applied to the facts before us, is persuasive and should control here. The Ninth Circuit majority, without any particular analysis, merely disagreed with the *Keinath* and *Cottrell* reasoning and held, in a conclusory statement, that the "'transfer' as used in the regulation means the transfer to the disclaimant of the property interest disclaimed by him," and that the transfer in question took place in 1939 when Mrs. Jewett died and petitioner received a contingent remainder from her estate. 638 F. 2d, at 96.

5. The Court notes, *ante*, at 316, that by the Tax Reform Act of 1976, Pub. L. 94–455, § 2009(b)(1), 26 U. S. C. § 2518, Congress now has imposed a uniform tax treatment of disclaimers, independent of state law. Section 2518, as so added to the Code, however, was specifically made prospective only, that is, it was made applicable only to transfers creating an interest after 1976. Pub. L. 94–455, § 2009(e)(2), 90 Stat. 1896. It thus has no application to the present case.

The Court declares, *ante*, at 317: "Congress expressed no opinion on the proper interpretation of the Regulation at issue in this case," but merely established an unambiguous rule for the future. That conclusion is not at all clear to me. Congress was aware of the *Keinath* decision. See H. R. Rep. No. 94–1380, p. 66, and n. 4 (1976). The House Committee on Ways and Means observed:

> "The amendments apply with respect to transfers creating an interest in the person disclaiming made after December 31, 1976. In the case of transfers made before January 1, 1977, the rules relating to transfers under present law, including the period within which a disclaimer must be made, are to continue to apply to disclaimers made after December 31, 1976." *Id.*, at 67–68.

For me, this is an acknowledgment that the *Keinath* ruling represented what the law was prior to 1977, and what it still is for trust instruments effective before that calendar year. I cannot join the Court's flat statement that "Congress expressed no opinion" on the existing law.

6. To be sure, the Tax Court has persisted in its contrary rulings. Those rulings, I feel, rest on an insecure base. The original case, from which all the other Tax Court decisions have flowed, was *Fuller* v. *Commissioner*, 37 T. C. 147 (1961), a reviewed case. In *Fuller*, the life beneficiary of five-eighths of the income of her husband's testamentary trust received that income for many years before she renounced a portion of her five-eighths share. Thus, she real-

ized actual enjoyment for a long period before she disclaimed. This, for me, is a vital fact that distinguishes the case from *Keinath*, *Cottrell*, and *Jewett*, where each disclaimant enjoyed no benefit whatsoever. Mrs. Fuller had accepted her gift before renouncing it.

The next Tax Court case was *Keinath* v. *Commissioner*, 58 T. C. 352 (1972). The judge who decided *Keinath* relied on *Fuller* as controlling precedent. He acknowledged Mrs. Fuller's receipt of income from the trust "for over 25 years," conceded that the Fuller facts "are admittedly different," but nevertheless ruled that "this distinction is immaterial." 58 T. C., at 358. He did not read *Fuller* "as resting upon Mrs. Fuller's acceptance of income from the trust but upon her acceptance of her interest in the trust." 58 T. C., at 358.

The next pertinent Tax Court decision was that in the present case.[4] 70 T. C. 430 (1978). There the court, in a reviewed decision, referred to, and relied upon, its own decision in *Keinath* which had been reversed by the Eighth Circuit. "We think that our decision in *Keinath* was correct and that it controls the decision in this case." 70 T. C., at 435.

The last Tax Court cases are *Estate of Halbach* v. *Commissioner*, 71 T. C. 141 (1978), and *Cottrell* v. *Commissioner*, 72 T. C. 489 (1979). The former was a federal estate tax case centering on 26 U. S. C. § 2035 (disclaimer within three years of death). The latter, concerning a sister of the *Halbach* decedent, related to federal gift tax. Neither was a reviewed decision. The judge in *Cottrell*, recognizing that that case was appealable only to the Eighth Circuit, avoided the Court of Appeals decision in *Keinath* by distinguishing it on grounds later found unacceptable by the Eighth Circuit majority when the Tax Court decision was reversed.

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[4] See, however, *Estate of Rolin* v. *Commissioner*, 68 T. C. 919, 927 (1977), aff'd, 588 F. 2d 368 (CA2 1978).

Such is the saga of the issue in the United States Tax Court. The cases build on one another, but the origin and base is *Fuller*. That original case, in my view, is clearly distinguishable on its facts and thus, indeed, is "a frail reed on which to lean."

7. The Court's and the Commissioner's position also seems to me to embrace a distinct element of unfairness. The Commissioner stresses repeatedly the number of years that elapsed between the death of the testatrix and the execution of the disclaimers. This same element has been stressed in others of these cases. But to require the disclaimer long before the interest could ripen into enjoyment means that the decision must be made at a time when the disclaimant does not know what he is disclaiming or whether he ever would receive and enjoy any interest. This concern is compatible with the wording of the applicable Regulation which speaks of "knowledge of the existence of the transfer." The Eighth Circuit recognized this element of unfairness in *Cottrell*. 628 F. 2d, at 1131.

For all these reasons, I would reverse the judgment of the Court of Appeals. I therefore respectfully dissent.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE *v.* KASSEL ET AL.

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

No. 79–1618. Argued November 9, 1981—Decided February 23, 1982

Certiorari dismissed.

John H. Lederer argued the cause for petitioner. With him on the briefs were *John Duncan Varda*, *Anthony R. Varda*, and *William C. Lewis, Jr.*

Mark E. Schantz, Solicitor General of Iowa, argued the cause for respondents. With him on the brief were *Thomas J. Miller*, Attorney General, *Robert W. Goodwin*, Special Assistant Attorney General, and *Lester A. Paff*, Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE WHITE, dissenting.

We granted certiorari in this case to decide one very narrow question: "May a court, without articulating its rationale, summarily deny an application for attorneys' fees under 42 U. S. C. § 1988?" Petitioner concedes that "not . . . all cases require opinions," Brief for Petitioner 6, n. 6, but argues that with respect to an application for fees under § 1988 "[t]he combination of discretion and a standard for the exercise of that discretion necessitates a statement of reasons to determine whether the decision is proper." *Id*, at 12. In my view, such an application is not sufficiently distinguishable

from numerous other motions and applications that a court may concedely decide without opinion. Whether this is a good or bad method of exercising discretion in a particular case, or even in general, is not at issue in this case. Because I do not believe that there is any *per se* rule that a court may never summarily deny an application for fees, I would affirm the decision below.

Accordingly, I dissent from the majority's disposition of this case.

NEW ENGLAND POWER CO. *v.* NEW HAMPSHIRE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

No. 80–1208. Argued December 7, 1981—Decided February 24, 1982*

Appellant New England Power Co., a public utility generating and transmitting electricity at wholesale, sells most of its power in Massachusetts and Rhode Island; its wholesale customers service less than 6% of New Hampshire's population. New England Power owns and operates hydroelectric units, some of which are located in New Hampshire. The units are licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act. A New Hampshire statute, enacted in 1913, prohibits a corporation engaged in the generation of electrical energy by water power from transmitting such energy out of the State unless approval is first obtained from the New Hampshire Public Utilities Commission. The statute empowers that Commission to prohibit the exportation of such energy when it determines that the energy "is reasonably required for use within this state and that the public good requires that it be delivered for such use." Since 1926, New England Power or its predecessor periodically obtained the Commission's approval to transmit electricity produced in New Hampshire to points outside the State. However, in 1980, after an investigation and hearings, the Commission withdrew such approval and ordered New England Power to arrange to sell the previously exported hydroelectric energy within New Hampshire. New England Power, the Commonwealth of Massachusetts, and the Attorney General of Rhode Island appealed the Commission's order to the New Hampshire Supreme Court, contending that the order was pre-empted by the Federal Power Act and imposed impermissible burdens on interstate commerce. The court rejected those arguments, holding, *inter alia*, that the "saving clause" of § 201(b) of the Federal Power Act granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the State. Section 201(b), which was enacted in 1935, provides that the Act's provisions delegating exclusive authority to the FERC to regulate the transmission and sale at wholesale of electric energy in interstate

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*Together with No. 80–1471, *Massachusetts et al.* v. *New Hampshire et al.*; and No. 80–1610, *Roberts, Attorney General of Rhode Island, et al.* v. *New Hampshire et al.*, also on appeal from the same court.

commerce "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."

Held: New Hampshire has sought to restrict the flow of privately owned and produced electricity in interstate commerce in a manner inconsistent with the Commerce Clause. Section 201(b) of the Federal Power Act does not provide an affirmative grant of authority to the State to do so. Pp. 338–344.

(a) Absent authorizing federal legislation, the Commerce Clause precludes a state from mandating that its residents be given a preferred right of access over out-of-state consumers to natural resources located within its borders or to the products derived therefrom. The New Hampshire Commission's order is precisely the sort of protectionist regulation that the Commerce Clause declares off limits to the states. Moreover, the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce that cannot be squared with the Commerce Clause when they serve only to advance simple economic protectionism. Pp. 338–340.

(b) In § 201(b), Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy. Nothing in the legislative history or language of the statute evinces a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause, or to modify this Court's earlier holdings concerning the limits of state authority to restrain interstate trade. When Congress has not expressly stated its intent to sustain state legislation from attack under the Commerce Clause, this Court has no authority to rewrite its legislation based on mere speculation as to what Congress probably had in mind. Pp.340–343.

120 N. H. 866, 424 A. 2d 807, reversed and remanded.

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

Samuel Huntington argued the cause for appellant in No. 80–1208. With him on the briefs were *John F. Sherman III*, *Edward Berlin*, *Carmen D. Legato*, and *J. Phillip Jordan*. *Donald K. Stern*, Assistant Attorney General of Massachusetts, argued the cause for appellants in Nos. 80–1471 and 80–1610. With him on the brief for appellants in No. 80–1471 were *Francis X. Bellotti*, Attorney General, *Thomas R. Kiley*, First Assistant Attorney General, and *Joan C. Stod-*

dard, E. Michael Sloman, and *Alan Sherr,* Assistant Attorneys General. *Dennis J. Roberts II,* Attorney General of Rhode Island, and *John R. McDermott* filed a brief for appellants in No. 80–1610.

Gregory H. Smith, Attorney General of New Hampshire, argued the cause for appellees. With him on the brief was *Peter C. Scott,* Assistant Attorney General.†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These three consolidated appeals present the question whether a state can constitutionally prohibit the exportation of hydroelectric energy produced within its borders by a federally licensed facility, or otherwise reserve for its own citizens the "economic benefit" of such hydroelectric power.

I

Appellant New England Power Co. is a public utility which generates and transmits electricity at wholesale. It sells 75% of its power in Massachusetts and much of the remainder in Rhode Island; less than 6% of New Hampshire's population is serviced by New England Power's wholesale customers. New England Power owns and operates six hydroelectric generating stations on the Connecticut River, consisting of 27 generating units. Twenty-one of these units—with a capacity of 419.8 megawatts, or about 10% of New England Power's total generating capacity—are located within the State of New Hampshire. The units are licensed by the Federal En-

†Briefs of *amici curiae* urging reversal were filed by *Acting Solicitor General Wallace, Stuart A. Smith,* and *Jerome M. Feit* for the United States et al.; by *Robert L. Baum* and *Ronald D. Jones* for the Edison Electric Institute; by *Joseph D. Alvaini* for the New England Legal Foundation et al.; by *James R. McIntosh* and *Allan B. Taylor* for the New England Power Pool Executive Committee; and by *Robert C. McDiarmid* for the Unaffiliated Massachusetts Municipal Wholesale Customers of New England Power Co.

ergy Regulatory Commission pursuant to Part I of the Federal Power Act, 41 Stat. 1063, as amended, 16 U. S. C. §§ 791a–823 (1976 ed. and Supp. IV). Since hydroelectric facilities operate without significant fuel consumption, these units can produce electricity at substantially lower cost than most other generating sources.

New England Power is a member of the New England Power Pool, whose utility-members own over 98% of the total generation capacity, and virtually all of the transmission facilities, in the six-state region. The objectives of the Power Pool, as described in the agreement among its members, are to assure the reliability of the region's bulk power supply and to attain "maximum practicable economy" through, *inter alia*, "joint planning, central dispatching . . . and coordinated construction, operation and maintenance of electric generation and transmission facilities owned or controlled by the Participants . . . ." New England Power Pool Agreement § 4.1, App. 31a. All member-owned generating facilities are placed under the control of the Power Pool's Dispatch Center. A computer calculates the cost of generation for each generating unit and assigns each unit an operating schedule that will minimize the cost of the region's total power supply. Power generated at the various units, including New England Power's Connecticut River hydroelectric stations, flows freely through the Pool's regional transmission network, or "grid." The energy is dispatched to members' customers as their power needs arise, without regard to generating source. The Pool bills each member the amount it would have cost the utility to meet its customers' load using only its own generating sources, minus that member's share of the savings resulting from the centralized dispatch system.[1]

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[1] Testimony before the New Hampshire Public Utilities Commission in these cases indicated that the savings have been substantial. For example, in 1979, the savings attributable to the Power Pool's centralized dis-

A New Hampshire statute, enacted in 1913, provides:

> "No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business." N. H. Rev. Stat. Ann. § 374:35 (1966).

The statute empowers the New Hampshire Commission to prohibit the exportation of such electrical energy when it determines that the energy "is reasonably required for use within this state and that the public good requires that it be delivered for such use." *Ibid.*

Since 1926, New England Power or a predecessor company periodically applied for and obtained approval from the New Hampshire Commission to transmit electricity produced at the Connecticut River plants to points outside New Hampshire. However, on September 19, 1980, after an investigation and hearings, the Commission withdrew the authority formerly granted New England Power to export its hydroelectric energy, and ordered the company to "make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire . . . ."[2] In its report accompanying the order,

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patch system were reported at over $44 million. App. 35a, 56a. See generally Federal Energy Regulatory Commission, Office of Electric Power Regulation, Power Pooling in the United States 15–23, 39–41, 69–79 (1981), for a description of efficiencies attributable to pooling arrangements.

[2] The order reads:

"ORDERED, that the permission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn as of thirty (30) days from the date of this Order; and it is

"FURTHER ORDERED, that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and munici-

the Commission found that New Hampshire's population and energy needs were increasing rapidly; that, primarily because of its low "generating mix" of hydroelectric energy, the Public Service Company of New Hampshire, the State's largest electric utility, had generating costs about 25% higher than those of New England Power; and that if New England Power's hydroelectric energy were sold exclusively in New Hampshire, New Hampshire customers could save approximately $25 million a year. The Commission therefore concluded that New England Power's hydroelectric energy was "required for use within the State" of New Hampshire, and that discontinuation of its exportation would serve the "public good." App. to Juris. Statement in No. 80–1208, pp. 25–39.

The Commission did not, however, order New England Power to sever its connections with the Power Pool. So long as the electricity produced at New England Power's hydroelectric plants continues to flow through the Pool's regional transmission network, it will be impossible to contain that electricity within the State of New Hampshire in any physical sense. Although the precise contours of the Commission's order are unclear, it appears to require that New England Power sell electricity to New Hampshire utilities in an amount equal to the output of its in-state hydroelectric facilities, at special rates adjusted to reflect the entire savings attributable to the low-cost hydroelectric generation.[3]

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palities within the State of New Hampshire within thirty (30) days of the date of this Order; and it is

"FURTHER ORDERED, that upon the completion of both units at Seabrook the Commission will again re-examine the issue of exportation."

[3] For example, the Commission's staff economist testified at the hearings that New England Power could "allocate the benefits of low-cost hydroelectric power to New Hampshire through billing mechanisms" pursuant to which the power would be sold in New Hampshire at "economic cost"—*i. e.*, the cost of producing the power, including depreciation, plus a return on invested capital. App. 38a–39a. The economist's analysis of the

New England Power, the Commonwealth of Massachusetts, and Dennis J. Roberts II, Attorney General of Rhode Island, appealed the Commission's order to the Supreme Court of New Hampshire. They contended that the order was pre-empted by Parts I and II of the Federal Power Act, 16 U. S. C. §§ 791a–824k (1976 ed. and Supp. IV), and imposed impermissible burdens on interstate commerce. The court rejected these arguments, concluding that the "saving clause" of § 201(b) of the Federal Power Act, 16 U. S. C. § 824(b) (1976 ed., Supp. IV), granted New Hampshire authority to restrict the interstate transportation of hydroelectric power generated within the State. *Appeal of New England Power Co.*, 120 N. H. 866, 876–877, 424 A. 2d 807, 814 (1980).[4] The court further held that the New Hampshire Commission's order did not interfere with the Federal Energy Regulatory Commission's exclusive regulatory authority over rates charged for interstate sales of electricity at wholesale. It thus remanded the case to permit the parties to "develop the mechanics of implemention" of the New

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benefits which would ensue from restricting the "exportation" of hydroelectric energy in this manner—upon which the New Hampshire Commission relied heavily in its report—was based on the assumption that New England Power would simply enter into new unit power contracts with New Hampshire utilities for an amount of kilowatt hours equal to New England Power's average hydroelectric generation over the course of a number of years. 3 Tr. of Hearings before the N. H. Public Utilities Comm'n in DE 79–223, pp. 23–24, 1–35. Although the record is not entirely clear on this point, it appears that the "economic benefit," or "savings," attributable to New England Power's hydroelectric facilities is currently reflected in the company's general wholesale rates, and thus shared pro rata by its customers in Massachusetts, Rhode Island, and New Hampshire. App. 15a–18a. See also Brief for Appellant in No. 80–1208, p. 7.

[4] The court also dismissed several arguments advanced only by appellants Massachusetts and Roberts—that § 201(b), as so interpreted, exceeded Congress' power under the Commerce Clause, Art. I, § 8, cl. 3, and violated both the Privileges and Immunities Clause, Art. IV, § 2, cl. 1, and the Tenth Amendment of the Constitution.

Hampshire Commission's order, and mandated that New England Power "make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power." *Id.*, at 878–879, 424 A. 2d, at 815.[5]

We noted probable jurisdiction, 451 U. S. 981 (1981), and we reverse.

II

The Supreme Court of New Hampshire recognized that, absent authorizing federal legislation, it would be "questionable" whether a state could constitutionally restrict interstate trade in hydroelectric power. 120 N. H., at 876, 424 A. 2d, at 814. Our cases consistently have held that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom. *E. g.*, *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). Only recently, in *Philadelphia* v. *New Jersey*, 437 U. S. 617, 627 (1978), we reiterated that "[t]hese cases stand for the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State'" (quoting *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10 (1928)).[6]

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[5] The parties inform us that the New Hampshire Commission has refrained from acting on remand pending this Court's disposition of the appeals.

[6] We find no merit in New Hampshire's attempt to distinguish these cases on the ground that it "owns" the Connecticut River, the source of New England Power's hydroelectricity. Whatever the extent of the State's proprietary interest in the river, the pre-eminent authority to regu-

The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states. Moreover, it cannot be disputed that the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce. See *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance "simple economic protectionism." *Philadelphia* v. *New Jersey*, *supra*, at 624.

The Supreme Court of New Hampshire nevertheless upheld the order of the New Hampshire Commission on the ground that § 201(b) of the Federal Power Act expressly permits the State to prohibit the exportation of hydroelectric power produced within its borders. It is indeed well settled

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late the flow of navigable waters resides with the Federal Government, *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), which has licensed New England Power to operate its Connecticut River hydroelectric plants pursuant to a determination that those facilities are "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce," 16 U. S. C. § 803(a). New Hampshire's purported "ownership" of the Connecticut River therefore provides no justification for restricting or conditioning the use of these federally licensed units. See *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152 (1946). Moreover, New Hampshire has done more than regulate use of the resource it assertedly owns; it has restricted the sale of electric energy, a product entirely distinct from the river waters used to produce it. See *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 179–181 (1932). This product is manufactured by a private corporation using privately owned facilities. Thus, New Hampshire's reliance on *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980)—holding that a state may confine to its residents the sale of products it *produces*—is misplaced.

that Congress may use its powers under the Commerce Clause to "[confer] 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 *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945). The dispositive question, however, is whether Congress in fact has authorized the states to impose restrictions of the sort at issue here.

III

The national concern for planning, development, and comprehensive utilization of the country's water resources was very early expressed by Congress under its Commerce Clause powers. The Federal Water Power Act, now Part I of the Federal Power Act, 16 U. S. C. §§ 791a–823 (1976 ed. and Supp. IV), was enacted in 1920. The potential of water power as a source of electric energy led Congress to exercise its constitutional authority over navigable streams to regulate and encourage development of hydroelectric power generation "to meet the needs of an expanding economy." *FPC* v. *Union Electric Co.*, 381 U. S. 90, 99 (1965).

In 1935, Congress enacted Part II of the Federal Power Act, 16 U. S. C. §§ 824–824k (1976 ed. and Supp. IV), which delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production. *United States* v. *Public Utilities Comm'n of California*, 345 U. S. 295 (1953). The 1935 enactment was a "direct result" of this Court's holding in *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, *supra*, that the states lacked power to regulate the rates governing interstate sales of electricity for resale. *United States* v. *Public Utilities Comm'n of California*, *supra*, at 311. Part II of the Act was intended to "fill the gap" created by *Attleboro* by establishing exclusive federal jurisdiction over such sales. 345 U. S., at 307–311.

Section 201(b) of the Act provides, *inter alia*, that the provisions of Part II "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." However, this provision is in no sense an affirmative grant of power to the states to burden interstate commerce "in a manner which would otherwise not be permissible." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, *supra*, at 769. In § 201(b), Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy; by its plain terms, § 201(b) simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise "lawful." The legislative history of the Act likewise indicates that Congress intended only that its legislation "*tak[e] no authority from* State commissions." H. R. Rep. No. 1318, 74th Cong., 1st Sess., 8 (1935) (emphasis added). Nothing in the legislative history or language of the statute evinces a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause," *United States* v. *Public Utilities Comm'n of California*, *supra*, at 304, or to modify the earlier holdings of this Court concerning the limits of state authority to restrain interstate trade. *E. g.*, *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). Rather, Congress' concern was simply "to define the extent of the federal legislation's pre-emptive effect on state law." *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 49.[7]

To support its argument to the contrary, New Hampshire relies on a single statement made on the floor of the House of

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[7] Indeed, had Congress intended § 201(b) to confer upon the states powers which they would have lacked in the absence of the federal legislation, it would have been anomalous to speak in terms of "authority *now exercised*." This language plainly assumes the prior existence of valid state authority; in addition, it appears to limit the saving effect of the provision to those few States in which the authority was in fact "exercised" in 1935.

Representatives during the debates preceding enactment of Part II. Congressman Rogers of New Hampshire stated:

> "[T]he Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire." 79 Cong. Rec. 10527 (1935).

From this expression of "hope," New Hampshire concludes that Congress specifically intended to preserve the very statute at issue here.

Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and "a step to be taken cautiously." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 26 (1977); *United States* v. *Public Utilities Comm'n of California, supra*, at 319–321 (Jackson, J., concurring). However, even were we to accord significant weight to Congressman Rogers' statement, it would not support New Hampshire's contention that § 201(b) was intended to permit states to regulate free from Commerce Clause restraint. Congressman Rogers simply urged his colleagues not to "deprive" the State of New Hampshire of "rights" it already possessed—*i. e.*, to ensure that the Act itself would not be read as pre-empting otherwise valid state legislation.

To be sure, some Members of Congress may have thought that no further protection of state authority was needed.[8]

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[8] On the other hand, it would not have been at all unusual had Congress taken care that the 1935 enactment not displace state authority in the area,

Indeed, given that the Commerce Clause—independently of the Federal Power Act—restricts the ability of the states to regulate matters affecting interstate trade in hydroelectric energy, § 201(b) may in fact save little in the way of "lawful" state authority.[9] But when Congress has not "expressly stated its intent and policy" to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress "probably had in mind." See *United States* v. *Public Utilities Comm'n of California*, 345 U. S., at 319 (Jackson, J., concurring); see also *id.*, at 311. We must construe § 201(b) as it is written, and as its legislative history indicates it was intended—as a standard "nonpre-emption" clause.[10]

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without consideration of the scope of that authority or the extent to which it might be constrained by other provisions of federal law. See *Milwaukee* v. *Illinois*, 451 U. S. 304, 329, n. 22 (1981).

[9] We need not speculate here as to the precise contours of § 201(b)'s saving effect.

[10] Even were we to conclude that Congress intended § 201(b) to override restraints placed on state regulatory power by the Commerce Clause, there would remain a substantial question whether the order of the New Hampshire Commission was entitled to protection under that provision. Section 201(b) seeks to protect only state regulation relating to the "exportation" of hydroelectric power. However, New England Power cannot terminate its out-of-state transmission of hydroelectricity without substantial alterations in the regional transmission system to which its hydroelectric facilities are connected—alterations which the New Hampshire Commission did not appear to contemplate would be made. *Appeal of New England Power Co.*, 120 N. H. 866, 876–877, 424 A. 2d 807, 814 (1980). The operative effect of the Commission's order would be to compel New England Power to enter into new wholesale contracts with New Hampshire utilities, at rates fixed by the New Hampshire Commission to reflect the "economic cost" of the company's hydroelectric production. See *supra*, at 336, and n. 3. Appellants argue that such state regulation is incompatible with Part II of the Federal Power Act—which vests in the Federal Energy Regulatory Commission exclusive ratemaking jurisdiction

IV

We conclude, therefore, that New Hampshire has sought to restrict the flow of privately owned and produced electricity in interstate commerce, in a manner inconsistent with the Commerce Clause. Section 201(b) of the Federal Power Act does not provide an affirmative grant of authority to the State to do so. For these reasons, the judgment of the Supreme Court of New Hampshire is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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over "the sale of electric energy at wholesale in interstate commerce," 16 U. S. C. §§ 824(b), 824d–824f (1976 ed. and Supp. IV)—and conflicts directly with § 205(b) of the Federal Power Act, 16 U. S. C. § 824d(b), which prohibits utilities from maintaining "any unreasonable difference in rates . . . as between localities" with respect to sales subject to federal jurisdiction. Given our holding that the New Hampshire Commission's order violates the Commerce Clause, we need not decide this issue.

BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* SHAPIRO, ESSEX COUNTY EXECUTIVE

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

No. 80–1436. Argued December 2, 1981—Decided February 24, 1982*

These cases present the question whether lists of addresses collected and utilized by the Bureau of the Census are exempt from disclosure, either by way of civil discovery or the Freedom of Information Act (FOIA), under the confidentiality provisions of the Census Act, 13 U. S. C. §§ 8 and 9. Section 8(b) allows the Secretary of Commerce to reveal statistical materials "which do not disclose the information reported by, or on behalf of, any particular respondent." Section 9(a) prohibits the Secretary from using the information furnished except for statistical purposes and from making any publication "whereby the data furnished by any particular establishment or individual . . . can be identified"; it also prohibits examination of individual reports by "anyone other than the sworn officers and employees of the Department or bureau or agency thereof." The 1980 census indicated that the areas of Essex County, N. J., and Denver, Colo., among others, had lost population during the 1970's. Both localities challenged the census count under the Census Bureau's local review procedures, asserting that the Bureau had erroneously classified occupied dwellings as vacant and seeking unsuccessfully to obtain access to a portion of the address lists used by the Bureau in conducting its count in their respective jurisdictions. In No. 80–1436, the Essex County Executive filed suit in Federal District Court to compel disclosure under the FOIA of the Bureau's master address list, compiled initially from commercial mailing address lists and census postal checks, and updated through direct responses to census questionnaires, canvassing by Bureau personnel, and in some instances a cross-check with the 1970 census data. The District Court held that the FOIA required disclosure of the requested information. The court rejected the contention that the confidentiality provisions of the Census Act constitute a statutory exception to disclosure within the meaning of Exemption 3 of the FOIA, which provides that disclosure need not be made as to information "specifically exempted from disclosure by statute" if the statute affords the agency no discretion on disclosure, or establishes particular cri-

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*Together with No. 80–1781, *McNichols, Mayor of Denver, et al.* v. *Baldrige, Secretary of Commerce, et al.*, on certiorari to the United States Court of Appeals for the Tenth Circuit.

teria for withholding the data, or refers to the particular types of material to be withheld. The Court of Appeals affirmed. In No. 80–1781, Denver officials filed suit in Federal District Court, seeking a preliminary injunction to require the Bureau's cooperation with the city in verifying its vacancy data. The District Court granted the city's discovery request for vacancy information contained in the Bureau's updated master address registers. However, the Court of Appeals reversed, relying on the language of the Census Act and Congress' intent to protect census information.

Held:

1. The requested information in No. 80–1436 is not subject to disclosure under the FOIA. Pp. 352–359.

(a) To stimulate public cooperation necessary for an accurate census—providing a basis for apportioning Representatives among the states in Congress, serving an important function in the allocation of federal grants to states based on population, and also providing important data for Congress and ultimately for the private sector—Congress has provided assurances that information furnished by individuals is to be treated as confidential. Title 13 U. S. C. §§ 8(b) and 9(a) explicitly provide for nondisclosure of certain census data, and no discretion is provided to the Census Bureau on whether or not to disclose such data. Thus, §§ 8(b) and 9(a) qualify as withholding statutes under Exemption 3 of the FOIA. Pp. 353–355.

(b) The unambiguous language of the confidentiality provisions of the Census Act—focusing on the "information" or "data" that constitutes the statistical compulation—as well as the Act's legislative history, indicates that Congress contemplated that raw data reported by or on behalf of individuals, not just the identity of the individuals, was to be held confidential and not available for disclosure. The master address list sought by Essex County is part of the raw census data intended by Congress to be protected under the Act. And under the Act's clear language, it is not relevant that municipalities seeking data will use it only for statistical purposes. Pp. 355–359.

2. Nor is the requested information in No. 80–1781 subject to disclosure under the discovery provisions of the Federal Rules of Civil Procedure. Under Rule 26(b)(1), if requested information is privileged, it may be withheld even if relevant to the lawsuit and essential to the establishment of plaintiff's claim. A privilege may be created by statute, and the strong policy of nondisclosure under the confidentiality provisions of the Census Act indicates that Congress intended such provisions to constitute a "privilege" within the meaning of the Federal Rules. Pp. 360–362.

No. 80–1436, 636 F. 2d 1210, reversed; No. 80–1781, 644 F. 2d 844, affirmed.

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

Elliott Schulder argued the cause for petitioners in No. 80–1436 and respondents in No. 80–1781. With him on the briefs were *Solicitor General Lee*, *Acting Solicitor General Wallace*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Geller*, *Leonard Schaitman*, *Michael Kimmel*, and *John Cordes*.

George J. Cerrone, Jr., argued the cause for petitioners in No. 80–1781. With him on the briefs was *Max P. Zall*.

David H. Ben-Asher argued the cause and filed a brief for respondent in No. 80–1436.†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether lists of addresses collected and utilized by the Bureau of the Census are exempt from disclosure, either by way of civil discovery or the Freedom of Information Act, under the confidentiality provisions of the Census Act, 13 U. S. C. §§8 and 9.

I

Under Art. I, §2, cl. 3, of the United States Constitution, responsibility for conducting the decennial census rests with

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†*Vilma S. Martinez* and *Morris J. Baller* filed briefs for the Mexican American Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance in No. 80–1436 and reversal in No. 80–1781.

John E. Flaherty, Jr., and *Malcolm J. Hall* filed a brief for Plaintiffs in MDL–444, *In re 1980 Decennial Census Adjustment Litigation*, as *amici curiae* urging reversal in No. 80–1781.

Robert Abrams, Attorney General, *Frederick A. O. Schwarz, Jr.*, *Robert S. Rifkind*, *Peter Bienstock*, and *Allen G. Schwartz* filed a brief for the State of New York et al. as *amici curiae*.

Congress.[1] Congress has delegated to the Secretary of Commerce the duty to conduct the decennial census, 13 U. S. C. § 141; the Secretary in turn has delegated this function to the Bureau of the Census. 13 U. S. C. § 21.

The 1980 enumeration conducted by the Bureau of the Census indicated that Essex County, N. J., which includes the city of Newark, and Denver, Colo., among other areas, had lost population during the 1970's. This information was conveyed to the appropriate officials in both Essex County and Denver. Under Bureau procedures a city has 10 working days from receipt of the preliminary counts to challenge the accuracy of the census data.[2] Both Essex County and Denver challenged the census count under the local review procedures. Both proceeded on the theory that the Bureau had erroneously classified occupied dwellings as vacant, and both sought to compel disclosure of a portion of the address lists used by the Bureau in conducting its count in their respective jurisdictions.

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[1] Article I, § 2, cl. 3, provides:

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . ."

Article I, § 2, cl. 3, was amended by § 2 of the Fourteenth Amendment to provide:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

The Sixteenth Amendment also altered cl. 3 to provide for direct taxation without apportionment among the states and without regard to any census or enumeration.

[2] See Revised Local Review Program Information Booklet (Apr. 1980), App. in No. 80–1436, pp. 22–48.

A

BALDRIGE v. *SHAPIRO (No. 80–1436)*

The Essex County Executive filed suit in the United States District Court for the District of New Jersey to compel the Bureau to release the "master address" register under the Freedom of Information Act (FOIA), 5 U. S. C. § 552.[3] The master address register is a listing of such information as addresses, householders' names, number of housing units, type of census inquiry, and, where applicable, the vacancy status of the unit. The list was compiled initially from commercial mailing address lists and census postal checks, and was updated further through direct responses to census questionnaires, pre- and post-enumeration canvassing by census personnel, and in some instances by a cross-check with the 1970 census data. The Bureau resisted disclosure of the master address list, arguing that 13 U. S. C. §§ 8(b) and 9(a) prohibit disclosure of all raw census data pertaining to particular individuals, including addresses. The Bureau argued that it therefore could lawfully withhold the information under the FOIA pursuant to Exemption 3, which provides that the FOIA does not apply where information is specifically exempt from disclosure by statute. 5 U. S. C. § 552(b)(3).

The District Court concluded that the FOIA required disclosure of the requested information. The court began its analysis by noting that public policy favors disclosure under the FOIA unless the information falls within the statutory exemptions. The District Court concluded that the Census Act did not provide a "blanket of confidentiality" for all census materials. Rather, the confidentiality limitation is

[3] Under 5 U. S. C. § 552(a)(4)(B), "the district court of the United States in the district in which the complainant resides . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."

"solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response." App. to Pet. for Cert. 10a. The court noted that Essex County did not seek access to individual census reports or information relative to particular individuals, but sought access to the address list exclusively for statistical purposes in conjunction with the Bureau's own program of local review. In addition, the Secretary is authorized by the Census Act to utilize county employees if they are sworn to observe the limitations of the statute. The District Court concluded that the Bureau's claim of confidentiality impeded the goal of accurate and complete enumeration. Finally, the District Court found that the information sought was not derived from the questionnaires received, but rather from data available prior to the census. The District Court ordered the Bureau to make available the address register of all property in the county, with the proviso that all persons using the records be sworn to secrecy.[4] The United States Court of Appeals for the Third Circuit affirmed for the reasons stated by the District Court. App. to Pet. for Cert. 1a. Judgment order reported at 636 F. 2d 1210 (1980).

B

McNICHOLS v. *BALDRIGE (No. 80–1781)*

The city of Denver, through its officials, filed suit in the United States District Court for the District of Colorado seeking a preliminary injunction to require the Bureau to cooperate with the city in verifying its vacancy data.[5] The

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[4] We note in passing that there is no provision in the FOIA for this procedure.

[5] Jurisdiction in the District Court for the District of Colorado was invoked under 28 U. S. C. §§ 1331, 1337, 1361, 2201, and 2202, under the Freedom of Information Act, 5 U. S. C. § 552, under 5 U. S. C. §§ 702, 704, and 706, and under U. S. Const., Art. I, § 2, cl. 3. The city argued

District Court did not rule on the preliminary injunction, but instead focused on whether the city of Denver was entitled to the vacancy information contained in the updated master address registers maintained by the Bureau. The District Court granted the city of Denver's discovery request for this information. The court concluded that the city should have access to the information because without the address list the city was denied any meaningful ability to challenge the Bureau's data. In light of what it deemed the important constitutional and statutory rights involved, the District Court concluded that the purposes of § 9 of the Census Act could be maintained without denying the city the right of discovery. The District Court entered a detailed order to protect the confidentiality of the information.[6]

The United States Court of Appeals for the Tenth Circuit reversed. 644 F. 2d 844 (1981). The Court of Appeals relied on the "express language" of the statute and on the "'emphatically expressed intent of Congress to protect census information.'" *Id.*, at 845, quoting *Seymour* v. *Barabba*,

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that as a result of the erroneous undercount, Denver would be underrepresented in Congress and would be deprived of certain federal funds to which it otherwise would be entitled under the federal grant-in-aid programs that distribute funds on the basis of population. The city also argued that it would be underrepresented in the state legislature because under the Colorado Constitution apportionment of state legislative districts is based on the federal census. Colo. Const., Art. V, § 48.

The city of Denver originally sought a temporary restraining order to require the Bureau to keep open its Denver offices. The parties agreed that the offices could close so long as the Bureau kept its updated master address lists in Denver.

[6] The District Court ordered that (1) the Government must produce the updated master address registers, described as "Follow-up Address Registers" (FAR's), or a list of vacant addresses culled from the FAR's; (2) all names and other identifying references must be eliminated; (3) all city employees with access to the information must take an oath of secrecy; (4) the information must be used only for adjustment of the census; and (5) Bureau officials may at their option accompany city employees as they verify the information.

182 U. S. App. D. C. 185, 188, 559 F. 2d 806, 809 (1977). The court reasoned that Congress has the power to make census information immune from direct discovery or disclosure. The court concluded that Congress has neither made nor implied an exception covering this case. The Court of Appeals also found no indication that Congress is constitutionally required to provide the city with information to challenge the census data. The court concluded that the city of Denver's remedy must lie with Congress.

Thus, the United States Court of Appeals for the Third Circuit ordered disclosure of the master address list under the FOIA. App. to Pet. for Cert. 1a. The United States Court of Appeals for the Tenth Circuit denied discovery of similar information, concluding that the data was privileged from disclosure. 644 F. 2d 844 (1981). We granted certiorari in these cases to determine whether such information is to be disclosed under either of the requested procedures. 451 U. S. 936 (1981); 452 U. S. 937 (1981).

II

A

The broad mandate of the FOIA is to provide for open disclosure of public information.[7] The Act expressly recognizes, however, that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U. S. C. § 552(b). Under Exemption 3 disclosure need not be made as to information "specifically exempted from disclosure by statute" if the statute affords the agency no discretion on disclosure, or establishes particular criteria for withholding the data, or refers to the

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[7] This principle has been reiterated frequently by this Court. See, *e.g.*, *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U. S. 139 (1981); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 220 (1978); *EPA* v. *Mink*, 410 U. S. 73, 80 (1973).

particular types of material to be withheld. The question in *Baldrige* v. *Shapiro*, No. 80–1436, is twofold: first, do §§ 8(b) and 9(a) of the Census Act constitute a statutory exception to disclosure within the meaning of Exemption 3; and second, is the requested data included within the protection of §§ 8(b) and 9(a).

B

Although the national census mandated by Art. I, § 2, of the Constitution fulfills many important and valuable functions for the benefit of the country as a whole, its initial constitutional purpose was to provide a basis for apportioning representatives among the states in the Congress.[8] The census today serves an important function in the allocation of federal grants to states based on population. In addition, the census also provides important data for Congress and ultimately for the private sector.[9]

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[8] As originally enacted the decennial census was to serve both for apportioning representatives and apportioning direct taxes among the states. The ratification of the Sixteenth Amendment in 1913 amended Art. I, § 2, to provide for direct taxation without apportionment.

Even the first census takers, who had a relatively small population to deal with, encountered difficulty in taking a national census. 31 The Writings of George Washington 329 (J. Fitzpatrick ed. 1939) ("Returns of the Census have already been made from several of the States and a tolerably just estimate has been formed now in others, by which it appears that we shall hardly reach four millions; but one thing is certain our *real* numbers will exceed, greatly, the official returns of them; because the religious scruples of some, would not allow them to give in their lists; the fears of others that it was intended as the foundation of a tax induced them to conceal or diminished theirs, and thro' the indolence of the people, and the negligence of many of the Officers numbers are omitted"); 8 The Writings of Thomas Jefferson 229 (A. Lipscomb ed. 1903) (Aug. 24, 1791, letter to Wm. Carmichael) ("I enclose you a copy of our census . . . . Making very small allowance for omissions, which we know to have been very great, we may safely say we are above four millions").

[9] The information obtained from the national census is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and so-

Although Congress has broad power to require individuals to submit responses, an accurate census depends in large part on public cooperation. To stimulate that cooperation Congress has provided assurances that information furnished to the Secretary by individuals is to be treated as confidential. 13 U. S. C. §§ 8(b), 9(a). Section 8(b) of the Census Act provides that subject to specified limitations, "the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent . . . ." Section 9(a) provides further assurances of confidentiality:

> "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> "(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

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cial studies. See Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, The Use of Population Data in Federal Assistance Programs, Ser. No. 95–16 (Committee Print compiled by the Library of Congress 1978); S. Rep. No. 94–1256, p. 1 (1976).

During congressional debates James Madison emphasized the importance of census information beyond the constitutionally designated purposes and encouraged the new Congress to "embrace some other subjects besides the bare enumeration of the inhabitants."

"This kind of information, [Madison] observed, all legislatures had wished for; but this kind of information had never been obtained in any country. . . . If the plan was pursued in taking every future census, it would give them an opportunity of marking the progress of the society, and distinguishing the growth of every interest." 13 The Papers of James Madison 8–9 (C. Hobson & R. Rutland eds. 1981) (Debate of Jan. 25, 1790).

A bill for obtaining information as described by Mr. Madison passed the House of Representatives but "was thrown out by the Senate as a waste of trouble and supplying materials for idle people to make a book." Letter to Thomas Jefferson, *id.*, at 41.

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports."

Sections 8(b) and 9(a) explicitly provide for the nondisclosure of certain census data. No discretion is provided to the Census Bureau on whether or not to disclose the information referred to in §§ 8(b) and 9(a). Sections 8(b) and 9(a) of the Census Act therefore qualify as withholding statutes under Exemption 3.[10] Raw census data is protected under the §§ 8(b) and 9(a) exemptions, however, only to the extent that the data is within the confidentiality provisions of the Act.

C

Essex County and various *amici* vigorously argue that §§ 8(b) and 9(a) of the Census Act are designed to prohibit disclosure of the identities of individuals who provide raw census data; for this reason, they argue, the confidentiality provisions protect raw data only if the individual respondent can be identified. The unambiguous language of the confidentiality provisions, as well as the legislative history of the Act, however, indicates that Congress plainly contemplated that raw data reported by or on behalf of individuals was to be held confidential and not available for disclosure.

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[10] Respondent Shapiro does not dispute this conclusion. See Brief for Respondent in No. 80–1436, p. 8. The legislative history of the FOIA clearly indicates that Congress recognized that the Census Act constituted a specific exemption under Exemption 3. See, *e. g.*, S. Rep. No. 1621, 85th Cong., 2d Sess., 9 (1958); 104 Cong. Rec. 6549–6550 (1958) (remarks of Rep. Moss); 112 Cong. Rec. 13646 (1966) (remarks of Rep. Olsen) ("information . . . or sources of information" given to the Bureau of the Census will be held confidential under Exemption 3); H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966); 122 Cong. Rec. 24211 (1976) (remarks of Reps. Abzug and McCloskey).

We begin first with the language of §§ 8(b) and 9(a). *Watt* v. *Energy Action Educational Foundation*, 454 U. S. 151 (1981). Section 8(b) allows the Secretary to provide statistical materials "which do not disclose *the information* reported by, or on behalf of, any particular respondent . . . ." (Emphasis added.) The focus of § 9(a) is also on the information that constitutes the statistical compilation. The Secretary is prohibited from using the "information" except for statistical purposes and is prohibited from publication "whereby the *data* furnished by any particular establishment or individual under this title can be identified . . . ." (Emphasis added.)

The language of each section refers to protection of the "information" or "data" compiled. In addition, the provisions of § 8(b) prohibit disclosure of data provided "by, or on behalf of," any respondent. By protecting data revealed "on behalf of" a respondent, Congress further emphasized that the data itself was to be protected from disclosure.

The legislative history also makes clear that Congress was concerned not solely with protecting the identity of individuals. Since 1879 Congress has expressed its concern that confidentiality of data reported by individuals also be preserved. At that time each census taker was required by law to take an oath "not [to] disclose any information contained in the schedules, lists, or statements." Act of Mar. 3, 1879, ch. 195, § 7, 20 Stat. 475, and Act of Apr. 20, 1880, ch. 57, 21 Stat. 75.[11] As a result of the detailed questions asked in the 1880 and 1890 censuses, Congress amended the Census Act

[11] Concern for confidentiality in census taking was expressed as early as the 1840 census in which each census enumerator was instructed to "consider all communications made to him in the performance of [his] duty, relative to the business of the people, as strictly confidential." Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Senate Committee on Governmental Affairs, The Decennial Census: An Analysis and Review, 96th Cong., 2d Sess., 113 (Committee Print compiled by the Library of Congress 1980) (hereinafter Decennial Census). See also A. Scott, Census, U. S. A. 29 (1968). The 1870 census instructions emphatically stated that "[a]ll disclosures should be treated as strictly

to broaden the confidentiality protections. Act of Mar. 3, 1899, ch. 419, § 21, 30 Stat. 1020. The law restricted disclosure unless the Director of the Census authorized that the information be revealed. The governor of any state or the chief officer of any municipal government upon request, however, could receive a list of individuals counted within the territory of the jurisdiction. § 30, 30 Stat. 1021. The Director of the Census frequently was asked to disclose information to cities complaining of undercounts. For example, data was revealed to New York City after the 1890 census in order to allow the city to challenge the accuracy of the federal count. House Committee on the Eleventh Census, Reenumeration of New York City, 51st Cong., 2d Sess. (1890). See also Decennial Census, at 113–138.

In 1929 Congress again amended the Census Act and provided the confidentiality provisions of § 9. Act of June 18,

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confidential, with the exception hereafter to be noted in the case of the mortality schedule. . . ." Decennial Census, at 114. The 1909 revisions of the Census Act stated that "[n]o publication shall be made by the Census Office whereby the *data* furnished by any particular establishment can be identified . . . ." Act of July 2, 1909, ch. 2, § 25, 36 Stat. 9 (emphasis added). See also Act of Apr. 2, 1924, ch. 80, § 3, 43 Stat. 31; Act of June 18, 1929, ch. 28, § 8, 46 Stat. 23; Act of July 25, 1947, ch. 331, 61 Stat. 458; Act of Aug. 31, 1954, Pub. L. 740, 68 Stat. 1013–1014; Act of Oct. 15, 1962, Pub. L. 87–813, 76 Stat. 922 (overriding decision in *St. Regis Paper Co.* v. *United States*, 368 U. S. 208 (1961), by prohibiting disclosure of copy of census report retained by business establishment).

For a more detailed history of the provisions of confidentiality see C. Kaplan & T. Van Valey, Census '80: Continuing the Factfinder Tradition 68–71 (U. S. Dept. of Commerce, 1980).

Recognition of the need for some degree of confidentiality of census materials is indicated in the confidentiality provisions of several foreign nations. Canada, France, Germany, Great Britain, Italy, Japan, The Netherlands, and Sweden make some provision for the confidentiality of census materials. See Senate Committee on Post Office and Civil Service, Laws on the Confidentiality of Census Records in Western Europe, Canada, and Japan, 94th Cong., 2d Sess. (Committee Print compiled by the Library of Congress 1976).

1929, ch. 28, § 11, 46 Stat. 25. The amendment gave the Director of the Census no discretion to release data, regardless of the claimed beneficial effect of disclosure. The confidentiality provisions extended to all information collected by the Bureau of the Census. Decennial Census, at 116. No special access was granted to states or municipalities. In 1976 the confidentiality provision of § 8 was strengthened "to add further protection of privacy" by prohibiting disclosure of information "reported by, or on behalf of, any respondent." S. Rep. No. 94–1256, pp. 3–4 (1976). See also H. R. Conf. Rep. No. 94–1719, p. 10 (1976). The prohibitions of disclosure of "material which might disclose information reported by, or on behalf of, any respondent" extend both to "public and private entities," S. Rep. No. 94–1256, *supra*, at 4, further indicating that the municipalities requesting disclosure of raw census data have no special claim to the information.

The foregoing history of the Census Act reveals a congressional intent to protect the confidentiality of census information by prohibiting disclosure of raw census data reported by or on behalf of individuals. Subsequent congressional action is consistent with this interpretation. In response to claimed undercounts in the census of 1960 and of 1970, Congress considered, but ultimately rejected, proposals to allow local officials limited access to census data in order to challenge the census count. See H. R. 8871, 95 Cong., 1st Sess. (1977); Hearings on H. R. 8871 before the Subcommittee on Census and Population of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977).

A list of vacant addresses is part of the raw census data—the information—intended by Congress to be protected. The list of addresses requested by the County of Essex constitutes "information reported by, or on behalf of," individuals responding to the census. The initial list of addresses is taken from prior censuses and mailing lists. This information then is verified both by direct mailings and census enumerators who go to areas not responding. See, *e. g.*, 1980

Census Questionnaire, Question No. H4 ("How many living quarters, occupied and vacant, are at this address?"). As with all the census material, the information on vacancies was updated from data obtained from neighbors and others who spoke with the followup census enumerators. The final master address list therefore includes data reported by or on behalf of individuals.

Under the clear language of the Census Act it is not relevant that the municipalities seeking the data will use it only for statistical purposes. Section 9(a)(1) permits use of the data only for "the statistical purposes for which it is supplied." There is no indication in the Census Act that the hundreds of municipal governments in the 50 states were intended by Congress to be the "monitors" of the Census Bureau.[12] In addition, limiting use of data only for "statistical" purposes in no way indicates that raw data may be revealed outside the strict requirements of the Census Act that data be handled by census employees sworn to secrecy.[13]

Because §§ 8(b) and 9(a) of the Census Act constitute withholding statutes under Exemption 3 of the FOIA and because the raw census data in this case was intended to be protected from disclosure within those provisions of the Census Act, the requested information is not subject to disclosure under the FOIA.

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[12] Congress may well have concluded that the controversy over the "vacant" or "occupied" status of property months after the census was taken could lead to interminable litigation and impair the constitutional and statutory purposes of the census.

Approximately 50 lawsuits have been brought by local governments claiming an undercount from the 1980 census. See, *e. g.*, *In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (J. P. M. D. L. 1981); *Carey* v. *Klutznick*, 653 F. 2d 732 (CA2), cert. pending *sub nom. Carey* v. *Baldrige*, No. 81–752.

[13] Although § 9(a)(1) allows use of census data for "statistical" purposes, it remains subject to § 8(b), which prohibits public disclosure of information reported by or on behalf of individuals.

III

The discovery provisions of the Federal Rules of Civil Procedure, similar to the FOIA, are designed to encourage open exchange of information by litigants in federal courts. Unlike the FOIA, however, the discovery provisions under the Federal Rules focus upon the need for the information rather than a broad statutory grant of disclosure.[14] Federal Rule of Civil Procedure 26(b)(1) provides for access to all information "relevant to the subject matter involved in the pending action" unless the information is privileged. If a privilege exists, information may be withheld, even if relevant to the lawsuit and essential to the establishment of plaintiff's claim.

It is well recognized that a privilege may be created by statute.[15] A statute granting a privilege is to be strictly construed so as "to avoid a construction that would suppress otherwise competent evidence." *St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 218 (1961). In the case of the city of Denver, the central inquiry is whether §§ 8(b) and 9(a) create a privilege so as to protect against disclosure of the raw census data requested.[16]

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[14] The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 143, n. 10 (1975); *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 24 (1974).

[15] Most courts have concluded that an FOIA exemption does not automatically constitute a "privilege" within the meaning of the Federal Rules of Civil Procedure. See, *e. g.*, *Frankel* v. *SEC*, 460 F. 2d 813, 818 (CA2 1972) (information exempt under FOIA may be obtained through discovery if party's need for information exceeds Government's need for confidentiality). See Toran, Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules, 49 Geo. Wash. L. Rev. 843, 848–854 (1981).

[16] Federal Rule of Evidence 501 provides that "*[e]xcept as otherwise required by* the Constitution of the United States or provided by *Act of Congress* . . . the privilege of a witness . . . [or] government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (Emphasis added.)

As noted above, § 8(b) and § 9(a) of the Census Act embody explicit congressional intent to preclude *all* disclosure of raw census data reported by or on behalf of individuals. This strong policy of nondisclosure indicates that Congress intended the confidentiality provisions to constitute a "privilege" within the meaning of the Federal Rules. Disclosure by way of civil discovery would undermine the very purpose of confidentiality contemplated by Congress. One such purpose was to encourage public participation and maintain public confidence that information given to the Census Bureau would not be disclosed. The general public, whose cooperation is essential for an accurate census, would not be concerned with the underlying rationale for disclosure of data that had been accumulated under assurances of confidentiality. Congress concluded in §§ 8(b) and 9(a) that only a bar on disclosure of all raw data reported by or on behalf of individuals would serve the function of assuring public confidence. This was within congressional discretion, for Congress is vested by the Constitution with authority to conduct the census "as they shall by Law direct." [17] The wisdom of its classifications is not for us to decide in light of Congress' 180 years' experience with the census process.

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[17] It is not unlikely that while checking the Bureau vacancy figures the city of Denver would speak to individuals who had supplied vacancy data to the Bureau. Even though the city might not be able to identify the individuals who originally gave the information, there would nonetheless be the *appearance* that confidentiality had been breached.

Congress has several times rejected proposals designed to assure availability of census records to historians and other legitimate researchers. See, *e. g.*, S. 3279, H. R. 10686, 94th Cong., 2d Sess. (1976). "Concerns about the legislation raised by the Bureau of the Census and others soon made it apparent that benefits gained from the release of census records could be easily offset by a loss of credibility for the census, as well as damage to the reputations of individual citizens." Senate Committee on Post Office and Civil Service, Laws on the Confidentiality of Census Records in Western Europe, Canada, and Japan, 94th Cong., 2d Sess. (Committee Print compiled by the Library of Congress 1976) (Foreword by Sen. McGee, Chairperson).

This is not to say that the city of Denver does not also have important reasons for requesting the raw census data for purposes of its civil suit. A finding of "privilege," however, shields the requested information from disclosure despite the need demonstrated by the litigant.

IV

We hold that whether sought by way of requests under the FOIA or by way of discovery rules, raw data reported by or on behalf of individuals need not be disclosed. Congress, of course, can authorize disclosure in executing its constitutional obligation to conduct a decennial census. But until Congress alters its clear provisions under §§ 8(b) and 9(a) of the Census Act, its mandate is to be followed by the courts.

Accordingly the judgment of the United States Court of Appeals for the Third Circuit in No. 80–1436 is reversed, and the judgment of the United States Court of Appeals for the Tenth Circuit in No. 80–1781 is affirmed.

It is so ordered.

HAVENS REALTY CORP. ET AL. *v.* COLEMAN ET AL.

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

No. 80–988. Argued December 1, 1981—Decided February 24, 1982

Section 804 of the Fair Housing Act of 1968 (Act) makes unlawful various forms of discriminatory housing practices. Section 812(a) authorizes civil actions to enforce § 804 and requires that suit be brought within 180 days after the alleged occurrence of a discriminatory practice. A class action for declaratory, injunctive, and monetary relief was brought in Federal District Court against petitioners—Havens Realty Corp. (Havens), an apartment complex owner in a suburb of Richmond, Va., and one of its employees—on the basis of their alleged "racial steering" in violation of § 804. The suit was brought by a black person (Coles) who, attempting to rent an apartment from Havens, allegedly was falsely told less than 180 days before suit was instituted that no apartments were available, and by respondents—Housing Opportunities Made Equal (HOME), a nonprofit corporation whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area," and two individuals (one black and one white) who were employed by HOME as "testers" to determine whether Havens practiced racial steering. The complaint alleged that on specified dates more than 180 days before suit was instituted, the black tester was told by Havens that no apartments were available, but the white tester was told that there were vacancies. It was also alleged that Havens' practices had deprived the individual plaintiffs (who were residents of Richmond or the adjacent county) of the "important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices"; that Havens' steering practices had frustrated HOME's activities as to housing counseling and referral services, with a consequent drain on resources; and that its members had been deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination. On petitioners' pretrial motion, the District Court dismissed respondents' claims, holding that they lacked standing and that their claims were barred by the Act's 180-day statute of limitations. The Court of Appeals reversed and remanded. It held that the allegations of injury to the respondents were sufficient to withstand a motion to dismiss, and that their claims were not time-barred because petitioners' conduct constituted a "continuing violation" lasting through the time of the alleged Coles incident, which was within the 180-day period of § 812(a).

Held:

1. Respondents' claims were not rendered moot by either (1) the District Court's entry of a consent order with respect to Coles' claims granting him and the class he represented monetary and injunctive relief, the order having been entered after a trial in which Havens was found to have engaged in unlawful racial steering, or (2) a letter agreement between petitioners and respondents—reached prior to this Court's grant of certiorari—whereby, upon approval by the District Court, respondents would each be entitled to $400 in damages and no further relief if this Court were either to deny certiorari or to grant it and affirm, but to no relief if this Court were to grant certiorari and reverse. Irrespective of the issue of injunctive relief, respondents continue to seek damages to redress alleged violations of the Act. The letter agreement would merely liquidate those damages. Pp. 370–371.

2. The determination of whether each of the respondents has standing to sue is guided by the decision in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, that Congress intended standing under § 812 of the Act to extend to the full limits of Art. III and that the courts accordingly lack authority to create prudential barriers to standing in suits brought under that section. Thus the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact—that the plaintiff allege that as a result of the defendant's actions he has suffered "a distinct and palpable injury." Pp. 372–379.

(a) The black individual respondent (Coleman) has standing to sue in her capacity as a "tester." Section 804(d) establishes an enforceable right of "any person" to truthful information concerning the availability of housing. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a damages claim under the Act. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the fact of injury within the meaning of § 804(d). If, as alleged, Coleman was told that apartments were not available while white testers were informed that apartments were available, she has suffered "specific injury" from petitioners' challenged acts, and the Art. III requirement of injury in fact is satisfied. However, since the white individual respondent (Willis) alleged that he was informed that apartments *were* available, rather than that petitioners misrepresented to him that apartments were unavailable, thus alleging no injury to his statutory right to accurate information, he has no standing to sue in his capacity as a tester and, more to the point, has not pleaded a cause of action under § 804(d). Pp. 373–375.

(b) Insofar as Coleman and Willis have alleged that the steering practices of petitioners have deprived the two respondents of the benefits of interracial association, the Court of Appeals properly held that dismissal was inappropriate at this juncture in the proceedings. It is implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area. But respondents have not identified the particular neighborhoods in which they lived, nor established the proximity of their homes to the site of petitioners' alleged steering practices. In the absence of further factual development, it cannot be said as a matter of law that no injury could be proved. Further pleading and proof might establish that the respondents lived in areas where petitioners' practices had an appreciable effect. Pp. 375–378.

(c) Although HOME apparently has abandoned its claim of standing to sue for injunctive relief as a representative of its members, it has standing to sue for damages in its own right under the Act. If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide housing counseling and referral services—with a consequent drain on the organization's resources—there can be no question that the organization has suffered the requisite injury in fact. Pp. 378–379.

3. The 180-day limitations period of § 812(a) of the Act is no bar to the "neighborhood" claims of the individual respondents or to HOME's claim for injury to its counseling and referral services, even though the alleged incidents of racial steering involving Coleman and Willis occurred more than 180 days before suit was filed. Where a plaintiff, pursuant to the Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice. Here, the individual respondents' "neighborhood" claims and HOME's claim are based not solely on isolated incidents involving the two individual respondents but on a continuing violation manifested in a number of incidents—including at least one (involving Coles) that is asserted to have occurred within the 180-day period. However, insofar as Coleman has standing to assert a claim as a "tester," she may not take advantage of the "continuing violation" theory, and such claim is time barred. It is not alleged, nor could it be, that the incident of steering involving Coles deprived Coleman of her § 804(d) right to truthful housing information. Pp. 380–381.

633 F. 2d 384, affirmed in part and reversed in part.

BRENNAN, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, *post*, p. 382.

Everette G. Allen, Jr., argued the cause for petitioners. With him on the briefs was *James F. Pascal.*

Vanessa Ruiz argued the cause for respondents. With her on the brief were *Daniel M. Singer, James B. Blinkoff,* and *Josephine L. Ursini.**

JUSTICE BRENNAN delivered the opinion of the Court.

This case presents questions concerning the scope of standing to sue under the Fair Housing Act of 1968 and the proper construction of § 812(a) of the Act, which requires that a civil suit be brought within 180 days after the alleged occurrence of a discriminatory practice.

I

The case began as a class action against Havens Realty Corp. (Havens) and one of its employees, Rose Jones. Defendants were alleged to have engaged in "racial steering"[1] violative of § 804 of the Fair Housing Act of 1968, 42 U. S. C.

**William D. North* and *John R. Linton* filed a brief for the National Association of Realtors as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Reginald M. Barley* for the City of Richmond; by *F. Willis Caruso* for the Leadership Council for Metropolitan Open Communities; and by *Martin E. Sloane* for the National Committee Against Discrimination in Housing, Inc., et al.

Briefs of *amici curiae* were filed by *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Wallace, Harriet S. Shapiro, Jessica Dunsay Silver, Mildred M. Matesich,* and *Gershon M. Ratner* for the United States; and by *Richard C. Dinkelspiel, Norman J. Chachkin, Roderic V. O. Boggs, Jack Greenberg, James M. Nabrit III, Lowell Johnston, Judith Reed,* and *William L. Taylor* for the Lawyers' Committee for Civil Rights Under Law et al.

[1] As defined in the complaint, "racial steering" is a "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." App. 11–12, ¶ 1.

§ 3604 (Act or Fair Housing Act).[2] The complaint, seeking declaratory, injunctive, and monetary relief, was filed in the United States District Court for the Eastern District of Virginia in January 1979 by three individuals[3]—Paul Coles, Sylvia Coleman, and R. Kent Willis—and an organization—Housing Opportunities Made Equal (HOME).

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[2] Section 804 provides:

"As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

"(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

"(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

"(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

"(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin." 82 Stat. 83, as amended, 88 Stat. 729.

The complaint also alleged violation of the Civil Rights Act of 1866, 42 U. S. C. § 1982. Since the judgment of the Court of Appeals did not rest on a violation of § 1982, we have no occasion to consider the applicability of that statute.

[3] The individual plaintiffs averred that they were "members of a class composed of all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who have been, or continue to be, adversely affected by the acts, policies and practices of" Havens. App. 12, ¶ 2.

At the time suit was brought, defendant Havens owned and operated two apartment complexes, Camelot Townhouses and Colonial Court Apartments, in Henrico County, Va., a suburb of Richmond. The complaint identified Paul Coles as a black "renter plaintiff" who, attempting to rent an apartment from Havens, inquired on July 13, 1978, about the availability of an apartment at the Camelot complex, and was falsely told that no apartments were available. App. 13, ¶ 7; *id.*, at 15, ¶ 12.[4] The other two individual plaintiffs, Coleman and Willis, were described in the complaint as "tester plaintiffs" who were employed by HOME to determine whether Havens practiced racial steering. *Id.*, at 13, ¶ 7. Coleman, who is black, and Willis, who is white, each assertedly made inquiries of Havens on March 14, March 21, and March 23, 1978, regarding the availability of apartments. On each occasion, Coleman was told that no apartments were available; Willis was told that there were vacancies. On July 6, 1978, Coleman made a further inquiry and was told that there were no vacancies in the Camelot Townhouses; a white tester for HOME, who was not a party to the complaint, was given contrary information that same day. *Id.*, at 16, ¶ 13.

The complaint identified HOME as "a nonprofit corporation organized under the laws of the State of Virginia" whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." *Id.*, at 13, ¶ 8. According to the complaint, HOME's membership was "multiracial and include[d] approximately 600 individuals." *Ibid.* Its activities included the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination. *Id.*, at 14, ¶¶ 8a, 8b.

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[4] According to the complaint,

"Camelot Townhouses is an apartment complex predominantly occupied by whites. Coles was informed that no apartments were available in the Camelot complex. He was told that an apartment was available in the adjoining Colonial Court complex. The Colonial complex is integrated." *Id.*, at 15–16, ¶ 12.

The three individual plaintiffs, who at the time the complaint was filed were all residents of the city of Richmond or the adjacent Henrico County, *id.*, at 13, ¶ 7, averred that they had been injured by the discriminatory acts of petitioners. Coles, the black renter, claimed that he had been "denied the right to rent real property in Henrico County." *Id.*, at 17, ¶ 14. Further, he and the two tester plaintiffs alleged that Havens' practices deprived them of the "important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." *Id.*, at 17, ¶¶ 14, 15. And Coleman, the black tester, alleged that the misinformation given her by Havens concerning the availability of apartments in the Colonial Court and Camelot Townhouse complexes had caused her "specific injury." *Id.*, at 16, ¶ 13.

HOME also alleged injury. It asserted that the steering practices of Havens had frustrated the organization's counseling and referral services, with a consequent drain on resources. *Id.*, at 17, ¶ 16. Additionally, HOME asserted that its members had been deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination. *Id.*, at 17–18, ¶ 16.

Before discovery was begun, and without any evidence being presented, the District Court, on motion of petitioners, dismissed the claims of Coleman, Willis, and HOME. The District Court held that these plaintiffs lacked standing and that their claims were barred by the Act's 180-day statute of limitations, 42 U. S. C. § 3612(a). App. 33–35.[5] Each of the dismissed plaintiffs—respondents in this Court—appealed, and the Court of Appeals for the Fourth Circuit reversed and remanded for further proceedings. *Coles* v. *Ha-*

[5] Coles' claims, however, were not dismissed. Rather, they went to trial following the court's certification of a class, represented by Coles, of individuals injured monetarily on or after January 9, 1977, by the steering practices of petitioners.

vens Realty Corp., 633 F. 2d 384 (1980). The Court of Appeals held that the allegations of injury by Willis and Coleman, both as testers and as individuals who were deprived of the benefits of residing in an integrated community, sufficed to withstand a motion to dismiss.[6] With respect to HOME, the Court of Appeals held that the organization's allegations of injury to itself and its members were sufficient, at the pleading stage, to afford the organization standing both in its own capacity and as a representative of its members. The Court of Appeals further held that none of the allegations of racial steering was time-barred, because petitioners' conduct constituted a "continuing violation" lasting through July 13, 1978—less than 180 days before the complaint was filed. We granted certiorari. 451 U. S. 905 (1981).

II

At the outset, we must consider whether the claims of Coleman, Willis, and HOME have become moot as a result of certain developments occurring after the District Court's dismissal. The first was the District Court's entry of a consent order with respect to Coles' claims. Following the dismissal of respondents' claims, Coles' undismissed claims went to trial, and Havens was found to have engaged in unlawful racial steering.[7] Shortly thereafter, at the request of the parties, the court entered a consent order granting Coles and the class he represented monetary and injunctive relief. App. to Brief for Respondents 10a. The second development con-

[6] The court noted that the District Court could require respondents to amend their pleadings to make more specific their allegations, and that if their allegations were "not supported by proof at trial, the case [could] be terminated for lack of standing at an appropriate stage of the trial." 633 F. 2d, at 391.

[7] The court found that the practices violated both the Fair Housing Act and the Civil Rights Act of 1866, 42 U. S. C. § 1982. That determination is not before us, and we intimate no view as to its correctness. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 115, n. 32 (1979).

cerns an agreement reached between petitioners and respondents prior to this Court's grant of certiorari.[8] The letter agreement, which expressly provides that it is to become effective only after approval by the District Court, states that if the Court were to deny certiorari, or grant it and affirm, respondents would each be entitled to $400 in damages and no further relief. The agreement provides also that if the Court were to grant certiorari and reverse, respondents would be entitled to no relief whatsoever.

Despite these two developments, this case is not moot. Irrespective of the issue of injunctive relief, respondents continue to seek damages to redress alleged violations of the Fair Housing Act.[9] The letter agreement, if approved by the District Court, would merely liquidate those damages. If respondents have suffered an injury that is compensable in money damages of some undetermined amount, the fact that they have settled on a measure of damages does not make their claims moot. Given respondents' continued active pursuit of monetary relief, this case remains "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937) (citations omitted). See *Powell* v. *McCormack*, 395 U. S. 486, 495–500 (1969); *Bond* v. *Floyd*, 385 U. S. 116, 128, n. 4 (1966).[10]

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[8] The parties filed the agreement with the Court following oral argument.

[9] The consent order involving Coles' claims did establish a fund to provide damages for "claimants." The parties agree, however, that respondents, whose claims were dismissed as time-barred and on standing grounds, cannot claim against the fund.

[10] It is true that with respect to the claims of HOME in its representative capacity, the complaint only requested injunctive relief, although of a broader nature than that provided in Coles' consent order. Even as to HOME's representative claims, however, the "stringent" test for mootness, *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968), is not satisfied, since the letter agreement, under which HOME agreed not to seek any further injunctive relief and which involves settle-

III

Our inquiry with respect to the standing issues raised in this case is guided by our decision in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91 (1979). There we considered whether six individuals and the village of Bellwood had standing to sue under § 812 of the Fair Housing Act, 42 U. S. C. § 3612,[11] to redress injuries allegedly caused by the racial steering practices of two real estate brokerage firms. Based on the complaints, "as illuminated by subsequent discovery," 441 U. S., at 95, we concluded that the village and four of the individual plaintiffs did have standing to sue under the Fair Housing Act, *id.*, at 111, 115.[12] In reaching that conclusion, we held that "Congress intended standing under § 812 to extend to the full limits of Art. III" and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section. *Id.*, at 103, n. 9, 109. Thus the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered "a distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). With this understanding,

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ment of an uncertified class action, is still subject to the approval of the District Court. For reasons stated *infra*, at 378, we nevertheless do not reach the question whether HOME has standing in its representative capacity.

[11] Section 812 provides in relevant part:

"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction." 82 Stat. 88.

[12] The Court did hold, however, that on the given record it was appropriate to grant summary judgment against the two remaining individual plaintiffs, neither of whom resided within the area alleged to have been adversely affected by the steering practices of the defendants. 441 U. S., at 112, n. 25. But the Court left the District Court free to permit these two individuals "to amend their complaints to include allegations of actual harm." *Id.*, at 113, n. 25.

we proceed to determine whether each of the respondents in the present case has the requisite standing.

A

The Court of Appeals held that Coleman and Willis have standing to sue in two capacities: as "testers" and as individuals deprived of the benefits of interracial association. We first address the question of "tester" standing.

In the present context, "testers" are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices. Section 804(d) states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," 42 U. S. C. § 3604(d) (emphasis added), a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act, 42 U. S. C. § 3612(a). Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

This congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth* v. *Seldin*, *supra*, at 500, quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617, n. 3 (1973). Accord, *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 212 (1972) (WHITE, J., concurring). Section 804(d), which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and there-

fore has standing to maintain a claim for damages under the Act's provisions. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d). See *Pierson* v. *Ray*, 386 U. S. 547, 558 (1967); *Evers* v. *Dwyer*, 358 U. S. 202, 204 (1958) *(per curiam)*. Whereas Congress, in prohibiting discriminatory refusals to sell or rent in § 804(a) of the Act, 42 U. S. C. § 3604(a),[13] required that there be a "bona fide offer" to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d).[14]

In the instant case, respondent Coleman—the black tester—alleged injury to her statutorily created right to truthful housing information. As part of the complaint, she averred that petitioners told her on four different occasions that apartments were not available in the Henrico County complexes while informing white testers that apartments were available. If the facts are as alleged, then respondent has suffered "specific injury" from the challenged acts of petitioners, see App. 16, ¶ 13, and the Art. III requirement of injury in fact is satisfied.

Respondent Willis' situation is different. He made no allegation that petitioners misrepresented to him that apart-

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[13] For the terms of § 804(a), see n. 2, *supra*.

[14] Congress' decision to confer a broad right of truthful information concerning housing availability was undoubtedly influenced by congressional awareness that the intentional provision of misinformation offered a means of maintaining segregated housing. Various witnesses testifying before Congress recounted incidents in which black persons who sought housing were falsely informed that housing was not available. See Hearings on S. 1358, S. 2114, and S. 2280 before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 99 (1967) (testimony of Roy Wilkins); *id.*, at 204, 206 (statement of Gerard A. Ferere); *id.*, at 497 (statement of Whitney M. Young, Jr.).

ments were unavailable in the two apartment complexes. To the contrary, Willis alleged that on each occasion that he inquired he was informed that apartments *were* available. As such, Willis has alleged no injury to his statutory right to accurate information concerning the availability of housing. We thus discern no support for the Court of Appeals' holding that Willis has standing to sue in his capacity as a tester.[15] More to the point, because Willis does not allege that he was a victim of a discriminatory misrepresentation, he has not pleaded a cause of action under § 804(d). We must therefore reverse the Court of Appeals' judgment insofar as it reversed the District Court's dismissal of Willis' "tester" claims.

B

Coleman and Willis argue in this Court, and the Court of Appeals held, that irrespective of their status as testers, they should have been allowed to proceed beyond the pleading stage inasmuch as they have alleged that petitioners' steering practices deprived them of the benefits that result from living in an integrated community. This concept of "neighborhood" standing differs from that of "tester" standing in that the injury asserted is an indirect one: an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff. By contrast, the injury underlying tester standing—the denial of the tester's own statutory right to truthful housing information caused by misrepresentations to the tester—is a direct one. See *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 80–81 (1978). The distinction is between "third-party" and "first-party" standing.

This distinction is, however, of little significance in deciding whether a plaintiff has standing to sue under § 812 of the Fair Housing Act. *Bellwood*, as we have already noted, held that the only requirement for standing to sue under

[15] Indeed, respondent Willis made no argument in this Court in defense of this holding and appears to concede its error.

§ 812 is the Art. III requirement of injury in fact. As long as respondents have alleged distinct and palpable injuries that are "fairly traceable" to petitioners' actions, the Art. III requirement of injury in fact is satisfied. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261 (1977). The question before us, then, is whether injury in fact has been sufficiently alleged.[16]

The two individual respondents, who according to the complaint were "residents of the City of Richmond or Henrico County," alleged that the racial steering practices of petitioners have deprived them of "the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." App. 13, ¶ 7; *id.*, at 17, ¶¶ 14, 15. The type of injury alleged thus clearly resembles that which we found palpable in *Bellwood*. In that case, plaintiffs alleged that the steering practices of the defendants, by transforming their neighborhood in Bellwood from an integrated into an almost entirely black environment, had deprived them of "the social and professional benefits of living in an integrated society" and had caused them "economic injury." 441 U. S., at 111, 115, and n. 30.[17]

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[16] "[A]s long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights, and thus are entitled to seek redress of that harm under § 812." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., at 103, n. 9.

[17] Similarly, in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972), on which *Bellwood* relied, we held that two tenants—one black and one white—of an apartment complex had standing to sue under § 810(a) of the Fair Housing Act, 42 U. S. C. § 3610(a), in challenging the alleged racial steering practices of their landlord. The plaintiffs' averments of injury, held sufficient for purposes of standing, were summarized by the Court in the following terms:

"(1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would

Petitioners do not dispute that the loss of social, professional, and economic benefits resulting from steering practices constitutes palpable injury. Instead, they contend that Coleman and Willis, by pleading simply that they were residents of the Richmond metropolitan area, have failed to demonstrate how the asserted steering practices of petitioners in Henrico County may have affected the *particular* neighborhoods in which the individual respondents resided.

It is indeed implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the *entire* Richmond metropolitan area. At the time relevant to this action the city of Richmond contained a population of nearly 220,000 persons, dispersed over 37 square miles. Henrico County occupied more than 232 square miles, in which roughly 170,000 people made their homes.[18] Our cases have upheld standing based on the effects of discrimination only within a "relatively compact neighborhood," *Bellwood*, 441 U. S., at 114. We have not suggested that discrimination within a single housing complex might give rise to "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S., at 501, throughout a metropolitan area.

Nonetheless, in the absence of further factual development, we cannot say as a matter of law that no injury could be proved. Respondents have not identified the particular neighborhoods in which they lived, nor established the proximity of their homes to the site of petitioners' alleged steering practices. Further pleading and proof might establish that they lived in areas where petitioners' practices had an appreciable effect. Under the liberal federal pleading standards, we therefore agree with the Court of Appeals that dismissal

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have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" 409 U. S., at 208.

[18] According to the Court of Appeals, the population of the city of Richmond as of 1978 was 219,883, while that of Henrico County was 172,922. 633 F. 2d, at 391, n. 5.

on the pleadings is inappropriate at this stage of the litigation. At the same time, we note that the extreme generality of the complaint makes it impossible to say that respondents have made factual averments sufficient if true to demonstrate injury in fact. Accordingly, on remand, the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint. Cf. Fed. Rule Civ. Proc. 12(e). If after that opportunity the pleadings fail to make averments that meet the standing requirements established by the decisions of this Court, the claims should be dismissed.

C

HOME brought suit against petitioners both as a representative of its members and on its own behalf. In its representative capacity, HOME sought only injunctive relief. See App. 17, ¶ 16; *id.*, at 18–20, ¶ 18. Under the terms of the letter settlement reached between petitioners and respondents, however, HOME has agreed to abandon its request for injunctive relief in the event the District Court ultimately approves the settlement. *Supra*, at 370–371, and n. 10. Additionally, in its brief in this Court, HOME suggests that we need not decide whether the organization has standing in its representative capacity. Brief for Respondents 8, n. 8; *id.*, at 39, n. 35. In view of HOME's apparent willingness to abandon this claim, we think it inappropriate that the Court use its resources to resolve an issue for which "such small embers of controversy . . . remain." *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 225 (1970) *(per curiam)*. While we therefore will not decide the question involving HOME's representative standing, we do proceed to decide the question whether HOME has standing in its own right; the organization continues to press a right to claim damages in that latter capacity.

In determining whether HOME has standing under the Fair Housing Act, we conduct the same inquiry as in the case of an individual: Has the plaintiff "'alleged such a personal stake in the outcome of the controversy' as to warrant his in-

vocation of federal-court jurisdiction"? *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 261 (emphasis omitted), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).[19] In the instant case, HOME's complaint contained the following claims of injury to the organization:

> "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's *[sic]* racially discriminatory steering practices." App. 17, ¶ 16.

If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests, see *Sierra Club* v. *Morton*, 405 U. S., at 739.[20] We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right.[21]

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[19] We have previously recognized that organizations are entitled to sue on their own behalf for injuries they have sustained. *E. g.*, *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975).

[20] That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 263 (1977), and accordingly does not deprive the organization of standing.

[21] Of course, HOME will have to demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief.

IV

Petitioners argue that even if respondents do have standing to sue under the Fair Housing Act, their claims are time-barred under § 812(a) of the Fair Housing Act, 42 U. S. C. § 3612(a). That section requires that a civil suit be brought within 180 days after the alleged occurrence of a discriminatory housing practice.[22] As petitioners note, although five different specific incidents allegedly in violation of the Fair Housing Act are detailed in the complaint, the four involving Coleman occurred more than 180 days before the complaint was filed, and the fifth, which was within 180 days of filing, involved only Coles, whose claims are already the subject of a consent order entered by the District Court. The Court of Appeals, adopting a "continuing violation" theory, held that because the Coles incident fell within the limitations period, none of the claims was barred.

We agree with the Court of Appeals that for purposes of § 812(a), a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. See *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945). Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, see *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 417 (1968). Cf. *Zipes* v. *Trans World Airlines, Inc.*, *post*, at 398. Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant

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[22] The section reads in pertinent part:

"A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred."

to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice[23] that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

Applying this principle to the "neighborhood" claims of Coleman and Willis, we agree with the Court of Appeals that the 180-day statute of limitations is no bar. Willis and Coleman have alleged that petitioners' continuing pattern, practice, and policy of unlawful racial steering has deprived them of the benefits of interracial association arising from living in an integrated neighborhood. Plainly the claims, as currently alleged, are based not solely on isolated incidents involving the two respondents, but a continuing violation manifested in a number of incidents—including at least one (involving Coles) that is asserted to have occurred within the 180-day period. HOME, too, claims injury to its counseling and referral services not only from the incidents involving Coleman and Willis, but also from a continuing policy and practice of unlawful racial steering that extends through the last alleged incident. We do not agree with the Court of Appeals, however, that insofar as respondent Coleman has standing to assert a claim as a "tester," she may take advantage of the "continuing violation" theory. Her tester claim is, in essence, that on four isolated occasions she received false information from petitioners in violation of § 804(d). It is not alleged, nor could it be, that the incident of steering involving Coles on July 13, 1978, deprived Coleman of her § 804(d) right to truthful housing information. See App. 16, ¶ 13.

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[23] Petitioners read § 813 of the Act, 42 U. S. C. § 3613, as permitting only the Attorney General to bring a civil suit under the Act challenging a "pattern or practice" of unlawful conduct. We disagree. That section serves only to describe the suits that the Attorney General may bring, and not to limit suits that private parties may bring under § 812. See *Fort* v. *White*, 383 F. Supp. 949 (Conn. 1974).

V

In sum, we affirm the judgment of the Court of Appeals insofar as the judgment reversed the District Court's dismissal of the claims of Coleman and Willis as individuals allegedly deprived of the benefits of interracial association, and the claims of HOME as an organization allegedly injured by the racial steering practices of petitioners; we reverse the judgment insofar as it directed that Coleman and Willis may proceed to trial on their tester claims. Further proceedings on the remand directed by the Court of Appeals shall be consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

In claiming standing based on a deprivation of the benefits of an integrated community, the individual respondents alleged generally that they lived in the city of Richmond or in Henrico County. This is an area of roughly 269 square miles, inhabited in 1978 by about 390,000 persons. Accordingly, as the Court holds, it is at best implausible that discrimination within two adjacent apartment complexes could give rise to "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), throughout this vast area. See *ante*, at 377. This, to me, is the constitutional core of the Court's decision. "Distinct and palpable" injury remains the minimal constitutional requirement for standing in a federal court.

Although I join the opinion of the Court, I write separately to emphasize my concern that the Art. III requirement of a genuine case or controversy not be deprived of all substance by meaningless pleading. Our prior cases have upheld standing, in cases of this kind, where the effects of discrimination were alleged to have occurred only within "a relatively compact neighborhood." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S., 91, 114 (1979). By implication

we today reaffirm that limitation. See *ante*, at 377. I therefore am troubled, not by the opinion of the Court, but by the record on which that opinion is based. After nearly four years of litigation we know only what the individual respondents chose to plead in their complaint—that they live or lived within a territory of 269 square miles, within which petitioners allegedly committed discrete acts of housing discrimination. The allegation would have been equally informative if the area assigned had been the Commonwealth of Virginia.

In *Warth*, *supra*, at 501–502, we noted that a district court properly could deal with a vague averment as to standing by requiring amendment:

> "[I]t is within the trial court's power to allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed."

The Federal Rules of Civil Procedure also permit a defendant to move for a more definite statement of the claims against him:

> "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just." Fed. Rule. Civ. Proc. 12(e).

See *United States* v. *SCRAP*, 412 U. S. 669, 689–690, n. 15 (1973) (Rule 12(e) motion would have been appropriate for defendants confronted with standing allegations "wholly barren of specifics").

In this case neither the District Court nor apparently counsel for the parties took appropriate action to prevent the case from reaching an appellate court with only meaningless averments concerning the disputed question of standing. One can well understand the impatience of the District Court that dismissed the complaint. Yet our cases have established the preconditions to dismissal because of excessive vagueness, *e. g.*, *Gladstone, Realtors, supra*, at 112–115, with regard to standing, and those conditions were not observed. The result is more than a little absurd: Both the Court of Appeals and this Court have been called upon to parse pleadings devoid of any hint of support or nonsupport for an allegation essential to jurisdiction.

Liberal pleading rules have both their merit and their price. This is a textbook case of a high price—in terms of a severe imposition on already overburdened federal courts as well as unjustified expense to the litigants. This also is a particularly disturbing example of lax pleading, for it threatens to trivialize what we repeatedly have recognized as a *constitutional* requirement of Art. III standing. See, *e. g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472–473, 475–476 (1982); *Warth, supra*, at 498.

In any event, in the context of this case, as it reaches us after some four years of confusing and profitless litigation, it is not within our province to order a dismissal. I therefore join the opinion of the Court.

Syllabus

ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.

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

No. 78–1545. Argued December 2, 1981—Decided February 24, 1982*

In 1970, the union then representing flight attendants employed by respondent Trans World Airlines, Inc. (TWA), brought a federal-court class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 by its policy of grounding all female flight attendants who became mothers while their male counterparts who became fathers were permitted to continue flying. Subsequently, individual members of the class (petitioners in No. 78–1545) were appointed as class representatives to replace the union, which was found to be an inadequate representative. The District Court later denied TWA's motion to exclude class members who had not filed charges with the Equal Employment Opportunity Commission (EEOC) within the time limit specified in Title VII, holding that while such filing requirement is a jurisdictional prerequisite not subject to waiver, any violation by TWA continued against all the class members until TWA changed its challenged policy. The court also granted the plaintiff class' motion for summary judgment on the issue of TWA's liability for violating Title VII. The Court of Appeals affirmed the grant of summary judgment and held that timely filing of EEOC charges was a jurisdictional prerequisite, but declined to extend the "continuing violation" theory so as to include in the plaintiff class those terminated employees who failed to file timely EEOC charges. However, the court stayed its mandate pending the filing of petitions in this Court, which, in turn, deferred consideration of the petitions pending completion of settlement proceedings in the District Court. In such proceedings, the District Court designated two subclasses: Subclass A, consisting of women who were terminated on or after March 20, 1970, and those who were discharged earlier but who had accepted reinstatement in ground positions, and Subclass B, consisting of all other members of the class, whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely-filing requirement. The flight at-

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*Together with No. 80–951, *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc., et al.*, also on certiorari to the same court.

tendants' current union (petitioner in No. 80–951) was permitted to intervene and object to the proposed settlement. On the basis of the Court of Appeals' stay of its mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. It also approved the settlement and awarded restoration of retroactive seniority. The Court of Appeals affirmed, rejecting the union's contention that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or to order retroactive seniority with respect to Subclass B.

Held:

1. Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The structure of Title VII, the congressional policy underlying it, and the reasoning of this Court's prior cases all lead to this conclusion. Pp. 392–398.

2. The District Court had authority to award retroactive seniority to the members of Subclass B as well as Subclass A. Pp. 398–401.

(a) The union's contention in No. 80–951 that there was no finding of discrimination with respect to Subclass B and thus no predicate for relief under § 706(g) of Title VII is without merit. The District Court found unlawful discrimination against the plaintiff class as a whole, at a time when the class had not yet been divided into the two subclasses, and the court's summary judgment ran in favor of the entire class. Since the Court of Appeals erred in ruling that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to the grant of summary judgment, there was no jurisdictional barrier to the District Court's finding of discrimination with respect to the entire class. Pp. 398–399.

(b) Equally meritless is the union's contention that retroactive seniority contrary to the collective-bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. Class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g). And, as made clear in *Teamsters* v. *United States*, 431 U. S. 324, once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. Pp. 399–400.

No. 78–1545, 582 F. 2d 1142, reversed; No. 80–951, 630 F. 2d 1164, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, and in Parts I and II of which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 401. STEVENS, J., took no part in the consideration or decision of the cases.

A. Raymond Randolph, Jr., argued the cause for petitioners in No. 78–1545. With him on the brief were *Aram A. Hartunian*, *Arnold I. Shure*, and *Kevin M. Forde*. *William A. Jolley* argued the cause for petitioner in No. 80–951. With him on the briefs were *Steven A. Fehr*, *Scott A. Raisher*, and *George Kaufmann*.

Laurence A. Carton argued the cause for respondent Trans World Airlines, Inc. With him on the brief was *James A. Velde*.†

JUSTICE WHITE delivered the opinion of the Court.

The primary question in these cases is whether the statutory time limit for filing charges under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed.) is a jurisdictional prerequisite to a suit in the District Court. Secondarily, we resolve a dispute as to whether retroactive seniority was a proper remedy in these Title VII cases.

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†*Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Barry Sullivan*, *Jessica D. Silver*, *Mark L. Gross*, *Constance L. Dupre*, and *Philip B. Sklover* filed a brief for the United States et al. as *amici curiae* urging reversal in No. 78–1545 and affirmance in No. 80–951.

J. Albert Woll, *Robert M. Weinberg*, *Michael H. Gottesman*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal in No. 80–951.

Robert E. Williams, *Douglas S. McDowell*, and *Daniel R. Levinson* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance in both cases.

I

In 1970, the Air Line Stewards and Stewardesses Association (ALSSA), then the collective-bargaining agent of Trans World Airlines (TWA) flight attendants, brought a class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII by its policy of grounding all female flight cabin attendants who became mothers, while their male counterparts who became fathers were permitted to continue flying. After collective bargaining eliminated the challenged practice prospectively, the parties in the case reached a tentative settlement. The settlement, which provided neither backpay nor retroactive seniority, was approved by the District Court. The Court of Appeals for the Seventh Circuit, however, found the union to be an inadequate representative of the class because of the inherent conflict between the interests of current and former employees. It remanded the case with instructions that the District Court name individual members of the class to replace ALSSA as the class representative.[1] *Air Line Stewards and Stewardesses Assn.* v. *American Airlines, Inc.*, 490 F. 2d 636 (1973).

Upon remand, petitioners in No. 78–1545 were appointed as class representatives. TWA moved to amend its answer to assert that the claims of plaintiffs and other class members were barred by Title VII's "statute of limitations" because they had failed to file charges with the Equal Employment Opportunity Commission (EEOC) within the statutory time

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[1] The class was defined as all female flight cabin attendants who were terminated from employment with TWA on or after July 2, 1965, for reasons of pregnancy. The Court of Appeals assumed the class to include only those who would have resumed flight duty after becoming mothers but for TWA's policy. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1147, and n. 9 (CA7 1978). The class thus included both former employees and current employees, that is, both those who declined and those who accepted ground positions.

limit. 1 App. 89a.[2] Although the District Court granted the motion to amend, it noted that the "delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense." *Id.*, at 101a.

Subsequently, on October 15, 1976, the District Court denied TWA's motion to exclude class members who had not filed timely charges with the EEOC. In support of its motion, TWA argued that instead of an affirmative defense analogous to a statute of limitations, timely filing with the EEOC is a jurisdictional prerequisite not subject to waiver by any action of the defendants. While the District Court agreed that the filing requirements of Title VII are jurisdictional, it denied the motion on the basis that any violation by the airline continued against all the class members until the airline changed the challenged policy. *Id.*, at 131a–132a. On October 19, 1976, the District Court granted the motion of the plaintiff class for summary judgment on the issue of TWA's liability for violating Title VII. *Id.*, at 133a–134a.

The Court of Appeals affirmed the order of October 18, 1976, granting summary judgment on liability, expressly holding that "TWA's no motherhood policy . . . provides a clear example of sex discrimination prohibited by § 2000e–2(a)." *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1145 (1978). It declined, however, "to extend the continuing violation theory, as did the district court, so as to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges." *Id.*, at 1149.

The Court of Appeals went on to hold that timely filing of EEOC charges was a jurisdictional prerequisite. Because TWA could not waive the timely-filing requirement, the

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[2] When suit was filed, 42 U. S. C. § 2000e–5(d) (1970 ed.) required charges to be filed within 90 days of the alleged unlawful employment practice. In 1972, this provision was amended to extend the time limit to 180 days and is now codified as § 2000e–5(e).

Court of Appeals found that approximately 92% of the plaintiffs' claims were jurisdictionally barred by the failure of those plaintiffs to have filed charges of discrimination with the EEOC within 90 days of the alleged unlawful employment practice. The Court of Appeals, however, stayed its mandate pending the filing of petitions in this Court. Petitions for certiorari were filed by the plaintiff class, No. 78–1545, and by TWA, No. 78–1549. This Court granted motions to defer consideration of the petitions pending completion of settlement proceedings in the District Court. 442 U. S. 916 (1979).

In connection with the settlement proceedings, the District Court designated two subclasses. Subclass A, consisting of some 30 women, comprised those who were terminated on or after March 2, 1970, as well as those who were discharged earlier, but who had accepted reinstatement in ground duty positions. Subclass B, numbering some 400 women, covered all other members of the class and consisted of those whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely-filing requirement. 2 App. 3.

The proposed settlement divided $3 million between the two groups. It also provided each class member with full company and union seniority from the date of termination. The agreement specified that "in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA."[3] App. to Pet. for Cert. in No. 80–951, p. 29a.

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[3] Section 706(g) of Title VII, 78 Stat. 253, as amended, 42 U. S. C. § 2000e–5(g) provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the

The Independent Federation of Flight Attendants (union), which had replaced ALSSA as the collective-bargaining agent for the flight attendants, was permitted to intervene and to object to the settlement. On the basis that the Court of Appeals had not issued the mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. *Id.*, at 14a–15a. After holding three days of hearings, the District Court approved the settlement and awarded competitive seniority. It explicitly found that full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases. *Id.*, at 18a–19a.

The union appealed. It argued that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or to order retroactive seniority with respect to Subclass B. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action." *Air Line Stewards and Stewardesses Assn.* v. *Trans World Airlines, Inc.*, 630 F. 2d 1164, 1169 (1980). It further explained that the question of jurisdiction as to Subclass B had not been finally determined because a challenge to its decision was pending before this Court and observed that the Courts of Appeals were split on the issue. The Court of Appeals noted that the District Court clearly had subject-matter jurisdiction over the claims of Subclass A. It concluded: "Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement

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complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate. . . ."

that is otherwise appropriate for district court approval." *Ibid.*

The Court of Appeals also affirmed the award of seniority. According to the court, the settlement served the public policy of remedying past acts of sex discrimination and the consequences of those past acts. Moreover, "[t]he right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects." *Ibid.*[4]

The union petitioned for certiorari, No. 80–951. We granted its petition together with the petitions in No. 78–1545 and No. 78–1549, 450 U. S. 979 (1981), but later removed the TWA case, No. 78–1549,[5] from the argument docket and limited the grant in No. 80–951. 451 U. S. 980 (1981).

II

The single question in No. 78–1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel. In reaching its decision that the requirement is jurisdictional, the Court of Appeals for the Seventh Circuit relied on its reading of the statutory language, the absence of any indication to the con-

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[4] The Court of Appeals relied on language in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 779, n. 41 (1976):

"[D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and . . . such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases."

[5] In No. 78–1549, TWA contends (a) that the Court of Appeals erred in affirming summary judgment for plaintiffs on the issue of liability, (b) that TWA should be required to grant only prospective relief to plaintiffs, and (c) that the Court of Appeals erred in defining the subclass of plaintiffs who had filed timely charges with the EEOC. In view of our decision in No. 78–1545 and No. 80–951, we now dismiss the petition in No. 78–1549 as improvidently granted.

trary in the legislative history, and references in several of our cases to the 90-day filing requirement as "jurisdictional."[6] Other Courts of Appeals that have examined the same materials have reached the opposite conclusion.[7]

We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.[8] The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

The provision granting district courts jurisdiction under Title VII, 42 U. S. C. §§ 2000e–5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC.[9] It contains no reference to the timely-

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[6] See *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 240 (1976); *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 555, n. 4 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973).

[7] See *Carlile* v. *South Routt School District Re 3–J*, 652 F. 2d 981 (CA10 1981); *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d 584 (CA5 1981); *Leake* v. *University of Cincinnati*, 605 F. 2d 255 (CA6 1979); *Hart* v. *J. T. Baker Chemical Corp.*, 598 F. 2d 829 (CA3 1979); *Laffey* v. *Northwest Airlines, Inc.*, 185 U. S. App. D. C. 322, 567 F. 2d 429 (1976).

[8] One of the questions on which we granted certiorari in No. 80–951 was whether the Court of Appeals erred in affirming the District Court's approval of the settlement of jurisdictionally barred claims. In reaching its decision, the Court of Appeals for the Seventh Circuit explicitly declined to follow *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (CA5 1978) (en banc). *Air Line Stewards and Stewardesses Assn.* v. *TWA*, 630 F. 2d 1164, 1168–1169 (1980). In *McArthur*, the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction because no plaintiff had filed a timely charge of discrimination with the EEOC. Because of our holding in No. 78–1545 that timely filing with the EEOC is not a jurisdictional prerequisite, this issue need not be resolved.

[9] Title 42 U. S. C. § 2000e–5(f)(3), for example, reads:

"Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction

filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.[10] The legislative history of the filing provision is sparse, but Senator Humphrey did characterize the time period for filing a claim as a "period of limitations," 110 Cong. Rec. 12723 (1964), and Senator Case described its purpose as preventing the pressing of "stale" claims, *id.*, at 7243, the end served by a statute of limitations.

Although subsequent legislative history is not dispositive, see *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U. S. 677, 686, n. 7 (1979), the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement. In the final Conference Committee section-by-section analysis of H. R. 1746, The Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167 (1972), the Committee not only termed the filing period a "time limitation," but explained:

> "This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have

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of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. . . ."

[10] Section 2000e–5(e), the amended version of the filing provision, reads simply: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."

> shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection."[11]

This result is entirely consistent with prior case law. Although our cases contain scattered references to the timely-filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases, and as or more often in the same or other cases, we have referred to the provision as a limitations statute.[12]

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[11] The Senate Labor Committee's section-by-section analysis of the amendments explained that "[t]his subsection would permit . . . a limitation period similar to that contained in the Labor-Management Relations Act, as amended." S. Rep. No. 92–415, p. 37 (1971). We have recognized that the National Labor Relations Act was "the model for Title VII's remedial provisons," *Teamsters* v. *United States*, 431 U. S. 324, 366 (1977). Because the time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board, see *NLRB* v. *Local 264, Laborers' Int'l Union*, 529 F. 2d 778, 781–785 (CA8 1976); *Shumate* v. *NLRB*, 452 F. 2d 717, 720 (CA4 1971); *NLRB* v. *A. E. Nettleton Co.*, 241 F. 2d 130, 133 (CA2 1957); *NLRB* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506–507 (CA5 1950), the time limitations under Title VII should be treated likewise.

Moreover, when Congress in 1978 revised the filing requirement of the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U. S. C. § 621 *et seq.* (1976 ed. and Supp. V), which was modeled after Title VII, see *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979), the House Conference Report explicitly stated that "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act." H. R. Conf. Rep. No. 95–950, p. 12.

[12] As the Court of Appeals for the Fifth Circuit points out in its opinion in *Coke*, *supra*, at 588–589, references to the filing requirement as a statute of limitations have come to dominate in our opinions:

"The trend of the Supreme Court cases is also significant. In the early cases, the Court in dicta referred to such time provisions using the label

More weighty inferences however, are to be drawn from other cases. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), was a Title VII suit against an employer and a union. The District Court denied relief for unnamed class members on the ground that those individuals had not filed administrative charges under the provisions of Title VII and that relief for them was thus not appropriate. The Court of Appeals did not disturb this ruling, but we reversed, saying:

> "The District Court stated two reasons for its denial of seniority relief for the unnamed class members. The first was that those individuals had not filed administrative charges under the provision of Title VII with the Equal Employment Opportunity Commission and therefore class relief of this sort was not appropriate. We rejected this justification for denial of class-based relief in the context of backpay awards in *Albemarle Paper* [*Co.* v. *Moody*, 422 U. S. 405 (1975),] and . . . reject it here. This justification for denying class-based relief in Title VII suits has been unanimously rejected by the courts of appeals, and Congress ratified that construction by the 1972 amendments. . . ." *Id.*, at 771 (footnote omitted).

'jurisdictional prerequisite.' *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 . . . (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 . . . (1974). In the 1976 *Robbins & Myers* decision the jurisdictional label was used once, but there were numerous references to 'tolling the limitations period,' 429 U. S. at 239, . . . and other labels obviously referring to a statute of limitations, as opposed to subject matter jurisdiction. See also *United Air Lines* v. *Evans*, 431 U. S. 553 . . . (1977), in which both labels are used. From and after late 1977, all nine justices have concurred in opinions containing dicta using the limitations label to the exclusion of the jurisdictional label. *Occidental Life Insurance Company* v. *EEOC*, 432 U. S. 355, 371–[3]72 . . . (1977); *United Air Lines, Inc.* v. *McDonald*, 432 U. S. 385, 391–[3]92 . . . (1977); *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 818–823 . . . (1980), *Delaware State College* v. *Ricks*, [449] U. S. [250] . . . (1980)."

If the timely-filing requirement were to limit the jurisdiction of the District Court to those claimants who have filed timely charges with the EEOC, the District Courts in *Franks* and *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority. We did not so hold. Furthermore, we noted that Congress had approved the Court of Appeals cases that awarded relief to class members who had not exhausted administrative remedies before the EEOC. It is evident that in doing so, Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court.

In *Love* v. *Pullman Co.*, 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.*, at 527. That principle must be applied here as well.

The reasoning of other cases assumes that the filing requirement is not jurisdictional. In *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229 (1976), we rejected the argument that the timely-filing requirement should be tolled because the plaintiff had been pursuing a grievance procedure set up in the collective-bargaining agreement. We did not reach this decision on the basis that the 180-day period was jurisdictional. Instead, we considered the merits of a series of arguments that grievance procedures should toll the requirement. Such reasoning would have been gratuitous if the filing requirement were a jurisdictional prerequisite.[13]

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[13] In *Robbins & Myers*, we also held that the expanded 180-day "limitations period," enacted by the 1972 amendments, was retroactive. 429 U. S., at 244. This holding presupposes that the requirement is not juris-

Similarly, we did not *sua sponte* dismiss the action in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980), on the basis that the District Court lacked jurisdiction because of plaintiff's failure to comply with a related Title VII time provision. Instead, we merely observed in a footnote that "[p]etitioner did not assert respondent's failure to file the action within 90 days as a defense." *Id.*, at 811, n. 9.

By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

We therefore reverse the Court of Appeals in No. 78–1545.

III

In No. 80–951, the union challenges on several grounds the District Court's authority to award, over the union's objection, retroactive seniority to the members of Subclass B. We have already rejected the union's first contention, namely, that the District Court had no jurisdiction to award relief to those who had not complied with Title VII's filing requirement. The union also contends that in any event there has been no finding of discrimination with respect to Subclass B members and that the predicate for relief under § 706(g) is therefore missing. This contention is also without merit.

The District Court unquestionably found an unlawful discrimination against the plaintiff class, and the class at that

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dictional. Moreover, in reaching this conclusion, we quoted from *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 316 (1945): "[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." Several Courts of Appeals have read *Robbins & Myers* as implicitly approving equitable tolling. *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d, at 588; *Hart* v. *J. T. Baker Chemical Corp.*, 598 F. 2d, at 833; *Smith* v. *American President Lines, Ltd.*, 571 F. 2d 102, 108–109 (CA2 1978).

time had not been subdivided into Subclasses A and B. Summary judgment ran in favor of the entire class, including both those members who had filed timely charges and those who had not. The Court of Appeals affirmed the summary judgment order as well as the finding of a discriminatory employment practice. The court went on, however, to hold that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to the grant of summary judgment. But as we have now held, that ruling is erroneous. The District Court did have jurisdiction over nonfiling class members. Thus, there was no jurisdictional barrier to its finding of discrimination with respect to the entire class. With the reversal of the Court of Appeals judgment in No. 78–1545 and our dismissal of No. 78–1549, which had challenged the affirmance of the summary judgment order, the order that found classwide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice.

Equally meritless is the union's contention that retroactive seniority contrary to the collective-bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. In *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 764, we read the legislative history of Title VII as giving

> "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole in so far as possible the victims of . . . discrimination . . . ."

While recognizing that backpay was the only remedy specifically mentioned in the provision, we reasoned that adequate relief might be denied without a seniority remedy. We concluded that the class-based seniority relief for identifiable vic-

tims of illegal discrimination is a form of relief generally appropriate under § 706(g).

In *Franks*, the District Court had found both that the employer had engaged in discrimination and that the discriminatory practices were perpetuated in the collective-bargaining agreements with the unions. 424 U. S., at 751. *Teamsters* v. *United States*, 431 U. S. 324 (1977), however, makes it clear that once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the District Court would decide "whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." *Id.*, at 331, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation as a defendant so that full relief could be awarded the victims of the employer's post-Act discrimination. *Id.*, at 356, n. 43.[14] Here, as in *Teamsters*, the settlement left to the District Court the final decision as to retroactive seniority.

In resolving the seniority issue, the District Court gave the union all the process that was due it under Title VII in our cases. The union was allowed to intervene. The District Court heard its objections, made appropriate findings, and determined that retroactive seniority should be awarded. The Court of Appeals agreed with that determination, and

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[14] In noting that the union in *Teamsters* properly remained a defendant in the litigation, we cited to Federal Rule of Civil Procedure 19(a). The union here was not joined under Rule 19 when individuals replaced the union as class representatives, but intervened later. Cf. *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1095 (CA6 1974) (joinder under Rule 19(a) provides union with full opportunity to participate in litigation and formulation of proposed relief, although as practical matter union does not play role in litigation until court finds violation of Title VII).

we have eliminated from our consideration here the question whether on the facts of these cases the Court of Appeals and the District Court were in error in this respect.

Accordingly, the judgment in No. 78–1545 is reversed and the judgment in No. 80–951 is affirmed.

So ordered.

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

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in No. 78–1545 and concurring in the judgment in No. 80–951.

The above cases arise out of the same protracted controversy, and the Court disposes of them in a single opinion. The only question in No. 78–1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit. I agree that timely filing is not jurisdictional and is subject to waiver and estoppel. Accordingly, I join Parts I and II of the Court's opinion.

I join only the judgment in No. 80–951. My concern with the Court's opinion is that it does not make clear that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a bona fide seniority system protected by § 703(h), 42 U. S. C. § 2000e–2(h).[1] This was made

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[1] In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), timely charges of discrimination had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a district court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the

clear in *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 559 (1977), a case not discussed in the Court's opinion.[2] I nevertheless concur in the remand of No. 80–951, in which a settlement agreement was approved awarding retroactive competitive-status seniority under the standard of *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976). This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to "what happened and when." I believe, however, that one can conclude that the requirements of *Evans* were met.

As noted in the Court's opinion, *ante*, at 398–399, the District Court's order finding classwide discrimination is now final. The District Court also entered an order finding that timely charges had been filed for all class members, and that order is similarly final. The timely-charge order was entered on October 15, 1976, three days before the entry of the order finding classwide discrimination. These orders were consolidated on appeal to the Court of Appeals for the Seventh Circuit. Although the October 18th order, finding discrimination, was affirmed, the Court of Appeals vacated the other order, holding that the members of Subclass B had failed to meet the jurisdictional requirements of Title VII because they had not filed timely claims. No District Court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and classwide discrimination, are now final.

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employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

[2] The Court refers to *United Air Lines* v. *Evans* twice, see *ante*, at 393, n. 6, and at 396, n. 12; both references are to terms used by the *Evans* Court in describing the timely-filing requirement.

I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of *Franks* v. *Bowman Transportation Co.*[3]

[3] I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the courts have addressed specifically whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. Rather than prolong this disruptive litigation, it may well be in the best interest of all of the parties to approve the settlement—as the Court's judgment does today.

G. D. SEARLE & CO. *v.* COHN ET AL.

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

No. 80–644. Argued December 7, 1981—Decided February 24, 1982

A New Jersey statute tolls the limitation period for an action against a foreign corporation that "is not represented" in New Jersey by any person or officer upon whom process may be served. In respondents' action against petitioner foreign corporation, originally brought in a New Jersey state court and removed to Federal District Court, petitioner moved for summary judgment based upon the applicable New Jersey statute of limitation, and respondents countered with the tolling provision. Although ruling that petitioner was not represented in New Jersey for purposes of the tolling provision, the District Court nevertheless held that the suit was barred. Reasoning that the tolling provision operated to preserve only causes of action against corporate defendants that were not subject to *in personam* jurisdiction in New Jersey, and that with the enactment of New Jersey's long-arm rule, the rationale for the pre-existing tolling provision ceased to exist, the District Court found the tolling provision invalid under the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals reversed. That court's decision was based upon an intervening decision of the New Jersey Supreme Court holding that, as a matter of New Jersey law, the tolling provision continued in force despite the advent of long-arm jurisdiction, and that such provision did not violate the Equal Protection Clause, because the increased difficulty of out-of-state service provided a rational basis for tolling the statute of limitation in a suit against an unrepresented foreign corporation.

Held:

1. The tolling provision does not violate the Equal Protection Clause. Rational reasons support the provision despite the institution of long-arm jurisdiction in New Jersey. The unrepresented foreign corporation remains potentially difficult to locate, and the institution of long-arm jurisdiction has not made service upon such a corporation the equivalent of service upon a corporation with a New Jersey representative but requires additional conditions for effective service. Because of these burdens connected with suing unrepresented foreign corporations, as opposed to suing a domestic corporation or a represented foreign corporation, the tolling provision does not deprive an unrepresented foreign corporation of the equal protection of the laws. Pp. 408–412.

2. But since neither lower court addressed directly the question

whether the tolling provision violates the Commerce Clause, and since, moreover, the Commerce Clause issue is clouded by an ambiguity in state law, the Court of Appeals' judgment is vacated, and the case is remanded for consideration of such issue. Pp. 412–414.

628 F. 2d 801, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined, and in Parts I and II of which BURGER, C. J., and POWELL, J., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., joined, *post*, p. 414. STEVENS, J., filed a dissenting opinion, *post*, p. 420.

William P. Richmond argued the cause for petitioner. With him on the briefs was *David W. Carpenter*.

Walter R. Cohn argued the cause and filed a brief for respondents.*

JUSTICE BLACKMUN delivered the opinion of the Court.

A New Jersey statute, N. J. Stat. Ann. § 2A:14–22 (West 1952), tolls the limitation period for an action against a foreign corporation that is amenable to jurisdiction in New Jersey courts but that has in New Jersey no person or officer upon whom process may be served. The United States Court of Appeals for the Third Circuit in this case held that the statute does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. We agree, but we vacate the Court of Appeals' judgment and remand the case for consideration of petitioner's Commerce Clause challenge to the statute.

I

Respondents, Susan and Walter Cohn, are husband and wife. In 1963, Susan Cohn suffered a stroke. Eleven years later, in 1974, the Cohns sued petitioner, G. D. Searle & Co., in the Superior Court of New Jersey, Essex County, alleging that Susan Cohn's stroke was caused by her use of an oral

**Stephen J. Pollak, I. Michael Greenberger,* and *Franklin D. Kramer* filed a brief for Brinco Mining Limited as *amicus curiae* urging reversal.

Arthur Ian Miltz and *Richard F. Gerry* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

contraceptive manufactured by petitioner.[1] Petitioner was served under New Jersey's long-arm rule, N. J. Ct. Rule 4:4–4(c)(1) (1969). Petitioner removed the suit to federal court and thereafter moved for summary judgment based upon New Jersey's 2-year statute of limitation, N. J. Stat. Ann. § 2A:14–2 (West 1952), governing an "action at law for an injury to the person caused by . . . wrongful act." Respondents countered with § 2A:14–22. That section tolls the statute of limitation for a cause of action against a foreign corporation that "is not represented" in New Jersey "by any person or officer upon whom summons or other original process may be served."[2]

The District Court ruled that petitioner was not represented in New Jersey for the purposes of the tolling provision.[3] 447 F. Supp. 903, 907–909 (NJ 1978). Nevertheless,

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[1] Petitioner is a Delaware corporation with principal place of business in Illinois. At all times pertinent to this case, petitioner was engaged in the business of manufacturing and selling pharmaceutical products.

[2] Section 2A:14–22 reads in pertinent part:

"If any person against whom there is any of the causes of action specified in sections 2A:14–1 to 2A:14–5 and 2A:14–8 . . . is not a resident of this state when such cause of action accrues, . . . or if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

[3] Petitioner had so-called "detailmen" in New Jersey. These were employees who promoted its products among New Jersey physicians. The District Court, contrary to petitioner's urging, held that the detailmen were not "persons" or "officers" for the purpose of the tolling provision, 447 F. Supp. 903, 906–907 (NJ 1978), and the Court of Appeals agreed, *Hopkins* v. *Kelsey-Hayes, Inc.*, 628 F. 2d 801, 808 (CA3 1980). That holding is not disputed in this Court.

it held that respondents' suit was barred. According to the District Court, the tolling provision had operated to preserve only causes of action against corporate defendants that were not subject to *in personam* jurisdiction in New Jersey. With the enactment of New Jersey's long-arm rule, now N. J. Ct. Rule 4:4–4(c),[4] the rationale for the pre-existing tolling provision ceased to exist. On this reasoning, the court held that the tolling provision served no logical purpose, found it invalid under the Equal Protection Clause, and ruled that the 2-year statute of limitation therefore barred respondents' suit. 447 F. Supp., at 911–913.

Respondents appealed. Before the Court of Appeals reached a decision, however, the Supreme Court of New Jersey decided *Velmohos* v. *Maren Engineering Corp.*, 83 N. J. 282, 416 A. 2d 372 (1980), appeal pending, No. 80–629. That court ruled, as a matter of New Jersey law, that the tolling provision continued in force despite the advent of long-arm jurisdiction. In addition, the court concluded that the tolling provision did not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment, because the increased difficulty of out-of-state service provided a rational basis for tolling the statute of limitation in a suit against an unrepresented foreign corporation.

The Court of Appeals then followed the New Jersey Supreme Court's lead and reversed the District Court.[5] Summing up what it felt to be the rational basis for the tolling provision, the Court of Appeals explained:

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[4] New Jersey's long-arm service rule was promulgated in 1958 as N. J. Ct. R. R. 4:4–4(d). In 1971, the New Jersey Supreme Court interpreted the rule to permit extraterritorial service to the full extent allowed by the United States Constitution. *Avdel Corp.* v. *Mecure*, 58 N. J. 264, 277 A. 2d 207. See generally *Velmohos* v. *Maren Engineering Corp.*, 83 N. J. 282, 289–292, 416 A. 2d 372, 376–378 (1980), appeal pending, No. 80–629.

[5] The Court of Appeals' decision was on consolidated appeals of the instant case and *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F. Supp. 539 (NJ 1978), aff'd, 628 F. 2d 801 (CA3 1980), cert. pending, No. 80–663. In *Hopkins*, a different New Jersey Federal District Judge had held the tolling provision to be consistent with the Equal Protection and Due Process Clauses.

> "Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants." *Hopkins* v. *Kelsey-Hayes, Inc.*, 628 F. 2d 801, 811 (CA3 1980).

Because of the novel and substantial character of the federal issue involved, we granted certiorari, 451 U. S. 905 (1981).

II

Like the Court of Appeals, we conclude that the New Jersey statute does not violate the Equal Protection Clause. In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends. *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981). The New Jersey tolling provision need satisfy only this constitutional minimum. As the Court explained in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945):

> "[Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."

See also *Campbell* v. *Holt*, 115 U. S. 620 (1885).[6]

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[6] Before the Court of Appeals, petitioner conceded that the tolling provision does not implicate a suspect classification. See 628 F. 2d, at

Petitioner insists that the tolling statute no longer is rationally related to a legitimate state objective. Repeating the argument it made below, petitioner claims that the statute's only purpose was to preserve causes of action for those New Jersey plaintiffs unable to obtain *in personam* jurisdiction over unrepresented foreign corporations. With the presence now of long-arm jurisdiction, petitioner contends, there is no longer a valid reason for tolling the limitation period for a suit against an amenable foreign corporation without a New Jersey representative.

We note at the outset, and in passing, that petitioner's argument fails as a matter of state law. The New Jersey Supreme Court disagreed with petitioner's interpretation of the statute. That court observed that the State's original tolling provision did not mention corporations and thus treated them like all other defendants. In 1949, the state legislature amended the statute and exempted corporations except those foreign corporations "not represented" in New Jersey. The legislature, the New Jersey Supreme Court emphasized, did not limit the tolling provision to corporations "not amenable to service" in New Jersey. Consequently, the court reasoned, the tolling provision was not rendered meaningless by the subsequent acceptance of long-arm jurisdiction. *Velmohos* v. *Maren Engineering Corp.*, 83 N. J., at 288–293, 416 A. 2d, at 376–379. As construed by the highest judicial authority on New Jersey law, the meaning of the tolling statute cannot be confined as narrowly as petitioner would like.

808–809. Before this Court, petitioner argues for a heightened level of scrutiny because it is a corporation not doing business in New Jersey and therefore is without a voice in the New Jersey Legislature. Only a rational basis, however, is required to support a distinction between foreign and domestic corporations. *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S. 648, 668 (1981). The same is true here where the tolling provision treats an unrepresented foreign corporation differently from a domestic corporation and from a foreign corporation having a New Jersey representative.

When the statute is examined under the Equal Protection Clause, it survives petitioner's constitutional challenge because rational reasons support tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. First, the unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey plaintiff must find the unrepresented foreign corporation before it can be served. See *id.*, at 296, 416 A. 2d, at 380. It is true, of course, that respondents had little or no trouble locating this particular, well-known defendant-petitioner, but the tolling provision is premised on a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve. See *Weinberger* v. *Salfi*, 422 U. S. 749, 780–785 (1975).

Second, the institution of long-arm jurisdiction in New Jersey has not made service upon an unrepresented foreign corporation the equivalent of service upon a corporation with a New Jersey representative. The long-arm rule, N. J. Ct. Rule 4:4–4(c)(1) (1969), prescribes conditions upon extraterritorial service to ensure that New Jersey's long-arm jurisdiction has been properly invoked. In *Velmohos*, the New Jersey Supreme Court explained:

> "Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is 'consistent with due process of law.'" 83 N. J., at 296, 416 A. 2d, at 381.

Thus, there are burdens a plaintiff must bear when he sues a foreign corporation lacking a New Jersey representative that he would not bear if the defendant were a domestic

corporation or a foreign corporation with a New Jersey representative.

In response to these rationales for treating unrepresented foreign corporations differently from other corporations, petitioner argues that the tolling provision is unnecessary. Petitioner cites N. J. Ct. Rule 4:2–2 and contends that a plaintiff can preserve his cause of action against a hard-to-locate corporate defendant by filing a complaint and thereby halting the running of the limitation period. But this is not an adequate substitute for the tolling provision. A court may dismiss a case if it has not been prosecuted after six months, N. J. Ct. Rule 1:13–7, or if summons is not issued within 10 days of the filing of the complaint, N. J. Ct. Rule 4:4–1. In any event, a State may provide more than one solution for a perceived problem. The Court of Appeals appropriately commented: "Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against non-represented foreign corporations which is additional to any mechanism found in the Court Rules." 628 F. 2d, at 811.

Petitioner also argues that a New Jersey plaintiff's burdens do not justify leaving a defendant open to suit without any time limit. In *Velmohos*, however, the New Jersey Supreme Court expressly authorized an unrepresented foreign corporation to plead another defense in response to a tardy suit. While the tolling provision denies an unrepresented foreign corporation the benefit of the statute of limitation, the corporation, the court stated flatly, remains free to plead laches. "If a plaintiff's delay is inexcusable and has resulted in prejudice to the defendant, the latter may raise the equitable defense of laches to bar the claim." 83 N. J., at 293, n. 10, 416 A. 2d, at 378, n. 10. Thus, under New Jersey law, an amenable, unrepresented foreign corporation may successfully raise a bar to a plaintiff's suit if the plaintiff's delay cannot be excused and the corporation has suffered "prejudice."

In sum, because of the burdens connected with serving unrepresented foreign corporations, we agree with the Court of Appeals and the New Jersey Supreme Court that the tolling provision does not deprive an unrepresented foreign corporation of the equal protection of the laws.[7] See *Dew* v. *Appleberry*, 23 Cal. 3d 630, 591 P. 2d 509 (1979) (holding similar tolling provision rationally related to a valid governmental interest); *Vaughn* v. *Deitz*, 430 S. W. 2d 487, 490 (Tex. 1968) (holding that absence from the State may, consistent with equal protection, support suspension of the statute of limitation). Cf. *Bauserman* v. *Blunt*, 147 U. S. 647 (1893) (applying Kansas statute tolling limitation period for out-of-state defendant subject to service, without discussing the constitutional issue).

III

Petitioner, however, raises another constitutional challenge. The tolling provision as interpreted by the New Jer-

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[7] Petitioner also presses a due process claim. In the Court of Appeals, petitioner argued that the tolling statute violates due process "by unfairly and irrationally denying certain foreign corporations the benefit of the Statute of Limitations without furthering any legitimate societal interest." Brief for Defendant-Appellee and Cross-Appellant in Nos. 79–2406 and 79–2605 (CA3), p. 29. The Court of Appeals rejected petitioner's due process challenge to the statute at the same time that it rejected petitioner's equal protection contention. See 628 F. 2d, at 808–809. Indeed, this due process argument is nothing more than a restatement of petitioner's equal protection claim. See *Velmohos*, 83 N. J., at 297, 416 A. 2d, at 381.

In this Court, petitioner has attempted to put forward a new due process argument. Petitioner notes that it can obtain the benefit of the statute of limitation by appointing an agent to accept service. See *Velmohos*, 83 N. J., at 293, n. 10, 416 A. 2d, at 378, n. 10; see also *infra*, at 413–414. Fearing that appointment of an agent might subject it to suit in New Jersey when there otherwise would not be the minimum contacts required for suit in that State under the Due Process Clause, see *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), petitioner insists that New Jersey law violates due process by conditioning the benefit of the limitation period upon the appointment of a New Jersey agent. Because petitioner did not present this argument to the Court of Appeals, we do not address it. See *United States* v. *Ortiz*, 422 U. S. 891, 898 (1975).

sey Supreme Court, petitioner argues, violates the Commerce Clause. Petitioner insists that, in order to obtain the benefit of the statute of limitation, it must obtain a certificate of authority by registering to do business in New Jersey. See N. J. Stat. Ann. § 14A:13–2 (West 1969). As a result, it will subject itself to all the duties and liabilities imposed on a domestic New Jersey corporation. Petitioner points out that it is engaged solely in interstate commerce in New Jersey, and, relying on cases such as *Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20 (1974), and *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914), petitioner contends that New Jersey violates the Commerce Clause by requiring it to register to do business in New Jersey in order to gain the benefit of the statute of limitation. For two reasons, we decline to resolve this issue.

First, neither the District Court nor the Court of Appeals addressed the question directly. There is no mention of the Commerce Clause in the opinion of the Court of Appeals. In a footnote, the District Court suggested that the tolling provision would violate the Commerce Clause. 447 F. Supp., at 911, n. 17. But the District Court there was answering respondents' contention that the tolling provision was enacted as a penalty to induce corporations to register to do business in New Jersey, an argument respondents no longer make.[8] Thus, neither court considered the Commerce Clause argument in its present form.

Second, the Commerce Clause issue is clouded by an ambiguity in state law. The dispute over the Commerce Clause

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[8] At that time, respondents were seeking to supply a rational basis for the tolling provision by arguing that it was intended as a penalty to induce foreign corporations to obtain New Jersey licenses. The District Court rejected that interpretation of the tolling provision before suggesting that respondents' reading of the statute would violate the Commerce Clause. 447 F. Supp., at 911, n. 17. It seems to us that the District Court was on sound ground when it rejected this theory of the statute's origin, since there is no hint in *Velmohos* that the tolling provision was designed to be a penalty for failure to obtain a New Jersey license.

centers in what seems to us to be an opaque footnote in the New Jersey Supreme Court's majority opinion in *Velmohos*. That court, without citation, commented: "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 N. J., at 293, n. 10, 416 A. 2d, at 378, n. 10. Petitioner, contending that there is no procedure in New Jersey for simply appointing an agent, interprets this sentence as requiring it to register to do business in New Jersey pursuant to N. J. Stat. Ann. § 14A:13–2 (West 1969) in order to obtain the benefit of the statute of limitation. Respondents, on the other hand, read the footnote as referring to the mere appointment of an agent, to be accomplished in some manner unexplained to us.

The lone sentence in the *Velmohos* footnote by itself does not clearly demonstrate the correctness of either view or lucidly inform us as to what the state law is. We consider it unwise for us to pass upon the constitutionality of this aspect of New Jersey law when we are uncertain of the critical footnote's meaning, particularly in light of the fact that the lower courts in this case did not address the Commerce Clause or the state-law issues. Consequently, we vacate the Court of Appeals' judgment and remand the case, so that the Court of Appeals may determine whether petitioner's Commerce Clause argument, if it was properly raised below, has merit.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. In Part III of its opinion, the Court addresses the Commerce Clause question and "decline[s] to resolve" it because "neither the District Court nor the Court of Appeals addressed the question directly." A further reason assigned by the Court for

remanding on this issue is that one sentence in a footnote to *Velmohos* v. *Maren Engineering Corp.*, 83 N. J. 282, 293, n. 10, 416 A. 2d 372, 378, n. 10 (1980), is "ambiguous."

The Commerce Clause question was not presented to the District Court by petitioner,[1] and normally this would fully justify a remand. It was, however, presented and argued to the Court of Appeals for the Third Circuit. Pet. for Cert. 6–7.[2] Curiously, that court did not mention the question in its opinion. Petitioner continued, as it had a right to do, to rely on the ground. Its petition for certiorari expressly included the question whether New Jersey's tolling statute "constitutes the imposition of a burden [on] interstate commerce." *Id.*, at i. With full knowledge that the Court of Appeals had ignored petitioner's Commerce Clause argument, we granted certiorari. Our grant did not limit the questions presented. See 451 U. S. 905 (1981). And respondents have not suggested that this question is not properly before us. Indeed, the issue was addressed at length by both parties in their briefs and in oral argument. In my view, the question is properly before us.

As I do not share the Court's view that ambiguity exists as to New Jersey law, I would decide the question on which we granted this case.

I

Petitioner argues that under New Jersey law the only way a foreign corporation may appoint an agent for service of process, and thereby obtain the benefit of the statute of limitations, is to obtain a certificate of authority to transact busi-

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[1] The District Court, apparently *sua sponte*, suggested that the tolling provision would violate the Commerce Clause but did not decide the question. See *ante*, at 413, and n. 8.

[2] Petitioner's assertion that it argued the Commerce Clause issue before the Court of Appeals is confirmed by its Third Circuit brief. See Brief for Defendant-Appellee and Cross-Appellant G. D. Searle & Co. in Nos. 79–2406 and 79–2605 (CA3), pp. 2, 33–38.

ness in the State. Respondents answer that other means of appointing such an agent—without qualifying to do business—are provided by New Jersey law. This difference between the parties is critical to the resolution of the Commerce Clause question, as significant consequences follow from registration. Neither *Velmohos*, nor any other New Jersey case brought to our attention, identifies any means—other than qualification—of appointing a duly authorized agent for service of process.

The Court perceives ambiguity in the following footnote in *Velmohos:*

> "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit [due to tolling of the statute of limitations] can be easily eliminated by the designation of an agent for service of process within the State." 83 N. J., at 293, n. 10., 416 A. 2d, at 378, n. 10.

The question before us was not the issue in *Velmohos*. The footnote merely says that the statute of limitations tolling problem may be eliminated "by the designation of an agent for service of process." This is simply a neutral observation that says *nothing* as to the means of designation of an agent under New Jersey law. If there were a genuine ambiguity in New Jersey statutes a remand would indeed be justified. I find no such ambiguity.

II

Only three New Jersey statutes have been identified as relevant, one by petitioner and two by respondents.

Petitioner cites N. J. Stat. Ann. §§ 14A:4–1 and 14A:13–4 (West 1969). This is a conventional type of statute requiring the qualification of foreign corporations that transact business in the State. It includes the requirement of a registered agent. Section 14A:13–4(1) requires the foreign corporation to file in the office of the Secretary of State an application setting forth specified information, including the

name and address of the registered agent and "a statement that the registered agent is an agent of the corporation upon whom process against the corporation may be served."

Counsel for petitioner obtained—and filed with the Court—an opinion from the New Jersey Secretary of State advising, in effect, that the foregoing statute is the *only* means of designating a registered agent for service of process.[3]

The *Velmohos* opinion itself suggests that this statute is the means by which a corporation must appoint an agent to gain the benefit of New Jersey's statute of limitations. In *Velmohos*, the New Jersey Supreme Court reviewed the legislative history of the tolling provision at issue in this case. As originally enacted, it simply tolled limitations periods while a *person* was not a resident of the State; there was no specific reference to corporations. The provision was amended in 1949 to add the current language, which grants the benefit of the statutes of limitations to foreign corporations that are "represented" in New Jersey. The *Velmohos* court quoted a portion of the 1949 legislative history: "'Foreign corporations *licensed to do business in New Jersey* are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation.'" 83 N. J., at 290, 416 A. 2d, at 377, quoting *Statement Accompanying Assembly No. 467* (1949) (emphasis added). See also *Coons* v. *Honda Motor Co., Ltd. of Japan*, 176 N. J. Super. 575, 582, 424 A. 2d 446, 450 (1980), cert. pending, No. 80–2003. This reference to a conventional scheme of licensing foreign corporations is further confirma-

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[3] The opinion reads in full as follows:

"In response to your recent letter, please be advised that it is the view of the Department of State that unless a foreign corporation has qualified to do business in New Jersey, they are unable to designate a registered agent for service of process." Letter from Frank Capece, Executive Assistant to the New Jersey Secretary of State, to James H. Freis, Esq. (Oct. 22, 1981).

tion that § 14A:4–1 *et seq.* are the means by which corporations are to gain relief from the disputed tolling provision.

Respondents are represented by New Jersey counsel. They do not dispute that statutory authority is necessary. Rather, they insist that the qualification statute is not the only statute authorizing appointment of a New Jersey agent for service. They cite two other statutes: the New Jersey fictitious corporate name statute, N. J. Stat. Ann. § 14A:2–2.1 (West Supp. 1981–1982), and the New Jersey business and partnership name registration statute. § 56:1–1 (West 1964). Respondents cite no New Jersey case, and present no opinion from any state official, in support of their view that these statutes provide a means of appointing an agent for service without complying with § 14A:4–1 *et seq.*

Neither of the statutes cited by respondents appears to have anything to do with the appointment by foreign corporations of agents for the service of process. The fictitious corporate name statute makes no reference either to appointment of agents of any type or to provisions for service of process. According to the accompanying comments of the New Jersey Corporation Law Revision Commission, "[t]he purpose of this [statute] is to create a public record of fictitious names used by corporations and thereby eliminate the possibility of deception." Commissioners' Comment—1972 Amendment, reprinted after N. J. Stat. Ann. § 14A:2–2.1 (West Supp. 1981–1982). Moreover, counsel for respondents makes no claim that petitioner uses—or has ever used—a fictitious name in New Jersey.

The New Jersey business and partnership name registration law appears to be equally irrelevant. The New Jersey Corporation Law Revision Commission explains the relationship between these two fictitious name statutes:

> "Until adoption of [the corporate fictitious name statute], there was no requirement that a corporation register a fictitious name, although there was a requirement that proprietorships and partnerships transacting busi-

> ness under assumed names file business name certificates. N. J. S. A. 56:1–1 *et seq. That statute is expressly inapplicable to corporations.* N. J. S. A. 56:1–5." *Ibid.*

Counsel for respondent has offered no answer to the statement of the Revision Commission that the proprietorship and partnership registration statute is "inapplicable to corporations."[4]

Thus, counsel have brought to our attention only three statutes, and I have found no others. The registration statute, § 14A:4–1 *et seq.*, explicitly provides for the designation of an agent for service. Neither of the statutes relied on by respondents has *any* provision for the appointment of an agent by a foreign corporation. In these circumstances, we are justified in concluding—as the opinion from the office of the New Jersey Secretary of State advises—that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business.

This squarely presents the serious question whether the consequences of registration in the State, solely to obtain the protection of the statute of limitations, unduly burden interstate commerce.[5] See *Allenberg Cotton Co.* v. *Pittman*, 419

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[4] In addition to their facial inapplicability, it is apparent that both of these statutes are administered by the New Jersey Secretary of State—the same office that has advised that foreign corporations are unable to designate a registered agent for service of process without qualifying to do business. See n. 3, *supra.*

[5] Corporations that obtain such certificates apparently must maintain a registered business office, N. J. Stat. Ann. § 14A:4–1 (West Supp. 1981–1982); report annually, § 14A:4–5 (West Supp. 1981–1982); and pay taxes, § 54:10A–2 (West Supp. 1981–1982). In addition, New Jersey apparently also requires such corporations to waive their defense against defending lawsuits in a forum with which they have no minimum contacts, see *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), for *all* future lawsuits in New Jersey. See N. J. Stat. Ann. § 14A:13–4(1)(d) (West 1969); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N. J. Super. 52, 61, 283 A. 2d 551, 556 (1971). Cf. Restatement (Second)

U. S. 20 (1974). This challenge has considerable force. As this was a question on which we granted certiorari and as it has been fully argued by counsel, I think in all fairness we should decide it rather than remand the case for a continuation of this litigation.

I therefore dissent from the decision of the Court to remand.

JUSTICE STEVENS, dissenting.

The equal protection question in this case is novel. I agree with the Court that there is a rational basis for treating unregistered foreign corporations differently from registered corporations because they are somewhat more difficult to locate and to serve with process. Thus, a provision that merely gave plaintiffs a fair opportunity to overcome these difficulties—for example, a longer period of limitations for suits against such corporations, or a tolling provision limited to corporations that had not filed their current address with the Secretary of State—would unquestionably be permissible. But does it follow that it is also rational to deny such corporations the benefit of any statute of limitations? Because there is a rational basis for *some* differential treatment, does it automatically follow that *any* differential treatment is constitutionally permissible? I think not; in my view the Constitution requires a rational basis for the special burden imposed on the disfavored class as well as a reason for treating that class differently.

The Court avoids these troubling questions by noting that the New Jersey Supreme Court has stated that an unrepresented foreign corporation may plead the defense of laches in an appropriate case. *Ante*, at 411. But there are material

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of Conflict of Laws § 44 and Comment *a* (1971) (States may exercise jurisdiction over foreign corporations that have authorized an agent to accept service of process to the extent of the agent's authority to accept service, even though no other basis for jurisdiction exists).

differences between laches—which requires the defendant to prove inexcusable delay and prejudice—and the bar of limitations, which requires no such proof. Thus, the availability of this alternative defense neither eliminates the differential treatment nor provides a justification for it; the defense merely lessens its adverse consequences.

I can find no legitimate state purpose to justify the special burden imposed on unregistered foreign corporations by the challenged statute.* I would reverse the judgment of the Court of Appeals.

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*I do not understand the Court to be holding that New Jersey has a legitimate interest in attempting to require all corporations to submit in all cases to the jurisdiction of its courts, and that discrimination against unregistered foreign corporations is justified by the State's desire to accomplish this purpose. Since a State may not enact a law that prohibits a foreign corporation from asserting a due process defense to an exercise of personal jurisdiction by a state court, I do not believe that the State may justify a classification that disfavors unregistered foreign corporations on the ground that they refused to take action that would accomplish the same purpose. See *Western & Southern Life Ins. Co.* v. *State Board of Equalization of California*, 451 U. S. 648, 674 (STEVENS, J., dissenting).

LOGAN *v.* ZIMMERMAN BRUSH CO. ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 80–5950. Argued October 14, 1981—Decided February 24, 1982

The Illinois Fair Employment Practices Act (FEPA) barred employment discrimination on the basis of physical handicap unrelated to ability. To obtain relief, a complainant had to bring a charge of unlawful conduct before the Illinois Fair Employment Practices Commission (Commission) within 180 days of the occurrence of such alleged conduct. The statute then gave the Commission 120 days within which to convene a factfinding conference to obtain evidence, ascertain the parties' positions, and explore the possibility of a settlement. Appellant, an employee of appellee, was discharged purportedly because his short left leg made it impossible for him to perform his duties as a shipping clerk. Appellant filed a timely charge alleging unlawful termination of his employment, but apparently through inadvertence the Commission scheduled the factfinding conference for a date 5 days after expiration of the 120-day statutory period. The Commission denied appellee's motion that the charge be dismissed for failure to hold a timely conference. On appeal, the Illinois Supreme Court held that the failure to comply with the 120-day convening requirement deprived the Commission of jurisdiction to consider appellant's charge, and rejected appellant's argument that his federal due process and equal protection rights would be violated were the Commission's error allowed to extinguish his cause of action.

Held: The judgment is reversed, and the case is remanded.

82 Ill. 2d 99, 411 N. E. 2d 277, reversed and remanded.

JUSTICE BLACKMUN delivered the opinion of the Court, concluding that appellant was deprived of a protected property interest in violation of the Due Process Clause of the Fourteenth Amendment. Pp. 428–437.

(a) Appellant's right to use the FEPA's adjudicatory procedures is a species of property protected by the Due Process Clause. Cf. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306. The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause," and appellant's right shares this characteristic. The 120-day limitation is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim. Pp.428–433.

(b) A consideration of the competing interests involved—the importance of the private interest and the length or finality of the deprivation,

the likelihood of governmental error, and the magnitude of the governmental interests—leads to the conclusion that appellant is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. The State's interest in refusing appellant's procedural request is, on the record, insubstantial. Pp. 433–435.

(c) The availability of a post-termination tort action does not provide appellant due process. It is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference; appellant is challenging not the Commission's error but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards. *Parratt* v. *Taylor*, 451 U. S. 527, distinguished. The Fourteenth Amendment requires " 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case,' " *Boddie* v. *Connecticut*, 401 U. S. 371, 378, and here appellant was denied such an opportunity. Pp. 435–437.

JUSTICE BLACKMUN, in a separate opinion, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR, concluded that under the "rational-basis" standard, the Illinois statute, as interpreted and applied by the Illinois Supreme Court to establish two categories—those processed within the prescribed 120 days and thus entitled to full consideration on the merits, and otherwise identical claims not processed within the prescribed time and thus terminated without a hearing—deprived appellant of his Fourteenth Amendment right to equal protection of the laws. Pp. 438–442.

JUSTICE POWELL, joined by JUSTICE REHNQUIST, while not joining all the broad pronouncements on the law of equal protection in JUSTICE BLACKMUN's separate opinion, also concluded that the challenged classification, as construed and applied in this case, failed to be rationally related to a state interest that would justify it, and thus violated appellant's right to equal protection of the laws. Pp. 443–444.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BLACKMUN, J., also filed a separate opinion, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post*, p. 438. POWELL, J., filed an opinion concurring in the judgment, in which REHNQUIST, J., joined, *post*, p. 443.

Gary H. Palm argued the cause and filed briefs for appellant. *Tyrone C. Fahner*, Attorney General of Illinois, filed a

brief for the Illinois Human Rights Commission et al. as appellees under this Court's Rule 10.4 in support of appellants. With him on the brief were *Paul J. Bargiel* and *Russell C. Grimes, Jr.*, Assistant Attorneys General.

Jay A. Canel argued the cause and filed briefs for appellee Zimmerman Brush Co.*

JUSTICE BLACKMUN delivered the opinion of the Court.†

The issue in this case is whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure.

I

A

The Illinois Fair Employment Practices Act (FEPA or Act), Ill. Rev. Stat., ch. 48, ¶851 *et seq.* (1979), barred employment discrimination on the basis of "physical . . . handicap unrelated to ability." ¶853(a). It also established a comprehensive scheme for adjudicating allegations of discrimination. To begin the process, a complainant had to bring a charge of unlawful conduct before the Illinois Fair Employment Practices Commission (Commission) within 180 days of the occurrence of the allegedly discriminatory act. ¶858(a). The statute—in the provision directly at issue here—then gave the Commission 120 days within which to convene a factfinding conference designed to obtain evidence, ascertain the positions of the parties, and explore the possibility of a negotiated settlement. ¶858(b). If the Commission found "substantial evidence" of illegal conduct, it was to attempt to "eliminate the effect thereof . . . by means of

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James D. Weill filed a brief for the Congress of Organizations of the Physically Handicapped et al. as *amici curiae* urging reversal.

†JUSTICE O'CONNOR joins only the separate opinion, *post*, p. 438.

conference and conciliation," ¶858(c), and, if that proved impossible, to issue a formal complaint against the employer within 180 days after the expiration of the 120-day period. ¶858(d). A formal adversary hearing was then to be held before a commissioner or duly appointed adjudicator, who was to make findings and who was empowered to recommend reinstatement, backpay, and reasonable attorney's fees. ¶858.01. If the commissioner or adjudicator did not find substantial evidence of discrimination, he was to recommend dismissal of the charge. *Ibid.*

The findings and recommended order were to be filed with the Commission. A complainant was entitled to obtain review by the full Commission of any of the possible dispositions of his charge, including an initial determination that the evidence did not justify a complaint. The Commission was to file a written order and decision. ¶858.02; Illinois Fair Employment Practices Commission, Rules and Regulations, §4.5 (1979). If still not satisfied, the complainant could seek judicial review of any Commission order. ¶860.[1]

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[1] After the inception of the present litigation, the Illinois Legislature repealed the FEPA, and put in its place the more comprehensive Illinois Human Rights Act. 1979 Ill. Laws, P. A. 81–1216, later amended by 1980 Ill. Laws, P. A. 81–1267. The new statute bars discrimination in real estate and financial transactions and in public accommodations, as well as in employment. It replaces the Fair Employment Practices Commission with two agencies: a Department of Human Rights, ¶7–101 *et seq.*, which is given the responsibility for investigating charges and issuing complaints upon a finding of substantial evidence, and a Human Rights Commission, ¶8–101 *et seq.*, which reviews the Department's findings and holds hearings upon issued complaints. The new Act modifies a number of the FEPA's procedural provisions; most important for present purposes, it commits to the Department's *discretion* the decision whether to hold a factfinding conference. ¶7–102(C)(3).

These revisions have no effect on Logan's case, however, for the Illinois Supreme Court has ruled that the Human Rights Act is not to be applied retroactively. *Zimmerman Brush Co.* v. *Fair Employment Practices Comm'n*, 82 Ill. 2d 99, 108–109, 411 N. E. 2d 277, 282–283 (1980).

B

On November 9, 1979, appellant Laverne L. Logan, a probationary employee hired one month previously, was discharged by appellee Zimmerman Brush Company, purportedly because Logan's short left leg made it impossible for him to perform his duties as a shipping clerk. Five days later, Logan, acting *pro se*, filed a charge with the Commission alleging that his employment had been unlawfully terminated because of his physical handicap. App. 3. This triggered the Commission's statutory obligation under ¶ 858(b) to convene a factfinding conference within 120 days; in Logan's case, this meant by March 13, 1980. Apparently through inadvertence, the Commission's representative scheduled the conference for March 18, five days *after* expiration of the statutory period. Notice of the meeting, which was mailed to both parties in January 1980, specified the hearing's date and location and declared that attendance was "required." It, however, did not allude to the FEPA's 120-day time limit. App. 5. The Commission also asked the company to complete a short questionnaire concerning its employment practices, and directed that it submit its answers by March 10. *Ibid.* The company did this without objection.

When the conference date arrived, the company moved that Logan's charge be dismissed because the Commission had failed to hold the conference within the statutorily mandated 120-day period. *Id.*, at 12. This request was rejected. *Id.*, at 16. The company thereupon petitioned the Supreme Court of Illinois for an original writ of prohibition. That court stayed proceedings on Logan's complaint pending decision on the request for a writ. *Id.*, at 24. Logan meanwhile obtained counsel, and—because 180 days had not yet passed since the occurrence of the allegedly discriminatory act—filed a second charge with the Commission. *Id.*, at 26.

Before the Illinois Supreme Court, Logan argued that terminating his claim because of the Commission's failure to convene a timely conference—a matter beyond Logan's, or in-

deed the company's, control—would violate his federal rights to due process and equal protection of the laws. But the court noted that the statutory provision at issue, ¶858(b), declared: "Within 120 days of the proper filing of a charge, the Commission *shall* convene a fact finding conference. . . ." (Emphasis added.) The Illinois court found this legislative language to be mandatory, and accordingly it held that failure to comply deprived the Commission of jurisdiction to consider Logan's charge. *Zimmerman Brush Co.* v. *Fair Employment Practices Comm'n*, 82 Ill. 2d 99, 411 N. E. 2d 277 (1980).

The court found controlling its decision in *Springfield-Sangamon County Regional Planning Comm'n* v. *Fair Employment Practices Comm'n*, 71 Ill. 2d 61, 373 N. E. 2d 1307 (1978),[2] where it had determined that ¶858(c)'s 180-day deadline for issuing a complaint was mandatory; since the state legislature wrote ¶858(b) after the *Springfield-Sangamon* decision, and used language similar to that employed in ¶858(c), it must have intended the 120-day time limit to be jurisdictional as well. This result, reasoned the court, comported with the statute's purposes by facilitating the "just and expeditious resolutions of employment disputes," 82 Ill. 2d, at 107, 411 N. E. 2d, at 282, while protecting employers "'from unfounded charges of discrimination,'" *id.*, at 106, 411 N. E. 2d, at 281, quoting ¶851.

The Illinois Supreme Court summarily rejected Logan's argument that his due process and equal protection rights would be violated were the Commission's error allowed to extinguish his cause of action. The state legislature had established the right to redress for discriminatory employment practices, it was said, and "[t]he legislature could establish reasonable procedures to be followed upon a charge . . . ."

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[2] See also *Board of Governors* v. *Fair Employment Practices Comm'n*, 78 Ill. 2d 143, 149, 399 N. E. 2d 590, 593 (1979); *Wilson* v. *All-Steel, Inc.*, 87 Ill. 2d 28, 428 N. E. 2d 489 (1981).

Id., at 108, 411 N. E. 2d, at 282. The court then went on to rule that Logan could not file a second charge with the Commission based upon the same act of alleged discrimination, for to allow the second complaint to proceed would circumvent the design of the Act and frustrate the public interest in an expeditious resolution of disputes.[3] *Id.*, at 108–109, 411 N. E. 2d, at 282–283.

Logan appealed, bringing his federal claims to this Court. We noted probable jurisdiction. 450 U. S. 909 (1981).

II

A

Justice Jackson, writing for the Court in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), observed: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313. At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due.

The first question, we believe, was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.[4] There, the Court confronted a challenge to a state law that provided for the settle-

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[3] The Illinois court also refused to give retroactive application to the new Illinois Human Rights Act, which makes the convening of a factfinding conference discretionary. 82 Ill. 2d, at 108–109, 411 N. E. 2d, at 282–283. See n. 1, *supra*.

[4] Two years ago, in *Martinez* v. *California*, 444 U. S. 277, 281–282 (1980), the Court noted that "[a]rguably," a state tort claim is a "species of 'property' protected by the Due Process Clause."

ment of common trust fund accounts by fiduciaries, upon notice given through newspaper publication. The effect of the statute was to terminate "every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund." *Id.*, at 311. This, the Court concluded, worked to deprive the beneficiaries of property by, among other things, "cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests." *Id.*, at 313. Such a result was impermissible unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect. *Id.*, at 315. Despite appellee Zimmerman Brush Company's arguments to the contrary, we see no meaningful distinction between the cause of action at issue in *Mullane* and Logan's right to use the FEPA's adjudicatory procedures.

This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale* v. *Rogers*, 357 U. S. 197 (1958), for example—where a plaintiff's claim had been dismissed for failure to comply with a trial court's order—the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.*, at 209. See also *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 349–351 (1909) (power to enter default judgment); *Hovey* v. *Elliott*, 167 U. S. 409 (1897) (same); *Windsor* v. *McVeigh*, 93 U. S. 274 (1876) (same). Cf. *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such

an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie* v. *Connecticut*, 401 U. S. 371, 380 (1971).[5]

In any event, the view that Logan's FEPA claim is a constitutionally protected one follows logically from the Court's more recent cases analyzing the nature of a property interest. The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975); *Board of Regents* v. *Roth*, 408 U. S. 564, 576–578 (1972). Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 646 (1949) (Frankfurter, J., dissenting); *Arnett* v. *Kennedy*, 416 U. S. 134,

[5] The Court's cases involving the right of access to courts provide an analogous method of analysis supporting our reasoning here. In *Boddie*, the Court established that, at least where interests of basic importance are involved, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U. S., at 377. Thus, the State's imposition of substantial filing and other fees upon indigents seeking divorces was held to deny them due process. In *United States* v. *Kras*, 409 U. S. 434 (1973), we agreed that a due process right of access to the courts exists when fundamental interests are present and the State has exclusive control over "the adjustment of [the] legal relationship[s]" involved. *Id.*, at 445. The relationship between these opinions and the right to procedural due process at issue in the instant case is made clear in *Boddie*, which relied in large part on the analysis of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and its guarantee "to all individuals [of] a meaningful opportunity to be heard." *Boddie*, 401 U. S., at 379; see also *id.*, at 377–378, 380, 382. Thus, while the right to seek a divorce may not be a property interest in the same sense as is a tort or a discrimination action, the theories of the cases are not very different: having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme.

207–208, and n. 2 (1974) (MARSHALL, J., dissenting); *Board of Regents* v. *Roth*, 408 U. S., at 571–572, 576–577. See, *e. g.*, *Barry* v. *Barchi*, 443 U. S. 55 (1979) (horse trainer's license protected); *Memphis Light, Gas & Water Div.* v. *Craft*, *supra* (utility service); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976) (disability benefits); *Goss* v. *Lopez*, *supra* (high school education); *Connell* v. *Higginbotham*, 403 U. S. 207 (1971) (government employment); *Bell* v. *Burson*, 402 U. S. 535 (1971) (driver's license); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) (welfare benefits).

The right to use the FEPA's adjudicatory procedures shares these characteristics. A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence. And an FEPA claim, which presumably can be surrendered for value, is at least as substantial as the right to an education labeled as property in *Goss* v. *Lopez*, *supra*.[6] Certainly, it would require a remarkable reading of a "broad and majestic ter[m]," *Board of Regents* v. *Roth*, 408 U. S., at 571, to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right to redress discrimination is not.

The Illinois Supreme Court nevertheless seemed to believe that no individual entitlement could come into being under the FEPA until the Commission took appropriate action within the statutory deadline. Because the entitlement arises from statute, the court reasoned, it was the legisla-

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[6] An FEPA claim is therefore distinguishable from an enforcement action like those conducted by the National Labor Relations Board pursuant to the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* In such a proceeding, the prosecution is controlled by the NLRB's General Counsel, and the Counsel's refusal to issue a complaint is generally not reviewable either by the Board or by the courts. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 138–139 (1975).

ture's prerogative to establish the "procedures to be followed upon a charge." 82 Ill. 2d, at 108, 411 N. E. 2d, at 282. This analysis, we believe, misunderstands the nature of the Constitution's due process guarantee.

Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980). See *Arnett* v. *Kennedy*, 416 U. S., at 166–167 (POWELL, J., concurring in part); *id.*, at 211 (MARSHALL, J., dissenting). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: "'While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.'" *Vitek* v. *Jones*, 445 U. S., at 490–491, n. 6, quoting *Arnett* v. *Kennedy*, 416 U. S., at 167 (opinion concurring in part).

Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs. The Court held as much in *Martinez* v. *California*, 444 U. S. 277 (1980), where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity arguably did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels. Cf.

U. S. Railroad Retirement Bd. v. *Fritz*, 449 U. S. 166, 174 (1980); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 575 (1979); *Flemming* v. *Nestor*, 363 U. S. 603, 609–610 (1960); *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 312, n. 8, 315–316 (1945). In each case, the legislative determination provides all the process that is due, see *Bi-Metallic Investment Co.* v. *State Bd. of Equalization*, 239 U. S. 441, 445–446 (1915); it "remain[s] true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez* v. *California*, 444 U. S., at 282. Indeed, as was acknowledged in *Martinez*, it may well be that a substantive "immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest." *Id.*, at 282, n. 5. Cf. *Ferri* v. *Ackerman*, 444 U. S. 193, 198 (1979).

The 120-day limitation in the FEPA, ¶858(b), of course, involves no such thing. It is a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the FEPA claim. Because the state scheme has deprived Logan of a property right, then, we turn to the determination of what process is due him.

B

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "*some* form of hearing" is required before the owner is finally deprived of a protected property interest. *Board of Regents* v. *Roth*, 408 U. S., at 570–571, n. 8 (emphasis in original). And that is why the Court has stressed that, when a "statutory scheme makes liability an important factor in the State's determination . . . , the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing." *Bell* v. *Burson*, 402

U. S., at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.[7] See *id.*, at 542.

On the other hand, the Court has acknowledged that the timing and nature of the required hearing[8] "will depend on appropriate accommodation of the competing interests involved." *Goss* v. *Lopez*, 419 U. S., at 579. These include the importance of the private interest and the length or finality of the deprivation, see *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S., at 19, and *Mathews* v. *Eldridge*, 424 U. S., at 334–335; the likelihood of governmental error, see *id.*, at 335; and the magnitude of the governmental interests involved, see *ibid.*, and *Wolff* v. *McDonnell*, 418 U. S., at 561–563.

Each of these factors leads us to conclude that appellant Logan is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and—more intangibly—in redressing an instance of alleged discrimination, are all substantial. At the same time, the deprivation here is final; Logan, unlike a claimant whose charge is dismissed on the merits for lack of evidence, cannot obtain judicial review of the Commission action. A system or procedure that deprives persons of their claims in a random manner, as is apparently true of ¶858(b), necessarily

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[7] This is not to suggest, of course, that the State must consider the merits of the claim when the *claimant* fails to comply with a reasonable procedural requirement, or fails to file a timely charge. See *infra*, at 437.

[8] Here, of course, we are not concerned with the timing of the required review on the merits. The Commission must consider the merits before the case may proceed; it is not meaningful to discuss the possibility of a post-termination hearing, because the property interest here is destroyed when the case is terminated.

presents an unjustifiably high risk that meritorious claims will be terminated. And the State's interest in refusing Logan's procedural request is, on this record, insubstantial.

There has been no suggestion that any great number of claimants are in Logan's position, or that directing the State to consider the merits of Logan's claim will be unduly burdensome. In any event, the State by statute has eliminated the mandatory hearing requirement, see n. 1, *supra*, demonstrating that it no longer has any appreciable interest in defending the procedure at issue.

Despite appellee Zimmerman Brush Company's arguments, the recent decision in *Parratt* v. *Taylor*, 451 U. S. 527 (1981), is not to the contrary. There, a state employee negligently lost a prisoner's hobby kit; while the Court concluded that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment, it held that all the process due was provided by the State's tort claims procedure. In such a situation, the Court observed, "[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.*, at 541. The company suggests that Logan is complaining of the same type of essentially negligent deprivation, and that he therefore should be remitted to the tort remedies provided by the Illinois Court of Claims Act, Ill. Rev. Stat., ch. 37, ¶439.1 *et seq.* (1979). That statute allows an action "against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person." ¶439.8(d).[9]

This argument misses *Parratt*'s point. In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by

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[9] Logan might also have a remedy under the Equal Opportunities for the Handicapped Act (EOHA), Ill. Rev. Stat., ch. 38, ¶65–21 *et seq.* (1979), which provided an action for damages and "other relief" to those discriminated against on the basis of physical handicap. ¶65–29. While the EOHA also was repealed when the Illinois Human Rights Act was passed, see n. 1, *supra*, the latter statute does not disturb claims arising or accruing under the EOHA prior to July 1, 1980. ¶9–102(B)(2). It is not clear

a state employee . . . not a result of some established state procedure." 451 U. S., at 541. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference—whether the Commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. See *id.*, at 545 (second concurring opinion). Unlike the complainant in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

In any event, the Court's decisions suggest that, absent "the necessity of quick action by the State or the impracticality of providing any predeprivation process," a postdeprivation hearing here would be constitutionally inadequate. *Parratt*, 451 U. S., at 539. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S., at 19–20; *Board of Regents* v. *Roth*, 408 U. S., at 570, n. 7; *Bell* v. *Burson*, 402 U. S., at 542; *Boddie* v. *Connecticut*, 401 U. S., at 379. Cf. *Barry* v. *Barchi*, 443 U. S., at 64–65 (post-termination hearing permitted where the decision to terminate was based on a reliable pretermination finding); *Mathews* v. *Eldridge*, 424 U. S., at 343–347 (same). That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action.[10] Seeking redress through a

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to us, however, that such an action is available to Logan; the Illinois Supreme Court concluded that allowing Logan to file a second FEPA claim would frustrate the design of the FEPA by prejudicing the employer's rights, 82 Ill. 2d, at 109, 411 N. E. 2d, at 283, and it might well apply a similar analysis to bar an EOHA claim here. We would hesitate to remit Logan to so speculative a remedy. In any event, our conclusion about the inadequacy of any post-termination remedy here makes the availability of an EOHA suit irrelevant for present purposes.

[10] In *Ingraham* v. *Wright*, 430 U. S. 651 (1977), the Court concluded that state tort remedies provided adequate process for students subjected to

tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole: the Illinois Court of Claims Act does not provide for reinstatement—as appellee Zimmerman Brush Company conceded at oral argument, Tr. of Oral Arg. 39—and even a successful suit will not vindicate entirely Logan's right to be free from discriminatory treatment.

Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, cf. *Chase Securities Corp.* v. *Donaldson*, 325 U. S., at 314–316, or, in an appropriate case, filing fees. *United States* v. *Kras*, 409 U. S. 434 (1973). And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Hammond Packing Co.* v. *Arkansas*, 212 U. S., at 351; *Windsor* v. *McVeigh*, 93 U. S., at 278. What the Fourteenth Amendment does require, however, "is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Hanover Tr. Co.*, *supra*, at 313." *Boddie* v. *Connecticut*, 401 U. S., at 378. It is such an opportunity that Logan was denied.

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corporal punishment in school. In doing so, however, the Court emphasized that the state scheme "preserved what 'has always been the law of the land,'" *id.*, at 679, quoting *United States* v. *Barnett*, 376 U. S. 681, 692 (1964), and that adding additional safeguards would be unduly burdensome. 430 U. S., at 680–682. Here, neither of those rationales is available. Terminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions. And the State's abandonment of the challenged practice makes it difficult to argue that requiring a determination on the merits will impose undue burdens on the state administrative process.

III

The judgment of the Supreme Court of Illinois, accordingly, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join.

The Court's opinion, *ante*, considers appellant Logan's due process claim and decides that issue in his favor. As has been noted, Logan also raised an equal protection claim and that issue has been argued and briefed here. Although the Court considered that it was unnecessary to discuss and dispose of the equal protection claim when the due process issue was being decided in Logan's favor, I regard the equal protection issue as sufficiently important to require comment on my part,[1] particularly inasmuch as a majority of the Members of the Court are favorably inclined toward the claim, although, to be sure, that majority is not the one that constitutes the Court for the controlling opinion.

On its face, Logan's equal protection claim is an unconventional one. The Act's ¶ 858(b) establishes no explicit classifications and does not expressly distinguish between claimants, and the company therefore argues that Logan has no more been deprived of equal protection than anyone would be who is injured by a random act of governmental misconduct. As the Illinois Supreme Court interpreted the statute, however, ¶ 858(b) unambiguously divides claims—and thus, necessarily, claimants—into two discrete groups that are accorded radically disparate treatment. Claims processed within 120 days are given full consideration on the merits,

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[1] "It cannot be suggested that in cases where the author [in writing by assignment] is the mere instrument of the Court he must forego expression of his own convictions." *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 576 (1949) (separate opinion). See also *Abbate* v. *United States*, 359 U. S. 187, 196 (1959) (separate opinion); *Helvering* v. *Davis*, 301 U. S. 619, 639–640 (1937).

and complainants bringing such charges are awarded the opportunity for full administrative and judicial review. In contrast, otherwise identical claims that do not receive a hearing within the statutory period are unceremoniously, and finally, terminated. Because the Illinois court recognized, in so many words, that the FEPA establishes two categories of claims, one may proceed to determine whether the classification drawn by the statute is consistent with the Fourteenth Amendment.

For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the Equal Protection Clause's guarantees.[2] At the minimum level, however, the Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981). This is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith. But the "rational-basis standard is 'not a toothless one,'" *id.*, at 234, quoting *Mathews* v. *Lucas*, 427 U. S. 495, 510 (1976); the classificatory scheme must "rationally advanc[e] a reasonable and identifiable governmental objective." *Schweiker* v. *Wilson*, 450 U. S., at 235. I see no need to explore the outer bounds of this test, for I find that the Illinois statute runs afoul of the lowest level of permissible equal protection scrutiny.

The FEPA itself has two express purposes: eliminating employment discrimination, and protecting employers and other potential defendants "from unfounded charges of discrimination." ¶ 851. It is evident at a glance that neither of these objectives is advanced by ¶ 858(b)'s deadline provision. Terminating potentially meritorious claims in a random manner obviously cannot serve to redress instances of discrimina-

[2] "Members of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear . . . and about the degree of deference afforded the legislature in suiting means to ends . . . ." *Schweiker* v. *Wilson*, 450 U. S. 221, 243, n. 4 (1981) (dissenting opinion).

tion. And it cannot protect employers from unfounded charges, for the frivolousness of a claim is entirely unrelated to the length of time the Commission takes to process that claim. So far as this purpose is concerned, ¶ 858(b) stands on precisely the same footing as the state statute invalidated in *Lindsey* v. *Normet*, 405 U. S. 56 (1972). There, the Court struck down a provision requiring a tenant to post a double bond before appealing an adverse forcible entry judgment. "The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive," the Court noted, "for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.*, at 78. Accord, *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966). Here, of course, the FEPA may operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process. While it may well be true that "[n]o bright line divides the merely foolish from the arbitrary law," *Schweiker* v. *Wilson*, 450 U. S., at 243 (dissenting opinion), I have no doubt that ¶ 858(b) is patently irrational in the light of its stated purposes.

In its opinion, however, the Illinois Supreme Court recognized a third rationale for ¶ 858(b): that provision, according to the court, was designed to further the "just and expeditious resolutio[n]" of employment disputes. *Zimmerman Brush Co.* v. *Fair Employment Practices Comm'n*, 82 Ill. 2d 99, 107, 411 N. E. 2d 277, 282 (1980). Insofar as the court meant to suggest that a factfinding conference may help settle controversies and frame issues for a more efficient future resolution, it was undoubtedly correct. But I cannot agree that terminating a claim that the State itself has misscheduled is a rational way of expediting the resolution of disputes.[3]

[3] The Illinois court concluded that the factfinding conference itself would help to resolve disputes expeditiously by encouraging settlement and "aid[ing] the Commission in setting up a procedural framework for the concilia-

Most important, the procedure at issue does not serve generally to hasten the processing or ultimate termination of employment controversies. Once the Commission has scheduled a factfinding conference and issued a complaint, there are no statutory time limits at all on the length of time it can take to resolve the claim. And ¶ 858(b) does not serve to protect employers from stale charges, because it does not function as a statute of limitation; Logan does not and could not quarrel with the requirement that complainants file their charges in a timely fashion.

It is true, of course, that ¶ 858(b) serves to expedite the resolution of certain claims—those not processed within 120 days—in a most obvious way, and in that sense it furthers the purpose of terminating disputes expeditiously. But it is not enough, under the Equal Protection Clause, to say that the legislature sought to terminate certain claims and succeeded in doing so, for that is "a mere tautological recognition of the fact that [the legislature] did what it intended to do." *U. S. Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 180 (1980) (STEVENS, J., concurring in judgment). This Court still has an obligation to view the classificatory *system*, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary. *Rinaldi* v. *Yeager*, 384 U. S., at 308 ("The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes"). Cf. *U. S. Railroad Retirement Bd.* v. *Fritz*, 449 U. S., at 178.

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tory process which follows." 82 Ill. 2d, at 106, 411 N. E. 2d, at 281. It is less clear to me that the court viewed the practice of terminating misscheduled claims as one that would aid the just and expeditious resolution of controversies. In light of my conclusions about the rationality of such a justification, however, it is irrelevant whether the Illinois Supreme Court intended to state that this was the actual or articulated rationale for ¶ 858(b)'s deadline proviso. I note that the rationales discussed in the text have not been expressed by the State's representatives; the Illinois Human Rights Commission, by the State's Attorney General, has filed a brief in this Court supporting Logan.

Here, that inquiry yields an affirmative result. So far as the State's purpose is concerned, every FEPA claimant's charge, when filed with the Commission, stands on the same footing. Yet certain randomly selected claims, because processed too slowly by the State, are irrevocably terminated without review. In other words, the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, I believe, is the very essence of arbitrary state action. "[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out,'" *James* v. *Strange*, 407 U. S. 128, 140 (1972), quoting *Rinaldi*, 384 U. S., at 308–309, and that rationality is absent here. The Court faced an analogous situation in a case involving sex-based classifications, and its conclusion there is applicable to the case before us now: giving preference to a discrete class "merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ." *Reed* v. *Reed*, 404 U. S. 71, 76 (1971).

Finally, it is possible that the Illinois Supreme Court meant to suggest that the deadline contained in ¶ 858(b) can be justified as a means of thinning out the Commission's caseload, with the aim of encouraging the Commission to convene timely hearings. This rationale, however, suffers from the defect outlined above: it draws an arbitrary line between otherwise identical claims. In any event, the State's method of furthering this purpose—if this was in fact the legislative end—has so speculative and attenuated a connection to its goal as to amount to arbitrary action. The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis. That is not so here.

I thus agree with appellant Logan that the Illinois scheme also deprives him of his Fourteenth Amendment right to the equal protection of the laws.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring in the judgment.

As the challenged statute now has been amended, this is a case of little importance except to the litigants. The action commenced with an isolated example of bureaucratic oversight that resulted in the denial even of a hearing on appellant's claim of discrimination. One would have expected this sort of negligence by the State to toll the statutory period within which a hearing must be held. The Supreme Court of Illinois, however, read the statutory terms as mandatory and jurisdictional.

The issue presented, at least for me, is too simple and straightforward to justify broad pronouncements on the law of procedural due process or of equal protection. I am particularly concerned by the potential implications of the Court's expansive due process analysis. In my view this is a case that should be decided narrowly on its unusual facts.*

The decision of the Illinois Supreme Court effectively created two classes of claimants: those whose claims were, and those whose claims were not, processed within the prescribed 120 days by the Illinois Fair Employment Practices Commission. Under this classification, claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time. The question is whether this unusual classification is rationally related to a state interest that would justify it.

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*It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinions in these areas often are criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved. Yet I suppose we would all agree—at least in theory—that unnecessarily broad statements of doctrine frequently do more to confuse than to clarify our jurisprudence. I have not always adhered to this counsel of restraint in my own opinion writing, and therefore imply no criticism of others. But it does seem to me that this is a case that requires a minimum of exposition.

The State no doubt has an interest in the timely disposition of claims. But the challenged classification failed to promote that end—or indeed any other—in a rational way. As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so. The State also has asserted goals of redressing valid claims of discrimination and of protecting employers from frivolous lawsuits. Yet the challenged classification, which bore no relationship to the merits of the underlying charges, is arbitrary and irrational when measured against either purpose.

This Court has held repeatedly that state-created classifications must bear a rational relationship to legitimate governmental objectives. See, *e. g.*, *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981); *Lindsey* v. *Normet*, 405 U. S. 56 (1972). Although I do not join JUSTICE BLACKMUN's separate opinion, I agree that the challenged statute, as construed and applied in this case, failed to comport with this minimal standard. I am concerned by the broad sweep of the Court's opinion, but I do join its judgment.

WHITE *v.* NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL.

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

No. 80–5887. Argued November 30, 1981—Decided March 2, 1982

Petitioner filed an action in Federal District Court alleging that respondent New Hampshire Department of Employment Security failed to make timely determinations of certain entitlements to unemployment compensation, thereby violating a provision of the Social Security Act, the Due Process Clause, and 42 U. S. C. § 1983. Ultimately, the District Court approved the parties' consent decree and entered judgment accordingly. Approximately four and one-half months after the entry of the judgment, petitioner filed a motion requesting an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which authorizes the award, in the court's discretion, of attorney's fees to the prevailing party "as part of the costs" in constitutional and civil rights litigation of various kinds. The District Court granted attorney's fees and denied respondents' subsequent motion to vacate the consent decree. The Court of Appeals reversed the District Court's decision to award attorney's fees under § 1988. It held that petitioner's motion for attorney's fees constituted a "motion to alter or amend the judgment" under Federal Rule of Civil Procedure 59(e) and was governed by the Rule's requirement that such a motion be served not later than 10 days after entry of the judgment.

Held: Rule 59(e) is not applicable to postjudgment requests for attorney's fees under § 1988. Pp. 450–454.

(a) The Rule has generally been invoked only to support reconsideration of matters properly encompassed in a decision on the merits. Since § 1988 provides for awards of attorney's fees only to a "prevailing party," the decision of entitlement to fees requires an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements. Pp. 451–452.

(b) Application of Rule 59(e) to § 1988 fee requests is neither necessary nor desirable to promote finality, judicial economy, or fairness. Many orders may issue in the course of a civil rights action, but it may be

unclear which orders are and which are not "final judgments." If Rule 59(e) were applicable, lawyers predictably would respond by entering fee motions in conjunction with nearly every interim ruling. No useful purpose would be served by encouragement of this practice, or by litigation over the "finality" of interim orders in connection with which fee requests were not filed within the 10-day period. The Rule's 10-day limit could also deprive counsel of the time necessary to negotiate private settlements of fee questions, thus generating increased litigation of fee questions. The discretion conferred on the court by § 1988 with regard to the award of attorney's fees will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party. Pp. 452–454.

629 F. 2d 697, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 455.

E. Richard Larson argued the cause for petitioner. With him on the briefs were *Bruce J. Ennis* and *Raymond J. Kelly*.

Marc R. Scheer, Assistant Attorney General of New Hampshire, argued the cause for respondents. With him on the brief was *Gregory H. Smith*, Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case arises from a postjudgment request for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. The question is whether such a request is a "motion to alter or

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*Briefs of *amici curiae* urging reversal were filed by *Donald E. Ware* and *Scott C. Moriearty* for the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association et al.; and by *Jack Greenberg*, *James M. Nabrit III*, and *Charles Stephen Ralston* for the NAACP Legal Defense and Educational Fund, Inc.

Marc L. Parris, *Charles Apotheker*, and *Martin Hurwitz* filed a brief for the County of Rockland, New York, as *amicus curiae*.

amend the judgment," subject to the 10-day timeliness standard of Rule 59(e) of the Federal Rules of Civil Procedure.[1]

I

This litigation began in March 1976, when the petitioner Richard White filed suit against respondent New Hampshire Department of Employment Security (NHDES) and its Commissioner. White claimed that the respondent failed to make timely determinations of certain entitlements to unemployment compensation, thereby violating an applicable provision of the Social Security Act, 42 U. S. C. § 503(a)(1), the Due Process Clause of the Constitution of the United States, and 42 U. S. C. § 1983. Alleging federal jurisdiction under 28 U. S. C. § 1343, he sought declaratory and injunctive relief and "such other and further relief as may be equitable and just." App. 15. His complaint did not specifically request attorney's fees.

Following certification of the case as a class action, the District Court granted relief on petitioner's claim under the Social Security Act.[2] Pending an appeal by NHDES to the Court of Appeals, however, the parties signed a settlement agreement. The case was then remanded to the District Court, which approved the consent decree and gave judgment accordingly on January 26, 1979.

Five days after the entry of judgment, counsel to White wrote to respondent's counsel, suggesting that they meet to discuss the petitioner's entitlement to attorney's fees as a prevailing party under 42 U. S. C. § 1988. No meeting appears to have been held. On June 7, 1979, approximately

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[1] Rule 59(e) provides:

"(e) Motion to Alter or Amend a Judgment

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

[2] Civ. No. 76–71 (NH, Nov. 15, 1977), as amended, Civ. No. 76–71 (NH, Dec. 16, 1977).

four and one-half months after the entry of a final judgment, the petitioner White filed a motion in which an award of fees formally was requested.

In a hearing in the District Court, respondent's counsel claimed he had been surprised by petitioner's postjudgment requests for attorney's fees.[3] He averred he understood that the consent decree, by its silence on the matter, implicitly had waived any claim to a fee award. White's counsel asserted a different understanding. Apparently determining that the settlement agreement had effected no waiver,[4] the District Court granted attorney's fees in the sum of $16,644.40.

Shortly thereafter, respondent moved to vacate the consent decree. It argued, in effect, that it had thought its total liability fixed by the consent decree and that it would not have entered a settlement knowing that further liability might still be established. The District Court denied the motion to vacate.

On appeal, the Court of Appeals for the First Circuit reversed the District Court's decision to award attorney's fees under § 1988. 629 F. 2d 697 (1980). The court held that petitioner's postjudgment motion for attorney's fees constituted a motion to alter or amend the judgment, governed by Rule 59(e) of the Federal Rules of Civil Procedure and its 10-day time limit. 629 F. 2d, at 699.

In holding as it did, the Court of Appeals recognized that § 1988 provided for the award of attorney's fees "as part of the costs."[5] But it declined to follow a recent decision of the

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[3] Transcript of the District Court Hearing on Plaintiffs' Motion for Attorney's Fees (Aug. 21, 1979), App. 56, 68–69.

[4] The District Court found specifically that the parties' prejudgment "attempts" to negotiate a waiver of costs and fees had proved "nugatory." *Id.*, at 75.

[5] The pertinent language of 42 U. S. C. § 1988 provides that

"[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U. S. C. 1681 *et seq.*], . . . the court, in its discretion, may allow the prevailing

Court of Appeals for the Fifth Circuit[6] that treated a § 1988 fee request as a motion for "costs" under Federal Rules of Civil Procedure 54(d)[7] and 58[8]—Rules that contain no explicit time bars. Despite the language of § 1988, the Court of Appeals reasoned that attorney's fees could not be the kind of "costs" contemplated by Rules 54(d) and 58. It reached this conclusion by looking to 28 U. S. C. § 1920, which specifies various "costs" that can be assessed by a clerk of court under Rule 54. The court found all to be "capable of routine computation" on a day's notice. 629 F. 2d, at 702. By contrast, an award of attorney's fees must be made by a judge. Further, as in this case, a fee award could affect substantially the total liability of the parties.

The Court of Appeals found this case distinguishable from *Hutto* v. *Finney*, 437 U. S. 678 (1978), in which this Court characterized attorney's fees, under the Fees Act, as "costs" taxable against a State. In *Hutto*, the Court of Appeals reasoned, the narrow question was whether the States have Eleventh Amendment immunity against liability for attorney's fees. The question was not whether attorney's fees are costs under Rule 54. The court also dismissed the argument that a request for attorney's fees is "a collateral and in-

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party, other than the United States, a reasonable attorney's fee as part of the costs."

[6] *Knighton* v. *Watkins*, 616 F. 2d 795 (1980).

[7] Rule 54(d) provides:

"(d) Costs

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . . Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Unless so defined by statute, attorney's fees are not generally considered "costs" taxable under Rule 54(d). *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975).

[8] Rule 58 states in pertinent part:

"Entry of the judgment shall not be delayed for taxing of costs."

dependent claim" properly adjudicated separately from a claim on the merits.

Because other Courts of Appeals have reached different conclusions about the applicability of Rule 59(e) to post-judgment motions for the award of attorney's fees,[9] we granted certiorari in this case to resolve the conflict.[10] We now reverse.

II

A

Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following the entry of judgment.[11] The question of the court's authority to do so had arisen in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F. 2d 321, 322 (CA8 1944). According to their report, the draftsmen intended Rule 59(e) specifically "to care for a situation such as that arising in Boaz."[12]

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[9] Courts of Appeals for the Fifth, Sixth, and Seventh Circuits have held that postjudgment requests for attorney's fees are not motions to alter or amend a judgment under Rule 59(e), but rather applications for "costs" under Rules 54(d) and 58. See *Johnson* v. *Snyder*, 639 F. 2d 316, 317 (CA6 1981); *Bond* v. *Stanton*, 630 F. 2d 1231, 1234 (CA7 1980); *Knighton* v. *Watkins*, *supra*, at 797–798. Like the Court of Appeals for the First Circuit in this case, the Court of Appeals for the Tenth Circuit has held squarely that postjudgment requests for fees *are* motions to alter or amend a judgment under Rule 59(e). *Glass* v. *Pfeffer*, 657 F. 2d 252 (1981). The Court of Appeals for the Eighth Circuit has taken still a third position: that a postjudgment motion for attorney's fees raises a "collateral and independent claim" that is not governed either by Rule 59(e) or by the "costs" provisions of Rules 54(d) and 58. *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F. 2d 574, 582 (1981).

[10] 451 U. S. 982 (1981).

[11] Notes of Advisory Committee on 1946 Amendment to Rules, 28 U. S. C., p. 491; 5 F. R. D. 433, 476 (1946).

[12] *Ibid.*

B

Consistently with this original understanding, the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. *E. g.*, *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257 (1978). By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action[13]—issues to which Rule 59(e) was never intended to apply.

Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on

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[13] Petitioner argues that the "collateral" and "independent" character of his request for attorney's fees is conclusively established by *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939). In *Sprague* this Court considered the power of a federal court to award counsel fees pursuant to an application filed several years after the entry of a judgment on the merits. Rejecting arguments that the request sought an impermissible reopening of the underlying judgment, the Court held that the petition for reimbursement represented "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree." *Id.*, at 170. The passage of time thus presented no bar to an award of fees. Although *Sprague* was decided under the then-applicable rules of equity, the Court suggested that the same result would follow under the new Federal Rules of Civil Procedure. *Id.*, at 169, n. 9.

This case arises in a posture different from that of *Sprague*. In *Sprague* the prevailing plaintiff had produced a "benefit" commonly available to others similarly situated. Although she "neither avowed herself to be the representative of a class nor . . . establish[ed] a fund in which others could participate," *id.*, at 166, her lawsuit had a *stare decisis* effect that inured to the benefit of others asserting similar claims. It was from the benefits accrued by them—not, as in this case, from the defendant—that the plaintiff sought an equitable award of fees.

Because of this difference between the cases, we cannot agree that *Sprague* controls the question now before us. Nonetheless, we agree with petitioner to this extent: *Sprague* at least establishes that fee questions are not inherently or necessarily subsumed by a decision on the merits. See also *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 66 (1980) (a

the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements. Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial. See *Hutto* v. *Finney*, 437 U. S., at 695, n. 24.

As the Court of Appeals for the Fifth Circuit recently stated:

> "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)." *Knighton* v. *Watkins*, 616 F. 2d 795, 797 (1980).[14]

III

In holding Rule 59(e) applicable to the postjudgment fee request in this case, the Court of Appeals emphasized the need to prevent fragmented appellate review and unfair postjudgment surprise to nonprevailing defendants. See 629 F. 2d, at 701–704. These are important concerns. But we do not think that the application of Rule 59(e) to § 1988 fee requests is either necessary or desirable to promote finality, judicial economy, or fairness.

A

The application of Rule 59(e) to postjudgment fee requests could yield harsh and unintended consequences. Section

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claimed entitlement to attorney's fees is sufficiently independent of the merits action under Title VII to support a federal suit "solely to obtain an award of attorney's fees for legal work done in state and local proceedings").

[14] There is implicit support for this view in decisions of the Courts of Appeals holding that decisions on the merits may be "final" and "appealable" prior to the entry of a fee award. See, *e. g.*, *Memphis Sheraton Corp.* v.

1988 authorizes the award of attorney's fees in constitutional and civil rights litigation of various kinds. In civil rights actions, especially in those involving "relief of an injunctive nature that must prove its efficacy only over a period of time," this Court has recognized that "many final orders may issue in the course of the litigation." *Bradley* v. *Richmond School Bd.*, 416 U. S. 696, 722–723 (1974). Yet sometimes it may be unclear even to counsel which orders are and which are not "final judgments." If Rule 59(e) were applicable, counsel would forfeit their right to fees if they did not file a request in conjunction with each "final" order. Cautious to protect their own interests, lawyers predictably would respond by entering fee motions in conjunction with nearly every interim ruling. Yet encouragement of this practice would serve no useful purpose. Neither would litigation over the "finality" of various interim orders in connection with which fee requests were not filed within the 10-day period.

The 10-day limit of Rule 59(e) also could deprive counsel of the time necessary to negotiate private settlements of fee questions. If so, the application of Rule 59(e) actually could generate increased litigation of fee questions—a result ironically at odds with the claim that it would promote judicial economy.[15]

Kirkley, 614 F. 2d 131, 133 (CA6 1980); *Hidell* v. *International Diversified Investments*, 520 F. 2d 529, 532, n. 4 (CA7 1975); see also *Obin* v. *District 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F. 2d, at 583–584. If a merits judgment is final and appealable prior to the entry of a fee award, then the remaining fee issue must be "collateral" to the decision on the merits. Conversely, the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as "final" and "appealable." *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, *supra*, at 584. Although "piecemeal" appeals of merits and fee questions generally are undesirable, district courts have ample authority to deal with this problem. See *infra*, at 454, and n. 16.

[15] As an additional reason for finding Rule 59(e) inapplicable to postjudgment fee requests, the petitioner and *amici* have urged that prejudgment fee negotiations could raise an inherent conflict of interest be-

B

Section 1988 authorizes the award of attorney's fees "in [the] discretion" of the court. We believe that this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party. Moreover, the district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees.[16] And of course the district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims to attorney's fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits.[17]

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tween the attorney and client. Because the defendant is likely to be concerned about his total liability, it is suggested, he may offer a lump-sum settlement, but remain indifferent as to its distribution as "damages" or "attorney's fees." In pursuing negotiations, the argument continues, the lawyer must decide what allocation to seek as between lawyer and client. Accordingly, petitioner argues, to avoid this conflict of interest any fee negotiations should routinely be deferred until after the entry of a merits judgment. Although sensitive to the concern that petitioner raises, we decline to rely on this proffered basis. In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

[16] See, *e. g.*, *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, *supra*, at 583 (recommending adoption of "a uniform rule requiring the filing of a claim for attorney's fees within twenty-one days after entry of judgment"); *Knighton* v. *Watkins*, 616 F. 2d, at 798, n. 2 (practices governing requests for attorney's fees "can be handled best by local rule"). As different jurisdictions have established different procedures for the filing of fee applications, there may be valid local reasons for establishing different time limits.

[17] The petitioner has urged us to hold expressly that the § 1988 provision for attorney's fees "as part of . . . costs" establishes that postjudgment fee requests constitute motions for "costs" under Rules 54(d) and 58, which specify no time barrier for motions for "costs." Because this question is

IV

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed, and the case is remanded for action consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, concurring in the judgment.

I agree with much that is said in the Court's opinion and I therefore concur, of course, in its judgment. I wish, however, that the Court had gone one step further.

We granted certiorari in this case, as the Court notes, *ante*, at 450, to resolve the existing conflict among the Courts of Appeals regarding postjudgment requests for attorney's fees under 42 U. S. C. § 1988. Three Circuits have held that these fee requests are not within Federal Rule of Civil Procedure 59(e), but are within the reach of Rules 54(d) and 58. Two have held that the requests are subject to Rule 59(e). And a sixth has held that such a request is not governed by *any* of the three Rules. See *ante*, at 450, n. 9. The Court today settles the conflict so far as Rule 59(e) and its inapplicability to a fee request are concerned. But it leaves unanswered the applicability of Rules 54(d) and 58 because "this question is unnecessary to our disposition of this case." *Ante*, at 454 and this page, n. 17.

I would answer that question, and hold that Rules 54(d) and 58 also do not apply to postjudgment § 1988 fees requests. I believe that the federal courts and the lawyers that practice in them should have an answer so that we shall not have yet another case to decide before the correct procedure for evaluating such requests is settled for all concerned.

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unnecessary to our disposition of this case, we do not address it. We note that the district courts would be free to adopt local rules establishing standards for timely filing of requests for costs, even if attorney's fees were so treated. See *Knighton* v. *Watkins*, *supra*, at 798, n. 2. Further, the district courts retain discretion under Rules 54(d) and 58 to deny even motions for costs that are filed with unreasonable tardiness.

I note, happily, that the Court at least touches upon the ultimate answer, *ante*, at 454, and n. 17, when it observes that district courts are free to adopt local rules. By so saying, the Court comes close to approving the position taken by the United States Court of Appeals for the Eighth Circuit in *Obin* v. *District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F. 2d 574 (1981). I think the Eighth Circuit is correct in its approach to the general problem. Thus, I would approve that approach and have the matter settled, eliminating the inconsistency which the Court leaves between the views of the Fifth, Sixth, and Seventh Circuits on the one hand, and the view of the Eighth Circuit on the other.

RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL.

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

No. 80–415. Argued December 2, 1981—Decided March 2, 1982*

In 1975, the Chicago, Rock Island and Pacific Railroad Co. (Rock Island) petitioned the District Court for reorganization under the Bankruptcy Act of 1898, and thereafter continued operation under the protection of that Act until September 1979, when it ceased operation as a result of a labor strike. The District Court concluded that reorganization was not possible and directed appellee Trustee of Rock Island's estate (hereafter appellee) to liquidate the estate's assets. On June 2, 1980, the reorganization court ordered abandonment of the Rock Island system and concluded that no claim or arrangement "for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court." However, three days before the court's order, the Rock Island Railroad Transition and Employee Assistance Act (RITA) was signed into law. Under §§ 106 and 110 of the statute, appellee must pay benefits of up to $75 million to those Rock Island employees who are not hired by other carriers, and the United States guarantees Rock Island's employee protection obligations. The statute also requires that such obligations must be considered administrative expenses of the Rock Island estate for purposes of determining the priority of the employees' claims to the estate's assets. On June 5, 1980, a complaint was filed in the reorganization court challenging the constitutionality of RITA and seeking injunctive relief. On June 9, the court issued a preliminary injunction against enforcement of §§ 106 and 110, holding that those provisions constituted an uncompensated taking of private property (Rock Island's creditors' interests in the estate's assets) for a public purpose in violation of the Just Compensation Clause of the Fifth Amendment. Pursuant to 28 U. S. C. § 1252, the District Court's order was appealed to this Court (No. 80–415). Congress responded to the District Court's injunction by enacting § 701 of the Staggers Rail Act of 1980, which re-enacted §§ 106 and 110 of RITA and added a provision seeking to avoid any implication that appellee and creditors had been deprived of any Tucker Act remedy otherwise available to pursue their takings claim against the United

*Together with No. 80–1239, *Railway Labor Executives' Assn.* v. *Gibbons, Trustee, et al.*, on appeal from the United States Court of Appeals for the Seventh Circuit.

States. Thereafter, the reorganization court denied a motion of appellant and the United States to vacate its June 9 injunction on the asserted ground that it was rendered moot by the passage of the Staggers Act, and issued a new order enjoining implementation of the labor protection provisions of RITA, as amended and re-enacted by the Staggers Act. This order was appealed to the Court of Appeals pursuant to § 124(a)(1) of RITA, as added by the Staggers Act. The Court of Appeals affirmed, and an appeal was then taken to this Court (No. 80–1239).

Held:

1. The June 9 injunction was rendered moot by the enactment of the Staggers Act, and accordingly the judgment of the District Court is vacated and it is ordered to vacate the injunction. P. 465.

2. The Court of Appeals' judgment is affirmed in No. 80–1239 because RITA, as amended by the Staggers Act, is repugnant to Art. I, § 8, cl. 4, of the Constitution, which empowers Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States." Pp. 465–473.

(a) The labor protection provisions of RITA are an exercise of Congress' power under the Bankruptcy Clause, rather than under the Commerce Clause. Although the subject of bankruptcies is incapable of final definition, "bankruptcy" has been defined as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 513–514. By its terms, the subject matter of RITA is the relationship between a bankrupt railroad and its creditors; Congress did nothing less than to prescribe the manner in which Rock Island's property is to be distributed among its creditors. The events surrounding RITA's passage, as well as its legislative history, also indicate that Congress was exercising its powers under the Bankruptcy Clause. Pp. 465–468.

(b) The Bankruptcy Clause's uniformity requirement does not prohibit Congress from distinguishing among classes of debtors, or from treating railroad bankruptcies as a distinctive problem. Nor does it deny Congress power to fashion legislation to resolve geographically isolated problems. However, RITA is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem. By its terms, RITA applies to only one regional bankrupt railroad; *only* Rock Island's creditors are affected by RITA's employee protection provisions and *only* Rock Island employees may take benefit of the arrangement. The language of the Bankruptcy Clause itself compels the conclusion that such a bankruptcy law is not within Congress' power to enact. Although meager, the debate in the Constitutional Convention regarding the Clause also supports the conclusion that the uniformity requirement prohibits Congress from enact-

ing bankruptcy laws that specifically apply to the affairs of only one named regional debtor. Pp. 468–473.

No. 80–415, vacated and remanded; No. 80–1239, 645 F. 2d 74, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 473.

John O'B. Clarke, Jr., argued the cause for appellant. With him on the briefs was *William G. Mahoney*.

Elinor H. Stillman argued the cause for the federal parties as appellees under this Court's Rule 10.4 in support of appellant. On the briefs were *Solicitor General Lee*, former *Solicitor General McCree*, former *Acting Solicitor General Wallace*, *Deputy Solicitor General Geller*, *Allen I. Horowitz*, *Richard A. Allen*, and *Henri F. Rush*.

Daniel R. Murray argued the cause for appellees. With him on the briefs were *Robert L. Stern*, *Milton L. Fisher*, *Harold L. Kaplan*, *Terry F. Moritz*, *Nicholas G. Manos*, *Albert E. Jenner, Jr.*, and *Barbara S. Steiner*.

JUSTICE REHNQUIST delivered the opinion for the Court.

In March 1975, the Chicago, Rock Island and Pacific Railroad Co. (Rock Island) petitioned the United States District Court for the Northern District of Illinois for reorganization under § 77 of the Bankruptcy Act of 1898, as added, 47 Stat. 1474, and amended, 11 U. S. C. § 205. Under the protection of § 77, the Rock Island continued to operate for approximately four and one-half years until it ceased all operations in September 1979 as a result of a labor strike that had depleted its cash reserves. Pursuant to 49 U. S. C. § 11125 (1976 ed., Supp. IV), the Interstate Commerce Commission (ICC) directed the Kansas City Terminal Railway Co. to provide rail service over the Rock Island lines. On January 25, 1980, the reorganization court concluded that reorganization was not possible. It then directed the Trustee of the Rock Island estate to prepare a plan for liquidation, and to continue planning for the cessation of rail operations upon the March 1980

expiration of the ICC's directed service order. App. 239a–240a. Since the entry of the January 25, 1980, order, the Trustee has been liquidating the assets of the Rock Island estate.

On March 4, 1980, various railroads and labor organizations representing Rock Island employees reached an agreement as to Rock Island employees hired by carriers acquiring the Rock Island's trackage. The agreement covered such matters as hiring preferences, monetary protection, and seniority, but it did not cover those Rock Island employees who are not employed by acquiring carriers.

On April 14, 1980, the Rock Island Trustee petitioned the reorganization court to confirm the Rock Island's abandonment of all rail lines and operations. The reorganization court referred the petition to the ICC for its recommendation. On May 23, the ICC concluded that the Rock Island's abandonment and dissolution as an operating railroad was necessary.

On June 2, the reorganization court ordered the total abandonment of the Rock Island system and the discontinuance of its service. The court found that to order the Rock Island to continue its operations indefinitely at a loss for the public's benefit would violate the "Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396 (1920)." *Id.*, at 270a. The reorganization court also concluded that "no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court" pursuant to § 17(a) of the Milwaukee Railroad Restructuring Act (MRRA), Pub. L. 96–101, 93 Stat. 744, 45 U. S. C. § 915(a) (1976 ed., Supp. IV).[1] App. 271a. The court reasoned that § 17(a) of the

[1] Section 17(a) of MRRA provides in relevant part: "In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49." 45 U. S. C. § 915(a) (1976 ed., Supp. IV).

MRRA does not apply to a total, systemwide abandonment of a railroad. App. 263a–264a.

Congress responded to the crisis resulting from this demise of the Rock Island by enacting the Rock Island Railroad Transition and Employee Assistance Act (RITA), Pub. L. 96–254, 94 Stat. 399, 45 U. S. C. § 1001 *et seq.* (1976 ed., Supp. IV). The President signed the Act into law on May 30, 1980, three days before the reorganization court's abandonment order. At issue in these cases are RITA's employee protections provisions. Sections 106[2] and 110[3] re-

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Title 49 U. S. C. § 11347 (1976 ed., Supp. IV) provides in relevant part: "[T]he Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected . . . as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. . . . The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission."

[2] Section 106, as originally enacted, provided in relevant part:

"(a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad, with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means

[Footnote 3 is on p. 462]

quire the Rock Island Trustee to provide economic benefits of up to $75 million to those Rock Island employees who are not hired by other carriers.[4] 45 U. S. C. §§ 1005, 1008 (1976 ed.,

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no less protective of the interests of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U. S. C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

. . . . . .

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the [Railroad Retirement] Board . . . .

"(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances *shall be treated as administrative expenses of the estate of the Rock Island Railroad.*" 94 Stat. 401–402 (emphasis added).

[3] Section 110, as originally enacted, provided in relevant part:

"(a) The Secretary . . . shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

"(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

"(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

"(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

"(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title." 94 Stat. 403.

[4] Those employees hired by other carriers are covered by the March 4, 1980, agreement. *Supra*, at 460.

Supp. IV). Benefits must be paid from the estate's assets. The employee benefit obligations must be considered administrative expenses of the Rock Island estate for purposes of determining the priority of the employees' claims to the assets of the estate upon liquidation.

On June 5, 1980, appellees filed a complaint in the reorganization court seeking to declare RITA unconstitutional and to enjoin its enforcement. On June 9, the reorganization court issued a preliminary injunction prohibiting the enforcement of §§ 106 and 110 of RITA. Although it suggested that RITA might have other constitutional infirmities, the court concluded that RITA's employee protection provisions constituted an uncompensated taking of private property for a public purpose in violation of the Just Compensation Clause of the Fifth Amendment. The court reasoned: "[T]he Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. . . . But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept." App. 153a. Since it determined that the Rock Island is no longer subject to the obligations of an operating railroad, the court concluded that the Rock Island creditors' and bondholders' interests in the estate's remaining assets may not be taken to serve the public's interest in providing economic protection for displaced employees. *Id.*, at 154a. Appellant appealed to this Court pursuant to 28 U. S. C. § 1252 (No. 80–415).

Congress responded to the reorganization court's injunction by enacting § 701 of the Staggers Rail Act of 1980,

Pub. L. 96–448, 94 Stat. 1959. With certain modifications,[5] § 701 of the Staggers Act re-enacted RITA §§ 106 and 110. The Staggers Act also added § 124 to RITA, 45 U. S. C. § 1018 (1976 ed., Supp. IV), which sought to avoid any implication that it had deprived appellees of any Tucker Act remedy otherwise available for the Trustee and creditors to pursue their takings claim against the United States.[6] The Staggers Act was signed into law on October 14, 1980.

Six days previously, appellant and the United States had moved the reorganization court to vacate its June 9 injunction on the basis that the passage of the Staggers Act rendered the injunction moot. In addition, it was argued that no irreparable injury could be shown because the Staggers Act amendments provided that a remedy under the Tucker Act, 28 U. S. C. § 1346, would be available if the labor protection provisions were found to constitute a taking. On October 15, the reorganization court denied the motion to vacate and issued a new order enjoining implementation of the labor protection provisions of the "Rock Island Act, as amended and re-enacted by the Staggers Rail Act." App. to Juris. Statement in No. 80–1239, p. 6a. Pursuant to § 124(a)(1) of RITA, as added by the Staggers Act, 45 U. S. C. § 1018(a)(1) (1976 ed., Supp. IV),[7] appellant and the United States appealed this order to the Court of Appeals for

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[5] In §§ 106(a) and (b), the respective time limits were shortened to five days after the enactment of the Staggers Act. The judicial review provisions of § 106(d) were modified substantially. In § 110(e), Congress added the words "to employees" after "liability," apparently in reference to the Tucker Act remedy alluded to in new § 124(c).

[6] Section 124(c) provides that "[n]othing in this chapter or in the Milwaukee Railroad Restructuring Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act . . . ." 45 U. S. C. § 1018(c) (1976 ed., Supp. IV).

[7] Section 124(a)(1), 45 U. S. C. § 1018(a)(1) (1976 ed., Supp. IV), provides that "any decision of the bankruptcy court with respect to the constitutionality of any provision of this chapter . . . shall be taken to the United States Court of Appeals for the Seventh Circuit."

the Seventh Circuit. The Court of Appeals affirmed without opinion by an equally divided vote. *In re Chicago, R. I. & P. R. Co.*, 645 F. 2d 74 (1980) (en banc).

This Court noted probable jurisdiction in No. 80–1239 and postponed the question of jurisdiction in No. 80–415 until our hearing the case on the merits. 451 U. S. 936 (1981). In No. 80–415 we order the District Court for the Northern District of Illinois to vacate its injunction of June 9, 1980.[8] We affirm in No. 80–1239 because we conclude that RITA, as amended by the Staggers Act, is repugnant to Art. I, § 8, cl. 4, the Bankruptcy Clause, of the Constitution. We therefore find it unnecessary to determine whether the employee protections provisions of RITA violate any other provision of the Constitution.[9]

Article I, § 8, cl. 4, of the United States Constitution provides that Congress shall have power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." It is necessary first to determine whether the labor protection provisions of amended RITA are an exercise of Congress' power under the Bankruptcy Clause, as contended by appellees, or under the Commerce Clause, as contended by appellant and the United States. Distinguishing a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy Clause is admittedly not an easy task, for the two Clauses are closely related. As James Madison observed, "[t]he power of estab-

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[8] The injunction of June 9, 1980, was rendered moot by the enactment of the Staggers Act which re-enacted and amended the sections of RITA declared unconstitutional by the reorganization court.

[9] In addition to the Bankruptcy Clause and the Just Compensation Clause of the Fifth Amendment, appellees have challenged RITA pursuant to principles of separation of powers, the equal protection component of the Fifth Amendment, and the Due Process Clause of the Fifth Amendment. We find it unnecessary to reach any of these additional contentions.

lishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 285 (N. Y. Heritage Press 1945). See *Sturges* v. *Crowninshield*, 4 Wheat. 122, 195 (1819) (Marshall, C. J.) ("The bankrupt law is said to grow out of the exigencies of commerce").

Although we have noted that "[t]he subject of bankruptcies is incapable of final definition," we have previously defined "bankruptcy" as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 513–514 (1938). See *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 673 (1935). Congress' power under the Bankruptcy Clause "contemplate[s] an adjustment of a failing debtor's obligations." *Ibid.* This power "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors." *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 186 (1902). It "includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do." *Id.*, at 188.

An examination of the employee protection provisions of RITA, we think, demonstrates that RITA is an exercise of Congress' power under the Bankruptcy Clause. Section 106 authorizes the ICC to impose upon the Rock Island estate "a fair and equitable" employee protection arrangement. After such an employee protection arrangement is imposed, "the bankruptcy court shall immediately authorize and direct the Rock Island trustee to . . . immediately implement such arrangement." § 106(c), 45 U. S. C. § 1005(c) (1976 ed.,

Supp. IV). Section 106(e)(2) provides that employee protection benefits shall be paid from Rock Island's assets and employee claims shall be treated as administrative expenses of the Rock Island estate. 45 U. S. C. § 1005(e)(2) (1976 ed., Supp. IV). Section 108(a) provides that any employee who elects to receive benefits under § 106 "shall be deemed to waive any employee protection benefits otherwise available to such employee" under the Bankruptcy Act, subtitle IV of Title 49 of the United States Code, or any applicable contract or agreement. 45 U. S. C. § 1007(a) (1976 ed., Supp. IV). Claims for "otherwise available" benefits are not accorded priority as an administrative expense of the estate. § 1007(c). Under § 110, the United States guarantees the Rock Island's employee protections obligations. 45 U. S. C. § 1008(a) (1976 ed., Supp. IV). As with the employee protection obligation itself, the guarantee is treated as an administrative expense of the Rock Island estate. § 1008(b).

In sum, RITA imposes upon a bankrupt railroad the duty to pay large sums of money to its displaced employees, and then establishes a mechanism through which these "obligations" are to be satisfied. The Act provides that the claims of these employees are to be accorded priority over the claims of Rock Island's commercial creditors, bondholders, and shareholders. It follows that the subject matter of RITA is the relationship between a bankrupt railroad and its creditors. See *Wright* v. *Union Central Life Ins. Co.*, *supra*, at 513–514. The Act goes as far as to alter the relationship among the claimants to the Rock Island estate's remaining assets. In enacting RITA, Congress did nothing less than to prescribe the manner in which the property of the Rock Island estate is to be distributed among its creditors.

The events surrounding the passage of RITA, as well as its legislative history, indicate that Congress was exercising its powers under the Bankruptcy Clause. In RITA, Congress was responding to the crisis resulting from the demise of the

Rock Island as an operating entity. The Act was passed almost five years after the Rock Island had initiated reorganization proceedings under § 77 of the Bankruptcy Act, and approximately 10 months after a strike had rendered the Rock Island unable to pay its operating expenses. In addition to providing for the continuation of the Rock Island under a directed service order until its lines could be acquired by other carriers, Congress sought to provide displaced employees with economic protection. Congress wanted to make liquidation of a railroad costly for the estate. As the House Conference Report explains, "it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest." H. R. Conf. Rep. No. 96–1430, pp. 138–139 (1980). Moreover, Congress was attempting to eliminate the confusion that existed at the time as to whether the labor protection provisions of the Interstate Commerce Act, 49 U. S. C. § 11347 (1976 ed., Supp. IV), applied to railroads that were in liquidation proceedings and arguably had no remaining common carrier responsibilities. See 126 Cong. Rec. 4870 (1980) (remarks of Sen. Kassebaum). In RITA, Congress intended that a labor protection arrangement be included as a part of the liquidation of the Rock Island estate.

We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. *Hodel* v. *Indiana*, 452 U. S. 314, 332 (1981); *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, 616 (1950) (distinguishing the Commerce Clause from Art. I, § 8, cl. 4). Thus, if we

were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws. It is therefore necessary for us to determine the nature of the uniformity required by the Bankruptcy Clause.

Pursuant to Art. I, § 8, cl. 4, of the Constitution, Congress has power to enact bankruptcy laws that are uniform throughout the United States. Prior to today, this Court has never invalidated a bankruptcy law for lack of uniformity. The uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform and yet "may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Stellwagen* v. *Clum*, 245 U. S. 605, 613 (1918). Thus, uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions. *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 172 (1946) (Frankfurter, J., concurring). In *Hanover National Bank* v. *Moyses*, 186 U. S., at 189–190, this Court held that Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement. The uniformity requirement, moreover, permits Congress to treat "railroad bankruptcies as a distinctive and special problem" and "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Regional Railroad Reorganization Act Cases*, 419 U. S. 102, 159 (1974) *(3R Act Cases)*. In the *3R Act Cases*, we upheld Congress' response to the existing rail transportation crisis in the Northeast. Since no railroad reorganization proceeding was then pending outside of the region defined by

the Regional Railroad Reorganization Act of 1973 (3R Act), 87 Stat. 985, 45 U. S. C. § 701 *et seq.*, the Act in fact operated uniformly upon all railroads then in bankruptcy proceedings.

But a quite different sort of "uniformity" question is presented in these cases. By its terms, RITA applies to only one regional bankrupt railroad.[10] *Only* Rock Island's creditors are affected by RITA's employee protection provisions and *only* employees of the Rock Island may take benefit of the arrangement. Unlike the situation in the *3R Act Cases*, there are other railroads that are currently in reorganization proceedings,[11] but these railroads are not affected by the employee protection provisions of RITA. The conclusion is thus inevitable that RITA is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad. The employee protection provisions of RITA cover neither a defined class of debtors nor a particular type of problem, but a particular

[10] By contrast, the 3R Act applied to the reorganization proceedings of 8 major railroads and 15 lessors of leased lines of the Penn Central. *3R Act Cases*, 419 U. S., at 108–109, n. 3.

[11] At the time RITA was enacted, the New York, Susquehanna and Western Railroad was in the process of liquidation under § 77 of the Bankruptcy Act of 1898. *In re New York, S. & W. R. Co.*, 504 F. Supp. 851 (NJ 1980), aff'd, 673 F. 2d 1301 (CA3 1981). Another bankrupt railroad is undergoing liquidation proceedings under the Bankruptcy Act of 1978, 11 U. S. C. §§ 1161–1174 (1976 ed., Supp. IV). *In re Auto-Train Corp.*, 11 B. R. 418 (Bkrtcy. DC 1981). The Milwaukee Road is in an income-based reorganization. That railroad is subject to its own employee protection requirements under §§ 5 and 9 of the MRRA, 45 U. S. C. §§ 904, 908 (1976 ed., Supp. IV). As with the case of §§ 106 and 108 of RITA, these sections of the MRRA apply only to one railroad. We have no occasion in these cases to consider the constitutionality of these provisions of the MRRA. Nevertheless, it is no argument that RITA is uniform because another statute imposes similar obligations upon another railroad, as the United States appears to contend. The issue is not whether Congress has discriminated against the Rock Island estate, but whether RITA's employee protection provisions are uniform bankruptcy laws. The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts.

problem of one bankrupt railroad. Albeit on a rather grand scale, RITA is nothing more than a private bill such as those Congress frequently enacts under its authority to spend money.[12]

The language of the Bankrupcty Clause itself compels us to hold that such a bankruptcy law is not within the power of Congress to enact. A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor. *In re Sink*, 27 F. 2d 361, 362 (WD Va. 1928), appeal dism'd per stipulation, 30 F. 2d 1019 (CA4 1929). As the legislative history to the Staggers Act indicates, *supra*, at 468, Congress might deem it sound policy to impose labor protection obligations in all bankruptcy proceedings involving major railroads. By its specific terms, however, RITA applies to only one regional bankrupt railroad, and cannot be said to apply uniformly even to major railroads in bankruptcy proceedings throughout the United States. The employee protection provisions of RITA therefore cannot be said to "apply equally to all creditors and all debtors." *3R Act Cases*, *supra*, at 160.

Although the debate in the Constitutional Convention regarding the Bankruptcy Clause was meager, we think it lends some support to our conclusion that the uniformity requirement of the Clause prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of only one named debtor.

The subject of bankruptcy was first introduced on August 29, 1787, by Charles Pinckney during discussion of the Full Faith and Credit Clause. Pinckney proposed the following grant of authority to Congress: "To establish uniform laws upon the subject of bankruptcies, and respecting the dam-

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[12] By its very terms, RITA applies only to the Rock Island. 45 U. S. C. §§ 1001, 1005, 1007–1008 (1976 ed., Supp. IV). Thus, we have no occasion to review a bankruptcy law which defines by identifying characteristics a particular class of debtors. Cf. *3R Act Cases*, *supra*, at 156–160.

ages arising on the protest of foreign bills of exchange." 2 M. Farrand, Records of the Federal Convention of 1787, p. 447 (1911). Two days later, John Rutledge recommended that the following be added to Congress' powers: "To establish uniform laws on the subject of bankruptcies." *Id.*, at 483. The Bankruptcy Clause was adopted on September 3, 1787, with only Roger Sherman of Connecticut voting against. *Id.*, at 489.[13]

Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Nadelmann, On the Origin of the Bankruptcy Clause, 1 Am. J. Legal Hist. 215, 221–223 (1957). Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. See *Millar* v. *Hall*, 1 Dall. 229 (Pa. Sup. Ct. 1788); *James* v. *Allen*, 1 Dall. 188 (Pa. Ct. Common Pleas 1786). Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States. See Nadelmann, *supra*, at 224–227. Similarly, the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws. See H. Black, Constitutional Prohibitions 6 (1887) (States had discriminated against British creditors). The States' practice of enacting private bills had rendered uniformity impossible.[14]

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[13] "Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England—& He did not chuse to grant a power by which that might be done here." 2 M. Farrand, Records of the Federal Convention of 1787, p. 489 (1911).

[14] The Framers' intent to achieve uniformity among the Nation's bankruptcy laws is also reflected in the Contract Clause. Apart from and independently of the Supremacy Clause, the Contract Clause prohibits the

Our holding today does not impair Congress' ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly. We have upheld bankruptcy laws that apply to a particular industry in a particular region. See *3R Act Cases*, 419 U. S. 102 (1974). The uniformity requirement, however, prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor. To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors. A bankruptcy law, such as RITA, confined as it is to the affairs of one named debtor can hardly be considered uniform. To hold otherwise would allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution.

Since that result may be accomplished only by the process prescribed in that document for its amendment, the judgment of the Court of Appeals in No. 80–1239 is affirmed, and the judgment of the District Court in No. 80–415 is vacated with instructions to dismiss the complaint as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950).

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the Court that the Rock Island Railroad Transition and Employee Assistance Act (RITA) violates the uniformity requirement of the Bankruptcy Clause. I write separately, however, because the Court accords a broader scope to that requirement than the Clause's language, its history, and the Court's cases justify. In particular, I am concerned that the Court's rationale may unduly restrict Congress' power to legislate with respect to the distinctive needs of a

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States from enacting debtor relief laws which discharge the debtor from his obligations, *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197–199 (1819), unless the law operates prospectively. *Ogden* v. *Saunders*, 12 Wheat. 213 (1827).

particular railroad or its employees. I conclude that the Clause permits such legislation if Congress finds that the application of the law to a single debtor (or limited class of debtors) serves a national interest apart from the economic interests of that debtor or class, and if the identified national interest justifies Congress' failure to apply the law to other debtors. However, because RITA does not satisfy this more stringent test, I agree that RITA is unconstitutional.

The Court argues that the uniformity requirement forbids Congress to enact any bankruptcy law affecting a single debtor. But I do not believe that uniformity invariably requires that a bankruptcy law apply to a multiplicity of debtors. The term "uniform" does not necessarily imply either that the law must avoid specifying the debtors to which it applies or that the law must affect more than a single debtor. As we have noted in different contexts, a named individual may constitute a "legitimate class of one." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 472 (1977) (rejecting claim that statute applying, and referring by name, only to a single former President is a bill of attainder). Cf. *Morey* v. *Doud*, 354 U. S. 457 (1957) (invalidating a statute expressly exempting the American Express Co. by name), overruled in *New Orleans* v. *Dukes*, 427 U. S. 297 (1976) *(per curiam)*.

In reviewing the scanty history of the Clause, the Court notes that one principal purpose was to avoid conflict between state laws concerning debtor insolvency. That concern, of course, is satisfied simply by uniform interstate application of federal bankruptcy laws under the Supremacy Clause. Another purpose, according to the Court, may have been to prevent the passage of private Acts to relieve individual debtors. However, the references to private Acts contained in the debates may have been intended only as examples of the first problem, in that other States failed to give credit to such Acts. To the extent that the Framers were concerned about the passage of private Acts, the question re-

mains whether they intended to prohibit all such Acts, and thus to disable Congress from enacting legislation applying to a specified debtor but promoting more general national policies than the simple economic interests of the debtor.

Our cases do not support the Court's view that any bankruptcy law applying to a single named debtor is unconstitutional. In the most relevant case, *Regional Rail Reorganization Act Cases*, 419 U. S. 102 (1974) *(3R Act Cases)*, this Court held that the Regional Rail Reorganization Act did not violate the Uniformity Clause even though it applied only to eight railroads in a specified geographic region. The Court squarely rejected the argument that the geographic nonuniformity of the Rail Act violated the Bankruptcy Clause. "The argument has a certain surface appeal but is without merit because it overlooks the flexibility inherent in the constitutional provision." *Id.*, at 158. Reviewing earlier cases, the Court emphasized Congress' power to recognize geographic differences and "to fashion legislation to resolve geographically isolated problems." *Id.*, at 159. The Court also noted that no other railroad was in reorganization during the time that the Act applied. The Court concluded that the Act satisfies the uniformity requirement because it is "designed to solve 'the evil to be remedied.'" *Id.*, at 161, quoting *Head Money Cases*, 112 U. S. 580, 595 (1884).

The Court's analysis in this case, too, "has a certain surface appeal." If a law applies to one debtor, it is invalid; if it applies to more than one debtor, it is valid if it satisfies the *3R Act Cases* test, *i. e.*, if it was designed to solve an identified evil. But there is nothing magical about a law that specifies only one object. I discern no principled ground for refusing to apply the same test without regard to the number of businesses regulated by the law.[1]

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[1] The Court implies that a law which is general in its terms but in operation applies only to a single debtor might satisfy the uniformity requirement. Again, such a formalistic requirement is not a principled reason for striking down congressional legislation.

I would apply the *3R Act Cases* test in every instance. Congress may specify what debtors, or (which is often the same thing) what portion of the country, will be subject to bankruptcy legislation. The constraint of uniformity, however, requires Congress to legislate uniformly with respect to an identified "evil." In the Regional Rail Reorganization Act, Congress imposed certain requirements on all railroads in reorganization; all were deemed to present the same "evil." If Congress has legislated pursuant to its bankruptcy power, furthering federal bankruptcy policies, and if the specificity of the legislation is defensible in terms of those policies, then, but only then, has Congress satisfied the uniformity requirement. Where, as here, the law subjects one named debtor to special treatment, I would require especially clear findings to justify the narrowness of the law.

Although the question is close, I conclude that Congress did not justify the specificity of RITA in terms of national policy. Rather, the legislative history indicates an attempt simply to protect employees of a single railroad from the consequences of bankruptcy. No explanation for the specificity of the law is given that would justify such narrow application. In its statutory findings, Congress stated that "uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions," and that a cessation of services would seriously affect certain state economies and the shipping public. 45 U. S. C. § 1001 (1976 ed., Supp. IV). The findings explicitly refer, however, only to the Rock Island Railroad. To be sure, in the legislative history Congress did recite more general purposes. Congressional Reports advert to the need for labor protection in "bankruptcy proceedings involving major rail carriers," H. R. Conf. Rep. No. 96–1430, p. 139 (1980), and the need "to avoid disruption of rail service and undue displacement of employees." H. R. Conf. Rep. No. 96–1041, p. 26 (1980). See S. Rep. No. 96–614, p. 5 (1980). But recitation of a general purpose does not justify narrow application to a

single debtor where, as here, that purpose does not explain the nonuniform treatment of other comparable railroads that are now, or may be, in reorganization. See *ante*, at 470, n. 11. With respect to such railroads, reorganization will result in the same displacement of employees and disruption of service—the same "evil"—that Congress purported to address in RITA. Because Congress' findings fail to demonstrate that the narrowness of RITA is addressed to a particular kind of problem, the law does not satisfy the uniformity requirement.

I agree with the Court that "[t]he employee protection provisions of RITA cover neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad." *Ante*, at 470–471. I do not agree that Congress may not legislate with respect to a single debtor, even if only that debtor presents "a particular type of problem." If, for example, Consolidated Rail Corp. were to fail, I cannot believe that Congress would be prohibited from enacting legislation addressed to the peculiar problems created by the bankruptcy of one of the Nation's principal freight carriers.[2]

For the foregoing reasons, I concur in the result reached by the Court.

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[2] It is indeed ironic that under the Court's approach, bankruptcy legislation respecting Conrail might be invalid. Conrail was created by the 3R Act, which reorganized eight bankrupt railroads into a single viable system operated by a private, for profit corporation. It is difficult to understand why legislation affecting the eight railroads passed constitutional muster in the *3R Act Cases*, 419 U. S., at 156–161, yet legislation affecting their successor might not.

MURPHY, DISTRICT JUDGE, FOURTH JUDICIAL DISTRICT OF NEBRASKA, DOUGLAS COUNTY *v.* HUNT

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80–2165. Argued January 18, 1982—Decided March 2, 1982

Appellee was charged with first-degree sexual offenses under Nebraska law. His pretrial requests for bail were denied by state courts pursuant to a provision of the Nebraska Constitution prohibiting bail in cases of first-degree sexual offenses "where the proof is evident or the presumption is great" (which appellee conceded). Pending trial, appellee filed suit in Federal District Court under 42 U. S. C. § 1983 (1976 ed., Supp. V), seeking declaratory and injunctive relief on the ground that the Nebraska constitutional provision violated his federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. On October 17, 1980, the District Court dismissed appellee's civil rights complaint. In the meantime, however, appellee had been convicted of two of the three charges against him in state-court prosecutions, and on November 13, 1980, he was convicted of the remaining charge. Appellee appealed these convictions to the Nebraska Supreme Court, and the appeals are pending before that court. On May 13, 1981, the Court of Appeals reversed, holding that the exclusion of violent sexual offenses from bail before trial violates the Excessive Bail Clause of the Eighth Amendment.

Held: Appellee's constitutional claim became moot following his state-court convictions. A favorable decision on his claim to *pretrial* bail would not have entitled him to bail once he was convicted. And he did not pray for damages or seek to represent a class of pretrial detainees in his federal-court action. Nor does this case fall within the "capable of repetition, yet evading review" exception to the general rule of mootness when the issues are no longer "live" or the parties lack a legally cognizable interest in the outcome of the case. Application of this exception depends upon a "reasonable expectation" or "demonstrated probability" that the same controversy will recur involving the same complaining party. There is no reasonable expectation that all of appellee's convictions will be overturned on appeal and that he will again be in the position to seek pretrial bail.

648 F. 2d 1148, vacated and remanded.

Terry R. Schaaf, Assistant Attorney General of Nebraska, argued the cause for appellant. With him on the brief was *Paul L. Douglas*, Attorney General.

Bennett G. Hornstein argued the cause and filed a brief for appellee.*

PER CURIAM.

Appellee Hunt was charged with first-degree sexual assault on a child and three counts of first-degree forcible sexual assault. He appeared on these charges in Omaha Municipal Court where his request for bail was denied.[1] On May 23, 1980, a bail review hearing was held in Douglas County District Court. Relying on Art. I, § 9, of the Nebraska Constitution, Judge Murphy, appellant here, denied Hunt's second application for bail.[2] That section of the Nebraska Constitution provides in relevant part: "All persons shall be bailable . . . except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption

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*Briefs of *amici curiae* urging reversal were filed by *James P. Manak*, *G. Joseph Bertain, Jr.*, *Lloyd F. Dunn*, *George Nicholson*, *Robert L. Toms*, *Donald E. Santarelli*, *Jack Yelverton*, *George Deukmejian*, Attorney General of California, and *Richard S. Gebelein*, Attorney General of Delaware, for Laws at Work (L. A. W.) et al.; and by *Daniel J. Popeo* and *Paul D. Kamenar* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Irvin B. Nathan* and *David P. Towey* for the American Civil Liberties Union; by *David Crump* for the Legal Foundation of America; by *Sheldon Portman* for the National Legal Aid and Defender Association et al.; and by *Quin Denvir* and *David R. Lipson* for the Public Defender of California.

[1] Appellee was also charged with several counts of nonsexual felonies and one count of nonforcible sexual assault. Bail was set as to each of these charges.

[2] The court relied as well upon a decision of the Supreme Court of Nebraska holding that Art. I, § 9, of the Nebraska Constitution violates neither the Sixth, Eighth, nor Fourteenth Amendment to the United States Constitution. See *Parker* v. *Roth*, 202 Neb. 850, 278 N. W. 2d 106 (1979).

great." For purposes of his application for bail, Hunt's counsel stipulated that, in this case, "the proof [was] evident and the presumption [was] great."

On June 9, 1980, pending trial on the charges against him, Hunt filed a complaint under 42 U. S. C. § 1983 (1976 ed., Supp. V) in the United States District Court for the District of Nebraska. He claimed that Art. I, § 9, of the State Constitution, limiting bail in cases of first-degree sexual offenses, violated his federal constitutional rights to be free from excessive bail and cruel and unusual punishment, to due process and equal protection of the laws, and to the effective assistance of counsel under the Sixth, Eighth, and Fourteenth Amendments. He sought declaratory and injunctive relief only. On October 17, 1980, the District Court dismissed Hunt's civil rights complaint. Hunt appealed to the Court of Appeals for the Eighth Circuit.

Meanwhile, the prosecutions against Hunt had proceeded. On September 10, 1980—even prior to the District Court decision—and November 5, 1980, he was found guilty of two of the three first-degree forcible sexual assault charges against him. On November 13, 1980, he was sentenced to consecutive terms of 8–15 years in prison for these offenses.[3] On October 8, 1980, again prior to the decision of the District Court, Hunt was convicted of first-degree sexual assault on a child. On December 11, 1980, he was sentenced to 12–15 years in prison on this charge. Hunt appealed each of these convictions to the Nebraska Supreme Court and each of these appeals remains pending before that court.

On May 13, 1981, the Court of Appeals for the Eighth Circuit decided Hunt's appeal from the dismissal of his § 1983 claim. *Hunt* v. *Roth*, 648 F. 2d 1148 (1981). The court reversed the District Court and held that the exclusion of violent sexual offenses from bail before trial violates the Excessive Bail Clause of the Eighth Amendment of the United

[3] The remaining first-degree sexual assault charge against him was dismissed on December 11, 1980.

States Constitution.[4] Because we find that Hunt's constitutional claim to pretrial bail became moot following his convictions in state court, we now vacate the judgment of the Court of Appeals.

In general a case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 396 (1980), quoting *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969). It would seem clear that under this general rule Hunt's claim to *pretrial* bail was moot once he was convicted.[5] The question was no longer live because even a favorable decision on it

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[4] "The constitutional protections involved in the grant of pretrial release by bail are too fundamental to foreclose by arbitrary state decree. . . .

"We hold, therefore, that the portion of Article I, section 9 of the Nebraska Constitution denying bail to persons charged with certain sexual offenses violates the eighth amendment of the United States Constitution, as incorporated in the fourteenth amendment." 648 F. 2d, at 1164–1165.

[5] Hunt made no claim of a constitutional right to bail pending appeal. Indeed, at the time he initiated this action he had not yet been convicted. The decision of the Court of Appeals held the Nebraska constitutional provision unconstitutional only as applied to "persons *charged* with certain . . . offenses." See n. 4, *supra* (emphasis added). Hunt's arguments before this Court are similarly limited to the constitutional rights of a person accused, but not convicted, of a noncapital offense.

The constitutionality of Art. I, § 9, as applied to a person awaiting trial is a question distinct from the constitutionality of that section as applied to a person who has been tried and convicted. The Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment may well apply differently in the two situations. As the Court has often noted: "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). Therefore, even assuming that Hunt had raised a claim for bail pending appeal, it would be that claim that the Court should decide—not the related but quite distinct claim for bail by a presumptively innocent person awaiting trial. For the same reasons it cannot be said as a

would not have entitled Hunt to bail. For the same reason, Hunt no longer had a legally cognizable interest in the result in this case. He had not prayed for damages nor had he sought to represent a class of pretrial detainees.

We have recognized an exception to the general rule in cases that are "capable of repetition, yet evading review." In *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) *(per curiam)*, we said that "in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." See *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 187 (1979); *Sosna* v. *Iowa*, 419 U. S. 393 (1975). Because the Nebraska Supreme Court might overturn each of Hunt's three convictions, and because Hunt might then once again demand bail before trial, the Court of Appeals held that the matter fell within this class of cases "capable of repetition, yet evading review."[6] We reach a different conclusion.

The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*. If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. *Weinstein* v. *Bradford*, *supra*, at 149. We detect no such level of probability in this case.

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matter of federal law that a decision holding that Hunt was unconstitutionally denied bail prior to trial will have any consequences with respect to his right to bail pending appeal and after conviction.

In short, the fact that Hunt may have a live claim for bail *pending appeal*, does not save from dismissal his now moot claim to *pretrial* bail.

[6]Judge Arnold dissented from this conclusion for the same reasons advanced in this opinion.

All we know from the record is that Hunt has been convicted on three separate offenses and that his counsel was willing to stipulate that, for the purposes of Hunt's eligibility for bail, the proof of guilt was evident and the presumption great. Based on these two facts, we cannot say that there exists a "reasonable expectation" or "demonstrated probability" that Hunt will ever again be in this position. There is no reason to expect that all three of Hunt's convictions will be overturned on appeal.[7] Hunt's willingness to stipulate that the proof against him was "evident" does not encourage us to believe otherwise.

Nor is *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), relied upon by the Court of Appeals, to the contrary. In that case we held that the constitutionality of a pretrial restrictive order, entered prior to a criminal trial and that expired once the jury was impaneled, was not moot even though the order had long since expired. The Court found that the controversy between the parties was "capable of repetition" because the defendant's conviction might be overturned on appeal, requiring a new trial and possibly a new restrictive order, *and* because the dispute between the Nebraska Press Association and the State of Nebraska as to the use of restrictive orders was likely to recur in future criminal trials. It was the combination of these elements, both of which were capable of repetition, that permitted the Court to conclude that the matter was not moot under the standard stated in *Weinstein*.[8]

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[7] "What the likelihood of such a triple reversal might be, we have no way of knowing, since this record contains no hint of the facts relevant to Hunt's guilt or innocence. The possibility of three reversals is wholly speculative. They could come about, but one may be pardoned, I hope, for doubting it." 648 F. 2d, at 1166 (Arnold, J., dissenting).

[8] The Court in *Nebraska Press Assn.* cited our decision in *Weinstein* for support of its conclusion that the matter was not moot. The Court in no way purported to weaken the standard of a "reasonable expectation" or "demonstrated probability" stated in *Weinstein*. See also *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 585, n. 13 (BRENNAN, J., concurring in judg-

There is no comparable set of expectations in this case. We have no reason to believe that Hunt will once again be in a position to demand bail before trial.

Accordingly, we find that the case presented is now moot. Indeed, it was moot at the time of the decisions of both the District Court and the Court of Appeals. The judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals with instructions that the complaint be dismissed.

So ordered.

JUSTICE WHITE, dissenting.

Article I, § 9, of the Nebraska Constitution states that aside from individuals charged with treason, murder, or forcible rape where the proof is evident or the presumption great, "[a]ll persons shall be bailable." The section is not limited to persons awaiting trial. Moreover, the Nebraska statute concerning appeals to the State Supreme Court provides that "[n]othing herein shall prevent any person from giving supersedeas bond in the district court . . . nor affect the right of a defendant in a criminal case to be admitted to bail pending the review of such case in the Supreme Court." Neb. Rev. Stat. § 25–1912 (1979).[1] Thus, the provision in the Nebraska Constitution which allowed Judge Murphy to

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ment) ("It is evident that the decision of the Nebraska Supreme Court will subject petitioners to future restrictive orders with respect to pretrial publicity . . .").

[1] The "same criteria would remain applicable" to bail pending appeal as bail pending trial; there is no "separate section of our law" for the former. Tr. of Oral Arg. 21. See Neb. Rev. Stat. § 29–901 (1979). Thus, "if bail is to be denied Mr. Hunt . . . it must be done pursuant to this constitutional provision." Tr. of Oral Arg. 22.

In addition, the Nebraska Supreme Court has held that Nebraska courts have the inherent power to consider the propriety of bail even without a specific authorizing statute. *State* v. *Jensen*, 203 Neb. 441, 279 N. W. 2d 120 (1979).

deny appellee Hunt bail pending trial also serves to deny Hunt bail pending appeal of his conviction. Both parties agree that this is so.[2]

The Court does not dispute that Art. I, § 9, of the Nebraska Constitution applies to applications for bail pending appeal. Instead the Court considers this factor irrelevant because Hunt has not requested bail pending appeal and because the Court of Appeals held the Nebraska constitutional provision unconstitutional only as applied to *pretrial* detainees. *Ante*, at 481–482, n. 5.

I am not persuaded that the issue can be so lightly dismissed. The claim is plainly presented in this Court that the challenged provision effectively bars bail during Hunt's appeal to the Nebraska Supreme Court. If § 9 were declared unconstitutional here, Hunt could seek bail pending review of

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[2] Probable jurisdiction having been noted, and the parties being in agreement that the case was not moot, the issue was not briefed. At oral argument, however, both Mr. Schaaf, the Assistant State Attorney General, and Mr. Hornstein, representing Hunt, directly stated that Art. I, § 9, applied to applications for bail pending appeal.

"Question: [A]fter conviction in a criminal case, is anyone entitled to bail while his case is on appeal?

"Mr. Schaaf: Yes . . . .

"Question: . . . I suppose that this statute would prevent bail while the case is pending on appeal.

"Mr. Schaaf: Yes . . . .

"Question: So why is it moot until it is decided?

"Mr. Schaaf: We suggest that it is not [moot]." Tr. of Oral Arg. 19.

"Question: Wouldn't this constitutional amendment be a basis for denying bail pending appeal?

"Mr. Hornstein: I agree with that. Certainly.

"Question: However the factors might sort out under the other statute, this would be independently a reason for denying bail?

"Mr. Hornstein: I think it mandates a denial of bail.

"Question: [A]nd as long as the case is pending, this case isn't moot, is it?

"Mr. Hornstein: No, our position is that it is not moot. I mean, I think both sides agree that it is not moot." *Id.*, at 40.

his convictions by that court. The fact that he has not yet filed such a request in the state courts cannot be taken as a waiver of the right to request release. Because Hunt was denied bail before trial under § 9, a request for bail after conviction would have been a useless formality. The provision forbids releasing on bail an individual charged with forcible rape where the proof of guilt is evident or the presumption great. Since Judge Murphy found that standard satisfied before Hunt's conviction, appellant could reasonably conclude that further application under current Nebraska law would be futile.

Because § 9 is an independent barrier denying Hunt the ability to obtain bail pending appeal, the question is not whether his *pretrial* detention is "capable of repetition, yet evading review." We therefore need not ask whether there is a reasonable expectation that Hunt would again be denied bail *prior* to trial.[3] The unavailability of an opportunity for bail pending appeal may constitute a sufficiently live issue to maintain Hunt's interest in the outcome of this litigation.

The Court's analysis must therefore rest on the limitation of the Court of Appeals' decision to pretrial detainees.

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[3] I am not convinced, however, that the Court is correct in finding that this case does not satisfy the conditions for the "capable of repetition, yet evading review" exception. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), suggests that the two bases for finding the events capable of repetition were independent. ("The controversy between the parties to this case is 'capable of repetition' in two senses." *Id.*, at 546.) Moreover, there is language in *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), which suggests that pretrial claims of this type are inherently within the exception when represented by a public defender:

"Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case."

This language, which the Court silently disavows by the result it has reached, may be read to suggest that the formalities of class certification are unnecessary because of the presence of the public defender, who, in effect, represents a continuing class of individuals subject to pretrial detention.

Even accepting this reading of the Court of Appeals' opinion, the Court's point appears to be no more than a restatement of the related observation that Hunt did not, in fact could not at the time this suit was filed, assert a claim to bail pending appeal. The Court of Appeals reasonably ruled no more broadly than required. Nevetheless, the consequences of the court's decision ruling the Nebraska provision unconstitutional extend to Hunt's rights to seek bail pending appeal. If the Eighth Amendment is applied to the States and does create an implied right to bail, then the State may not be able to categorically deny bail pending appeal in the manner Nebraska has chosen. If conversely, there is no right to pretrial bail, *a fortiori*, Hunt would not be able to obtain release under present circumstances.[4]

Because the Court of Appeals found Hunt's denial of pretrial bail not moot under *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), it had no cause to consider other reasons why the case remained alive. When this Court has entertained doubt about the continuing nature of a case or controversy, it has remanded the case to the lower court for consideration of the possibility of mootness. *Vitek* v. *Jones*, 436 U. S. 407 (1978); *Scott* v. *Kentucky Parole Board*, 429 U. S.

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[4] The Court misinterprets the significance of this point. Contrary to the Court's account, *ante*, at 481–482, n. 5, it is not that the Court should now decide whether the provision is unconstitutional with respect to persons requesting bail after conviction. Rather, the point is that deciding whether Hunt was unconstitutionally denied bail prior to trial will have important consequences with respect to Hunt's right to bail pending appeal—a collateral consequence giving Hunt a continuing stake in the resolution of this case. There is nothing novel in this approach. See, *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 51 (1968) ("mere release of a prisoner does not mechanically foreclose consideration of the merits [of his conviction] by this Court"); *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108–109, n. 3 (1977) ("possibility of a criminal defendant's suffering 'collateral legal consequences' from a sentence already served permits him to have his claims reviewed here on the merits"); *Powell* v. *McCormack*, 395 U. S. 486 (1969) (remaining claim for back salary justified determining whether Powell was properly excluded from membership in the House of Representatives despite the fact that he had already been seated).

60 (1976); *Indiana Employment Security Div.* v. *Burney*, 409 U. S. 540 (1973). A remand is particularly in order where, as here, the mootness issue has not been briefed and both parties agree that the case is not moot.

While couched in terms of justiciability, the effect of the Court's decision is to vacate the judgment of the Court of Appeals. The restrictions on bail struck down as unconstitutional by the Eighth Circuit are given new life; consequently, any attempt by Hunt to obtain release pending appeal of his convictions will be denied pursuant to the Nebraska Constitution. Because of Hunt's undeniable interest in securing his liberty, his interests remain adverse with those of the appellant, and an Art. III case or controversy may well exist. I would prefer that the Court of Appeals be allowed to explore the mootness issue further. I therefore dissent.

Syllabus

VILLAGE OF HOFFMAN ESTATES ET AL. *v.* THE FLIPSIDE, HOFFMAN ESTATES, INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80–1681. Argued December 9, 1981—Decided March 3, 1982

An ordinance of appellant village requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Guidelines define the items (such as "roach clips," which are used to smoke cannabis, "pipes," and "paraphernalia"), the sale of which is required to be licensed. Appellee, which sold a variety of merchandise in its store, including "roach clips" and specially designed pipes used to smoke marihuana, upon being notified that it was in possible violation of the ordinance, brought suit in Federal District Court, claiming that the ordinance is unconstitutionally vague and overbroad, and requesting injunctive and declaratory relief and damages. The District Court upheld the ordinance and awarded judgment to the village defendants. The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face.

Held: The ordinance is not facially overbroad or vague but is reasonably clear in its application to appellee. Pp. 494–505.

(a) In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications. Pp. 494–495.

(b) The ordinance here does not violate appellee's First Amendment rights nor is it overbroad because it inhibits such rights of other parties. The ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus does not embrace noncommercial speech. With respect to any commercial speech interest implicated, the ordinance's restriction on the manner of marketing does not appreciably limit appellee's communication of information, except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if deemed "speech," is speech proposing an illegal transaction and thus subject to government regulation or ban. It is irrelevant whether the ordinance has an overbroad scope encompassing other persons' commercial speech, since the overbreadth doctrine does not apply to commercial speech. Pp. 495–497.

(c) With respect to the facial vagueness challenge, appellee has not shown that the ordinance is impermissibly vague in all of its applications. The ordinance's language "designed . . . for use" is not unconstitutionally vague on its face, since it is clear that such standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. Thus, the "designed for use" standard is sufficiently clear to cover at least some of the items that appellee sold, such as "roach clips" and the specially designed pipes. As to the "marketed for use" standard, the guidelines refer to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus such standard requires scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips." Pp. 499–503.

(d) The ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render it void for vagueness in a pre-enforcement facial challenge. Pp. 503–504.

639 F. 2d 373, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 507. STEVENS, J., took no part in the consideration or decision of the case.

Richard N. Williams argued the cause and filed briefs for appellants.

Michael L. Pritzker argued the cause and filed a brief for appellee.*

**Ronald A. Zumbrun* and *John H. Findley* filed a brief for Community Action Against Drug Abuse as *amicus curiae* urging reversal.

Charles A. Trost filed a brief for American Businesses for Constitutional Rights as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Arkansas et al. by *Steve Clark*, Attorney General of Arkansas, *J. D. MacFarlane*, Attorney General of Colorado, *Carl R. Ajello*, Attorney General of Connecticut, *Richard S. Gebelein*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, and *Mitchell D. Franks*, *David H. Leroy*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Robert T.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969–1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F. 2d 373 (1981). We noted probable jurisdiction, 452 U. S. 904 (1981), and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside), sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices, and jewelry, in its store located in the village of Hoffman Estates, Ill. (village).[1] On February

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Stephan, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, and *Paul F. Strain*, *Dennis M. Sweeney*, and *Linda H. Lamone*, Assistant Attorneys General, *Paul L. Douglas*, Attorney General of Nebraska, *Richard H. Bryan*, Attorney General of Nevada, *James R. Zazzali*, Attorney General of New Jersey, *Jeff Bingaman*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, and *David S. Crump* and *James L. Wallace, Jr.*, Deputy Attorneys General, *Jan Eric Cartwright*, Attorney General of Oklahoma, *Leroy S. Zimmerman*, Attorney General of Pennsylvania, *Mark White*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, and *Kenneth O. Eikenberry*, Attorney General of Washington; and for the Village of Wilmette, Illinois, by *Robert J. Mangler*.

[1] More specifically, the District Court found:

"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette hold-

20, 1978, the village enacted an ordinance regulating drug paraphernalia, to be effective May 1, 1978.[2] The ordinance makes it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." The license fee is $150. A business must also file affidavits that the licensee and its employees have not been convicted of a drug-related offense. Moreover, the business must keep a record of each sale of a regulated item, including the name and address of the purchaser, to be open to police inspection. No regulated item may be sold to a minor. A violation is subject to a fine of not less than $10 and not more than $500, and each day that a violation continues gives rise to a separate offense. A series of licensing guidelines prepared by the Village Attorney define "Paper," "Roach Clips," "Pipes," and "Paraphernalia," the sale of which is required to be licensed.[3]

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ers, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff." 485 F. Supp. 400, 403 (ND Ill. 1980).

[2] The text of the ordinance is set forth in the Appendix to this opinion.

[3] The guidelines provide:

"LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

"Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

"Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

"Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips,

After an administrative inquiry, the village determined that Flipside and one other store appeared to be in violation of the ordinance. The Village Attorney notified Flipside of the existence of the ordinance, and made a copy of the ordinance and guidelines available to Flipside. Flipside's owner asked for guidance concerning which items were covered by the ordinance; the Village Attorney advised him to remove items in a certain section of the store "for his protection," and he did so. App. 71. The items included, according to Flipside's description, a clamp, chain ornaments, an "alligator" clip, key chains, necklaces, earrings, cigarette holders, glove stretchers, scales, strainers, a pulverizer, squeeze bottles, pipes, water pipes, pins, an herb sifter, mirrors, vials, cigarette rolling papers, and tobacco snuff. On May 30, 1978, instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances,[4] Flipside filed this lawsuit in the United States District Court for the Northern District of Illinois.

The complaint alleged, *inter alia*, that the ordinance is unconstitutionally vague and overbroad, and requested injunctive and declaratory relief and damages. The District Court, after hearing testimony, declined to grant a preliminary injunction. The case was tried without a jury on additional evidence and stipulated testimony. The court issued

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or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

"Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered."

[4] Ordinance No. 932–1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the drug paraphernalia ordinance, and provides that an interested person may petition for the adoption of an interpretive rule. If the petition is denied, the person may place the matter on the agenda of an appropriate village committee for review. The Village Attorney indicated that no interpretive rules had been adopted with respect to the drug paraphernalia ordinance because no one had yet applied for a license. App. 68.

an opinion upholding the constitutionality of the ordinance, and awarded judgment to the village defendants. 485 F. Supp. 400 (1980).

The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face. The court reviewed the language of the ordinance and guidelines and found it vague with respect to certain conceivable applications, such as ordinary pipes or "paper clips sold next to *Rolling Stone* magazine." 639 F. 2d, at 382. It also suggested that the "subjective" nature of the "marketing" test creates a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles. *Id.*, at 384. Finally, the court determined that the availability of administrative review or guidelines cannot cure the defect. Thus, it concluded that the ordinance is impermissibly vague on its face.

II

In a facial challenge to the overbreadth and vagueness of a law,[5] a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.[6] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates

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[5] A "facial" challenge, in this context, means a claim that the law is "invalid *in toto*—and therefore incapable of any valid application." *Steffel* v. *Thompson*, 415 U. S. 452, 474 (1974). In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered. *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972).

[6] In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964), quoting *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958); see *Grayned*, *supra*, at 109; cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 58–61 (1976).

no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.[7] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

The Court of Appeals in this case did not explicitly consider whether the ordinance reaches constitutionally protected conduct and is overbroad, nor whether the ordinance is vague in all of its applications. Instead, the court determined that the ordinance is void for vagueness because it is unclear in *some* of its applications to the conduct of Flipside and of other hypothetical parties. Under a proper analysis, however, the ordinance is not facially invalid.

III

We first examine whether the ordinance infringes Flipside's First Amendment rights or is overbroad because it inhibits the First Amendment rights of other parties. Flipside makes the exorbitant claim that the village has imposed a "prior restraint" on speech because the guidelines treat the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or

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[7] "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975). See *United States* v. *Powell*, 423 U. S. 87, 92–93 (1975); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32–33, 36 (1963). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974). The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971). Such a provision simply has *no* core." *Smith* v. *Goguen*, 415 U. S. 566, 578 (1974).

drugs." Flipside also argues that because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes "protected symbolic speech." Brief for Appellee 25.

These arguments do not long detain us. First, the village has not directly infringed the noncommercial speech of Flipside or other parties. The ordinance licenses and regulates the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs," Guidelines, *supra* n. 3, but does not prohibit or otherwise regulate the sale of literature itself. Although drug-related designs or names on cigarette papers may subject those items to regulation, the village does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace noncommercial speech.

Second, insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information[8]—with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 563–564 (1980); *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 388 (1973). Finally, it is irrelevant whether the ordinance has an

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[8] Flipside explained that it placed items that the village considers drug paraphernalia in locations near a checkout counter because some are "point of purchase" items and others are small and apt to be shoplifted. App. 43. Flipside did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers.

overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech. *Central Hudson*, *supra*, at 565, n. 8.[9]

IV

A

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications. Flipside makes no such showing.

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[9] Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Brief for Appellee 10, 33–35. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. We find that claim unpersuasive in this pre-enforcement facial challenge. See *infra*, at 497–504. If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive due process. The latter claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the village presented evidence of illegal drug use in the community. App. 37. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124–125 (1978).

The hostility of some lower courts to drug paraphernalia laws—and particularly to those regulating the sale of items that have many innocent uses, see, *e. g.*, 639 F. 2d 373, 381–383 (1981); *Record Revolution No. 6, Inc.* v. *City of Parma*, 638 F. 2d 916, 928 (CA6 1980), vacated and remanded, 451 U. S. 1013 (1981)—may reflect a belief that these measures are ineffective in stemming illegal drug use. This perceived defect, however, is not a defect of clarity. In the unlikely event that a state court construed this ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague. He could, of course, object that the law was not intended to cover such items.

The standards for evaluating vagueness were enunciated in *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow,[10] and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.[11] Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.[12] The Court has also expressed greater tolerance of

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[10] *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162 (1972) (dictum; collecting cases).

[11] See, *e. g.*, *United States* v. *National Dairy Products Corp.*, 372 U. S. 29 (1963). Cf. *Smith* v. *Goguen*, 415 U. S., at 574.

[12] See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 49 (1966); *McGowan* v. *Maryland*, 366 U. S. 420, 428 (1961).

enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.[13] And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.[14]

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.[15]

B

This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil penalties. However, the village concedes that the ordinance is "quasi-criminal," and its prohibitory and stigmatizing effect may warrant a relatively strict test.[16]

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[13] See *Barenblatt* v. *United States*, 360 U. S. 109, 137 (1959) (Black, J., with whom Warren, C. J., and Douglas, J., joined, dissenting); *Winters* v. *New York*, 333 U. S. 507, 515 (1948).

[14] See, *e. g.*, *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979); *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 342 (1952); *Screws* v. *United States*, 325 U. S. 91, 101–103 (1945) (plurality opinion). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 87, n. 98 (1960).

[15] See, *e. g.*, *Papachristou*, *supra*; *Grayned*, 408 U. S., at 109.

[16] The village stipulated that the purpose of the ordinance is to discourage use of the regulated items. App. 33. Moreover, the prohibitory and stigmatizing effects of the ordinance are clear. As the Court of Appeals remarked, "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police." 639 F. 2d, at 377. The proposed register is entitled, "Retail Record for Items Designed or Marketed for Use with Illegal Cannabis or Drugs." Record, Complaint, App. B. At argument, counsel for the village admitted that the ordinance is "quasi-criminal." Tr. of Oral Arg. 4–5.

Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside.

The ordinance requires Flipside to obtain a license if it sells "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Flipside expresses no uncertainty about which drugs this description encompasses; as the District Court noted, 485 F. Supp., at 406, Illinois law clearly defines cannabis and numerous other controlled drugs, including cocaine. Ill. Rev. Stat., ch. 56½, ¶¶ 703 and 1102(g) (1980). On the other hand, the words "items, effect, paraphernalia, accessory or thing" do not identify the type of merchandise that the village desires to regulate.[17] Flipside's challenge thus appropriately focuses on the language "designed or marketed for use." Under either the "designed for use" or "marketed for use" standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing.

1. "Designed for use"

The Court of Appeals objected that "designed . . . for use" is ambiguous with respect to whether items must be inherently suited only for drug use; whether the retailer's intent or manner of display is relevant; and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer." 639 F. 2d, at 380–381. For the reasons that follow, we conclude that this language is not unconstitutionally vague on its face.

The Court of Appeals' speculation about the meaning of "design" is largely unfounded. The guidelines refer to "pa-

[17] The District Court apparently relied principally on the growing vernacular understanding of "paraphernalia" as drug-related items, and therefore did not separately analyze the meaning of "designed or marketed for use." 485 F. Supp., at 405–407. We agree with the Court of Appeals that a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated. 639 F. 2d, at 380.

per of colorful design" and to other specific items as conclusively "designed" or not "designed" for illegal use.[18] A principal meaning of "design" is "[t]o fashion according to a plan." Webster's New International Dictionary of the English Language 707 (2d ed. 1957). Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 454, n. 3 (1939). It is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not "designed for use" with illegal drugs. Moreover, no issue of fair warning is present in this case, since Flipside concedes that the phrase refers to structural characteristics of an item.[19]

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[18] The guidelines explicitly provide that "white paper . . . may be displayed," and that "Roach Clips" are "designed for use with illegal cannabis or drugs *and therefore* covered" (emphasis added). The Court of Appeals criticized the latter definition for failing to explain what a "roach clip" is. This criticism is unfounded because that technical term has sufficiently clear meaning in the drug paraphernalia industry. Without undue burden, Flipside could easily determine the meaning of the term. See American Heritage Dictionary of the English Language 1122 (1980) (defining "roach" as "[t]he butt of a marijuana cigarette"); R. Lingeman, Drugs from A to Z: A Dictionary 213–214 (1969) (defining "roach" and "roach holder"). Moreover, the explanation that a retailer may display certain paper "not necessarily designed for use" clarifies that the ordinance at least embraces items that are necessarily designed for use with cannabis or illegal drugs.

[19] "It is readily apparent that under the Hoffman Estates scheme, the 'designed for use' phrase refers to the physical characteristics of items deemed *per se* fashioned for use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the 'designer' (i. e. patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural 'design' of the finished product." Brief for Appellee 42–43. Moreover, the village President described drug paraphernalia as items "*[m]anufactured* for that purpose and marketed for that purpose." App. 82 (emphasis added).

The ordinance and guidelines do contain ambiguities. Nevertheless, the "designed for use" standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, through the guidelines, explicitly regulates "roach clips." Flipside's co-operator admitted that the store sold such items, see Tr. 26, 30, and the village Chief of Police testified that he had never seen a "roach clip" used for any purpose other than to smoke cannabis. App. 52. The Chief also testified that a specially designed pipe that Flipside marketed is typically used to smoke marihuana. *Ibid.* Whether further guidelines, administrative rules, or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge.

2. "Marketed for use"

Whatever ambiguities the "designed . . . for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Under this test, Flipside had ample warning that its marketing activities required a license. Flipside displayed the magazine High Times and books entitled Marijuana Grower's Guide, Children's Garden of Grass, and The Pleasures of Cocaine, physically close to pipes and colored rolling papers, in clear violation of the guidelines. As noted above, Flipside's co-operator admitted that his store sold "roach clips," which are principally used for illegal purposes. Finally, in the

same section of the store, Flipside had posted the sign, "You must be 18 or older to purchase any head supplies."[20] Tr. 30.

V

The Court of Appeals also held that the ordinance provides insufficient standards for enforcement. Specifically, the court feared that the ordinance might be used to harass individuals with alternative lifestyles and views. 639 F. 2d, at 384. In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning of what is proscribed. Moreover, this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law. Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness. Cf. *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 168–171 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971).

We do not suggest that the risk of discriminatory enforcement is insignificant here. Testimony of the Village Attorney who drafted the ordinance, the village President, and the Police Chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the "judgment" of police officers to give meaning to the ordinance and to enforce it fairly. At this stage, however, we are not prepared to hold that this risk jeopardizes the entire ordinance.[21]

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[20] The American Heritage Dictionary of the English Language 606 (1980) gives the following alternative definition of "head": "*Slang.* One who is a frequent user of drugs."

[21] The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine, 639 F. 2d, at

Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope. We also find it significant that the village, in testimony below, primarily relied on the "marketing" aspect of the standard, which does not require the more ambiguous item-by-item analysis of whether paraphernalia are "designed for" illegal drug use, and which therefore presents a lesser risk of discriminatory enforcement. "Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 52 (1966).[22]

VI

Many American communities have recently enacted laws regulating or prohibiting the sale of drug paraphernalia.

382, is of no due process significance unless the possibility ripens into a prosecution.

[22] The Court of Appeals also referred to potential Fourth Amendment problems resulting from the recordkeeping requirement, which "implies that a customer who purchases an item 'designed or marketed for use with illegal cannabis or drugs' intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item." *Id.*, at 384. We will not address these Fourth Amendment issues here. In a pre-enforcement challenge it is difficult to determine whether Fourth Amendment rights are seriously threatened. Flipside offered no evidence of a concrete threat below. In a postenforcement proceeding Flipside may attempt to demonstrate that the ordinance is being employed in such an unconstitutional manner, and that it has standing to raise the objection. It is appropriate to defer resolution of these problems until such a showing is made.

To determine whether these laws are wise or effective is not, of course, the province of this Court. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 728–730 (1963). We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.

Accordingly, 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 STEVENS took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

Village of Hoffman Estates Ordinance No. 969–1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, Section 8–7–16, which additional section shall read as follows:

Sec. 8–7–16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8–1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8–7–16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8–2–1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

Section 4: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

JUSTICE WHITE, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Ante*, at 495. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it

is "transparently clear" that some particular conduct is restricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the Court. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–615 (1973). Whether the appellee may make use of the overbreadth doctrine depends, in the first instance, on whether or not it has a colorable claim that the ordinance infringes on constitutionally protected, noncommercial speech of others. Although appellee claims that the ordinance does have such an effect, that argument is tenuous at best and should be left to the lower courts for an initial determination.

Accordingly, I concur in the judgment reversing the decision below.

Syllabus

ROSE, WARDEN v. LUNDY

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

No. 80–846. Argued October 14, 1981—Decided March 3, 1982

Title 28 U. S. C. §§ 2254(b) and (c) provide that a state prisoner's application for a writ of habeas corpus in a federal district court based on an alleged federal constitutional violation will not be granted unless the applicant has exhausted the remedies available in the state courts. After respondent was convicted of certain charges in a Tennessee state court and his convictions were affirmed, he unsuccessfully sought postconviction relief in a state court. He then filed a petition in Federal District Court for a writ of habeas corpus under § 2254, alleging four specified grounds of relief. The District Court granted the writ, notwithstanding the petition included both claims that had not been exhausted in the state courts and those that had been. The Court of Appeals affirmed.

Held: The judgment is reversed and the case is remanded.

624 F. 2d 1100, reversed and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, and IV, concluding that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims. A rule requiring exhaustion of all claims in state courts promotes comity and furthers the purposes underlying the exhaustion doctrine, as codified in §§ 2254(b) and (c), of protecting the state courts' role in the enforcement of federal law and preventing disruption of state judicial proceedings. Pp. 513–520.

JUSTICE O'CONNOR, joined by CHIEF JUSTICE BURGER, JUSTICE POWELL, and JUSTICE REHNQUIST, concluded in Part III–C that the total exhaustion rule will not impair the state prisoner's interest in obtaining speedy federal relief on his claims, since, rather than returning to state court to exhaust all of his claims, he can always amend the petition to delete the unexhausted claims, although by doing so he would risk dismissal of subsequent federal petitions. Pp. 520–521.

O'CONNOR, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, III–A, III–B, and IV, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined, and an opinion with respect to Part III–C, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 522. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J.,

joined, *post*, p. 532. WHITE, J., filed an opinion concurring in part and dissenting in part, *post*, p. 538. STEVENS, J., filed a dissenting opinion, *post*, p. 538.

John C. Zimmermann, Assistant Attorney General of Tennessee argued the cause *pro hac vice* for petitioner. With him on the briefs was *William M. Leech, Jr.*, Attorney General.

D. Shannon Smith, by appointment of the Court, 451 U. S. 904, argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court, except as to Part III–C.

In this case we consider whether the exhaustion rule in 28 U. S. C. §§ 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary.[1] After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for postconviction relief in the Knox County Criminal Court.

**Solicitor General McCree*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *George W. Jones* filed a brief for the United States as *amicus curiae* urging reversal.

[1] The court sentenced the respondent to consecutive terms of 120 years on the rape charge and from 5 to 15 years on the crime against nature charge.

The respondent subsequently filed a petition in Federal District Court for a writ of habeas corpus under 28 U. S. C. § 2254, alleging four grounds for relief: (1) that he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the State's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. After reviewing the state-court records, however, the District Court concluded that it could not consider claims three and four "in the constitutional framework" because the respondent had not exhausted his state remedies for those grounds. The court nevertheless stated that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."[2]

Apparently in an effort to assess the "atmosphere" of the trial, the District Court reviewed the state trial transcript and identified 10 instances of prosecutorial misconduct, only 5 of which the respondent had raised before the state courts.[3]

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[2] The Tennessee Criminal Court of Appeals had ruled specifically on grounds one and two, holding that although the trial court erred in restricting cross-examination of the victim and the prosecuting attorney improperly alluded to the respondent's violent nature, the respondent was not prejudiced by these errors. *Lundy* v. *State*, 521 S. W. 2d 591, 595–596 (1974).

[3] In particular, the District Court found that the prosecutor improperly:

(1) misrepresented that the defense attorney was guilty of illegal and unethical misconduct in interviewing the victim before trial;

(2) "testified" that the victim was telling the truth on the stand;

(3) stated his view of the proper method for the defense attorney to interview the victim;

(4) misrepresented the law regarding interviewing government witnesses;

In addition, although purportedly not ruling on the respondent's fourth ground for relief—that the state trial judge improperly charged that "every witness is presumed to swear the truth"—the court nonetheless held that the jury instruction, coupled with both the restriction of counsel's cross-examination of the victim and the prosecutor's "personal testimony" on the weight of the State's evidence, see n. 3, *supra*, violated the respondent's right to a fair trial. In conclusion, the District Court stated:

> "Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.
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> . . . . . .
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> ". . . Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights

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(5) misrepresented that the victim had a right for both private counsel and the prosecutor to be present when interviewed by the defense counsel;

(6) represented that because an attorney was not present, the defense counsel's conduct was inexcusable;

(7) represented that he could validly file a grievance with the Bar Association on the basis of the defense counsel's conduct;

(8) objected to defense counsel's cross-examination of the victim;

(9) commented that the defendant had a violent nature;

(10) gave his personal evaluation of the State's proof.

The petitioner concedes that the state appellate court considered instances 1, 3, 4, 5, and 9, but states without contradiction that the respondent did not object to the prosecutor's statement that the victim was telling the truth (#2) or to any of the several instances where the prosecutor, in summation, gave his opinion on the weight of the evidence (#10). The petitioner also notes that the conduct identified in #6 and #7 did not occur in front of the jury, and that the conduct in #8, which was only an objection to cross-examination, can hardly be labeled as misconduct.

were violated and the jury poisoned by the prosecutorial misconduct."[4]

In short, the District Court considered several instances of prosecutorial misconduct never challenged in the state trial or appellate courts, or even raised in the respondent's habeas petition.

The Sixth Circuit affirmed the judgment of the District Court, 624 F. 2d 1100 (1980), concluding in an unreported order that the court properly found that the respondent's constitutional rights had been "seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct." The court specifically rejected the State's argument that the District Court should have dismissed the petition because it included both exhausted and unexhausted claims.

II

The petitioner urges this Court to apply a "total exhaustion" rule requiring district courts to dismiss every habeas corpus petition that contains both exhausted and unexhausted claims.[5] The petitioner argues at length that such a

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[4] The court granted the writ and ordered the respondent discharged from custody unless within 90 days the State initiated steps to bring about a new trial.

[5] The Fifth and Ninth Circuits have adopted a "total exhaustion" rule. See *Galtieri* v. *Wainwright*, 582 F. 2d 348, 355–360 (CA5 1978) (en banc), and *Gonzales* v. *Stone*, 546 F. 2d 807, 808–810 (CA9 1976). A majority of the Courts of Appeals, however, have permitted the District Courts to review the exhausted claims in a mixed petition containing both exhausted and unexhausted claims. See, *e. g.*, *Katz* v. *King*, 627 F. 2d 568, 574 (CA1 1980); *Cameron* v. *Fastoff*, 543 F. 2d 971, 976 (CA2 1976); *United States ex rel. Trantino* v. *Hatrack*, 563 F. 2d 86, 91–95 (CA3 1977), cert. denied, 435 U. S. 928 (1978); *Hewett* v. *North Carolina*, 415 F. 2d 1316, 1320 (CA4 1969); *Meeks* v. *Jago*, 548 F. 2d 134, 137 (CA6 1976), cert. denied, 434 U. S. 844 (1977); *Brown* v. *Wisconsin State Dept. of Public Welfare*, 457 F. 2d 257, 259 (CA7), cert. denied, 409 U. S. 862 (1972); *Tyler* v. *Swenson*,

rule furthers the policy of comity underlying the exhaustion doctrine because it gives the state courts the first opportunity to correct federal constitutional errors and minimizes federal interference and disruption of state judicial proceedings. The petitioner also believes that uniform adherence to a total exhaustion rule reduces the amount of piecemeal habeas litigation.

Under the petitioner's approach, a district court would dismiss a petition containing both exhausted and unexhausted claims, giving the prisoner the choice of returning to state court to litigate his unexhausted claims, or of proceeding with only his exhausted claims in federal court. The petitioner believes that a prisoner would be reluctant to choose the latter route since a district court could, in appropriate circumstances under Habeas Corpus Rule 9(b), dismiss subsequent federal habeas petitions as an abuse of the writ.[6] In other words, if the prisoner amended the petition to delete the unexhausted claims or immediately refiled in federal court a petition alleging only his exhausted claims, he could lose the opportunity to litigate his presently unexhausted claims in federal court. This argument is addressed in Part III–C of this opinion.

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483 F. 2d 611, 614 (CA8 1973); *Whiteley* v. *Meacham*, 416 F. 2d 36, 39 (CA10 1969), rev'd on other grounds, 401 U. S. 560 (1971).

In *Gooding* v. *Wilson*, 405 U. S. 518 (1972), this Court reviewed the merits of an exhausted claim after expressly acknowledging that the prisoner had not exhausted his state remedies for all of the claims presented in his habeas petition. *Gooding* does not control the present case, however, since the question of total exhaustion was not before the Court. Two years later, in *Francisco* v. *Gathright*, 419 U. S. 59, 63–64 (1974) *(per curiam)*, the Court expressly reserved the question of whether § 2254 requires total exhaustion of claims.

[6] Rule 9(b) provides that

"[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In order to evaluate the merits of the petitioner's arguments, we turn to the habeas statute, its legislative history, and the policies underlying the exhaustion doctrine.

III

A

The exhaustion doctrine existed long before its codification by Congress in 1948. In *Ex parte Royall*, 117 U. S. 241, 251 (1886), this Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act:

> "The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

Subsequent cases refined the principle that state remedies must be exhausted except in unusual circumstances. See, *e. g.*, *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17–19 (1925) (holding that the lower court should have dismissed the petition because none of the questions had been raised in the state courts. "In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted"). In *Ex parte Hawk*, 321 U. S. 114, 117 (1944), this Court reiterated that comity was the basis for the exhaustion doctrine: "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to

exist.'"[7] None of these cases, however, specifically applied the exhaustion doctrine to habeas petitions containing both exhausted and unexhausted claims.

In 1948, Congress codified the exhaustion doctrine in 28 U. S. C. § 2254, citing *Ex parte Hawk* as correctly stating the principle of exhaustion.[8] Section 2254,[9] however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise "the question presented," but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legislative history of § 2254, as well as the pre-1948 cases, contains

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[7] The Court also made clear, however, that the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to "afford a full and fair adjudication of the federal contentions raised." 321 U. S., at 118.

[8] The Reviser's Notes in the appendix of the House Report state: "This new section [§ 2254] is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, . . . 321 U. S. 114 . . .)." H. R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947); Historical and Revision Notes following 28 U. S. C. § 2254. See also *Darr* v. *Burford*, 339 U. S. 200, 210 (1950) ("In § 2254 of the 1948 recodification of the Judicial Code, Congress gave legislative recognition to the *Hawk* rule for the exhaustion of remedies in the state courts and this Court"); *Brown* v. *Allen*, 344 U. S. 443, 447–450 (1953); *Fay* v. *Noia*, 372 U. S. 391, 434 (1963).

[9] Section 2254 in part provides:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

no reference to the problem of mixed petitions,[10] in all likelihood Congress never thought of the problem.[11] Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope. *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975) ("'In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy'" (citations omitted)); *United States* v. *Bacto-Unidisk*, 394 U. S. 784, 799 (1969) ("where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose'" (citation omitted)); *United States* v. *Sisson*, 399 U. S. 267, 297–298 (1970) ("The axiom that courts should endeavor to give statutory language that meaning that nurtures the poli-

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[10] Section 2254 was one small part of a comprehensive revision of the Judicial Code. The original version of § 2254, as passed by the House, provided that

"[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court or authority of a State officer shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is no adequate remedy available in such courts or that such courts have denied him a fair adjudication of the legality of his detention under the Constitution and laws of the United States." H. R. 3214, 80th Cong., 1st Sess. (1947).

The Senate amended the House bill, changing the House version of § 2254 to its present form. The Senate Report accompanying the bill states that one purpose of the amendment was "to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment." S. Rep. No. 1559, 80th Cong., 2d Sess., 10 (1948). The House accepted the Senate version of the Judicial Code without further amendment.

In 1966, Congress amended § 2254 to add subsection (a) and redesignate the existing paragraphs as subsections (b) and (c). See Pub. L. 89–711, § 2 (c), 80 Stat. 1105.

[11] See Note, Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency, 57 B. U. L. Rev. 864, 867, n. 30 (1977) (suggesting that before 1948 habeas petitions did not contain multiple claims).

cies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed"); *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59, 64 (1953) ("Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved").

B

The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484, 490–491 (1973).[12] Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U. S., at 251. Because "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," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr* v. *Burford*, 339 U. S. 200, 204 (1950). See *Duckworth* v. *Serrano*, 454 U. S. 1, 2 (1981) *(per curiam)* (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all

[12] See also Developments, Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970) (cited favorably in *Braden*).

claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, *supra*, at 490. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review. Cf. 28 U. S. C. § 2254(d) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court).

The facts of the present case underscore the need for a rule encouraging exhaustion of all federal claims. In his opinion, the District Court Judge wrote that "there is such mixture of violations that one cannot be separated from and considered independently of the others." Because the two unexhausted claims for relief were intertwined with the exhausted ones, the judge apparently considered all of the claims in ruling on the petition. Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

In his dissent, JUSTICE STEVENS suggests that the District Court properly evaluated the respondent's two exhausted claims "in the context of the entire trial." *Post*, at 541. Unquestionably, however, the District Court erred in considering unexhausted claims, for § 2254(b) expressly requires the prisoner to exhaust "the remedies available in the courts of the State." See n. 9, *supra*. Moreover, to the extent that exhausted and unexhausted claims are interrelated, the general rule among the Courts of Appeals is to dismiss mixed habeas petitions for exhaustion of all such claims. See, *e. g.*, *Triplett* v. *Wyrick*, 549 F. 2d 57 (CA8 1977); *Miller* v. *Hall*, 536 F. 2d 967 (CA1 1976); *Hewett* v. *North Carolina*, 415 F. 2d 1316 (CA4 1969).

Rather than an "adventure in unnecessary lawmaking" (STEVENS, J., *post*, at 539), our holdings today reflect our in-

terpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies. There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions (STEVENS, J., *post*, at 550), or will serve to "trap the unwary *pro se* prisoner." (BLACKMUN, J., *post*, at 530.) On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement. Those prisoners who misunderstand this requirement and submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims.

Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

C

The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, *supra*, at 490. A total exhaustion rule will not impair that interest since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under 28 U. S. C. § 2254 Rule 9(b), a district court

may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ." See n. 6, *supra*. The Advisory Committee to the Rules notes that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders* v. *United States*, 373 U. S. 1, 18 (1963), where this Court stated:

> "[I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." [13]

See Advisory Committee Note to Habeas Corpus Rule 9(b), 28 U. S. C., p. 273. Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.

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[13] In *Wong Doo* v. *United States*, 265 U. S. 239 (1924), the petitioner brought two habeas corpus petitions to obtain release from the custody of a deportation order. The ground for relief contained in the second petition was also contained in the first petition, but had not been pursued in the first habeas proceeding. The Court held that because the petitioner "had full opportunity to offer proof" in the first hearing, the lower court should not consider the second petition. *Id.*, at 241. The present case, of course, is not controlled by *Wong Doo* because the respondent could not have litigated his unexhausted claims in federal court. Nonetheless, the case provides some guidance for the situation in which a prisoner deliberately decides not to exhaust his claims in state court before filing a habeas corpus petition.

IV

In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.[14] Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

The important issue before the Court in this case is whether the conservative "total exhaustion" rule espoused now by two Courts of Appeals, the Fifth and the Ninth Circuits, see *ante*, at 513, n. 5, is required by 28 U. S. C. §§ 2254(b) and (c), or whether the approach adopted by eight other Courts of Appeals—that a district court may review the *exhausted* claims of a mixed petition—is the proper interpretation of the statute. On this basic issue, I firmly agree with the majority of the Courts of Appeals.

I do not dispute the value of comity when it is applicable and productive of harmony between state and federal courts, nor do I deny the principle of exhaustion that §§ 2254(b) and (c) so clearly embrace. What troubles me is that the "total exhaustion" rule, now adopted by this Court, can be read into the statute, as the Court concedes, *ante*, at 516–517, only by sheer force; that it operates as a trap for the uneducated and indigent *pro se* prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts. To use the old expression, the Court's ruling seems to me to "throw the baby out with the bath water."

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[14] Because of our disposition of this case, we do not reach the petitioner's claims that the grounds offered by the respondent do not merit habeas relief.

Although purporting to rely on the policies upon which the exhaustion requirement is based, the Court uses that doctrine as "a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 490 (1973). Those purposes do not require the result the Court reaches; in fact, they support the approach taken by the Court of Appeals in this case and call for dismissal of only the unexhausted claims of a mixed habeas petition. Moreover, to the extent that the Court's ruling today has any impact whatsoever on the workings of federal habeas, it will alter, I fear, the litigation techniques of very few habeas petitioners.

I

A

The Court correctly observes, *ante*, at 516–517, that neither the language nor the legislative history of the exhaustion provisions of §§ 2254(b) and (c) mandates dismissal of a habeas petition containing both exhausted and unexhausted claims. Nor does precedent dictate the result reached here. In *Picard* v. *Connor*, 404 U. S. 270 (1971), for example, the Court ruled that "once the federal *claim* has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Id.*, at 275 (emphasis supplied). Respondent complied with the direction in *Picard* with respect to his challenges to the trial court's limitation of cross-examination of the victim and to at least some of the prosecutor's allegedly improper comments.

The Court fails to note, moreover, that prisoners are not compelled to utilize every available state procedure in order to satisfy the exhaustion requirement. Although this Court's precedents do not address specifically the appropriate treatment of mixed habeas petitions, they plainly suggest that state courts need not inevitably be given every opportunity to safeguard a prisoner's constitutional rights and to pro-

vide him relief before a federal court may entertain his habeas petition.[1]

B

In reversing the judgment of the Sixth Circuit, the Court focuses, as it must, on the purposes the exhaustion doctrine is intended to serve. I do not dispute the importance of the exhaustion requirement or the validity of the policies on which it is based. But I cannot agree that those concerns will be sacrificed by permitting district courts to consider *exhausted* habeas claims.

The first interest relied on by the Court involves an offshoot of the doctrine of federal-state comity. The Court hopes to preserve the state courts' role in protecting constitutional rights, as well as to afford those courts an opportunity to correct constitutional errors and—somewhat patronizingly—to "become increasingly familiar with and hospitable toward federal constitutional issues." *Ante*, at 519. My proposal, however, is not inconsistent with the Court's concern for comity: indeed, the state courts have occasion to rule first on every constitutional challenge, and

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[1] In *Brown* v. *Allen*, 344 U. S. 443, 447 (1953), the Court made clear that the exhaustion doctrine does not foreclose federal habeas relief whenever a state remedy is available; once a prisoner has presented his claim to the highest state court on direct appeal, he need not seek collateral relief from the State. Additionally, in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973), the Court permitted consideration of a § 2254 petition seeking to force the State to afford the prisoner a speedy trial. Although the defendant had not yet been convicted, and therefore obviously had not utilized all available state procedures, and although he could have raised his Sixth Amendment claim as a defense at trial, the Court found the interests underlying the exhaustion doctrine satisfied because the petitioner had presented his existing constitutional claim to the state courts and because he was not attempting to abort a state proceeding or disrupt the State's judicial process. See *id.*, at 491. Finally, in *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), the Court held that an intervening change in the relevant state law, which had occurred subsequent to the prisoner's exhaustion of state remedies and which suggested that the state courts would look favorably on the request for relief, did not necessitate a return to state court.

have ample opportunity to correct any such error, before it is considered by a federal court on habeas.

In some respects, the Court's ruling appears more destructive than solicitous of federal-state comity. Remitting a habeas petitioner to state court to exhaust a patently frivolous claim before the federal court may consider a serious, exhausted ground for relief hardly demonstrates respect for the state courts. The state judiciary's time and resources are then spent rejecting the obviously meritless unexhausted claim, which doubtless will receive little or no attention in the subsequent federal proceeding that focuses on the substantial exhausted claim. I can "conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles." *Roberts* v. *LaVallee*, 389 U. S. 40, 43 (1967).[2]

The second set of interests relied upon by the Court involves those of federal judicial administration—ensuring that a § 2254 petition is accompanied by a complete factual record to facilitate review and relieving the district courts of the responsibility for determining when exhausted and unex-

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[2] The Court fails to mention two related state interests relied upon by the petitioner warden—ensuring finality of convictions and avoiding the mooting of pending state proceedings. The finality of a conviction in no way depends, however, on a federal court's treatment of a mixed habeas petition. If a State is concerned with finality, it may adopt a rule directing defendants to present all their claims at one time; a prisoner's failure to adhere to that procedural requirement, absent cause and prejudice, would bar subsequent federal habeas relief on additional grounds. See *Wainwright* v. *Sykes*, 433 U. S. 72 (1977); *Murch* v. *Mottram*, 409 U. S. 41 (1972). As long as the State permits a prisoner to continue challenging his conviction on alternative grounds, a federal court's dismissal of a mixed habeas petition will provide no particular incentive for consolidation of all potential claims in a single state proceeding.

A pending state proceeding involving claims not included in the prisoner's federal habeas petition will be mooted only if the federal court grants the applicant relief. Even in those cases, though, the state courts will be saved the trouble of undertaking the useless exercise of ruling on unexhausted claims that are unnecessary to the disposition of the case.

hausted claims are interrelated. If a prisoner has presented a particular challenge in the state courts, however, the habeas court will have before it the complete factual record relating to that claim.[3] And the Court's Draconian approach is hardly necessary to relieve district courts of the obligation to consider exhausted grounds for relief when the prisoner also has advanced interrelated claims not yet reviewed by the state courts. When the district court believes, on the facts of the case before it, that the record is inadequate or that full consideration of the exhausted claims is impossible, it has always been free to dismiss the entire habeas petition pending resolution of unexhausted claims in the state courts. Certainly, it makes sense to commit these decisions to the discretion of the lower federal courts, which will be familiar with the specific factual context of each case.

The federal courts that have addressed the issue of interrelatedness have had no difficulty distinguishing related from unrelated habeas claims. Mixed habeas petitions have been dismissed *in toto* when "the issues before the federal court logically depend for their relevance upon resolution of an unexhausted issue," *Miller* v. *Hall*, 536 F. 2d 967, 969 (CA1 1976), or when consideration of the exhausted claim "would necessarily be affected . . ." by the unexhausted claim, *United States ex rel. McBride* v. *Fay*, 370 F. 2d 547, 548 (CA2 1966). Thus, some of the factors to be considered in determining whether a prisoner's grounds for collateral relief are interrelated are whether the claims are based on the same constitutional right or factual issue, and whether they require an understanding of the totality of the circumstances and therefore necessitate examination of the entire record. Compare *Johnson* v. *United States District Court*, 519 F. 2d 738, 740 (CA8 1975) (prisoner's challenge to the voluntariness of his guilty plea intertwined with his claims that at the time

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[3] The district court is free, of course, to order expansion of the record. See 28 U. S. C. § 2254 Rule 7.

of the plea he was mentally incompetent and without effective assistance of counsel); *United States ex rel. DeFlumer* v. *Mancusi*, 380 F. 2d 1018, 1019 (CA2 1967) (dispute regarding the voluntariness of the prisoner's guilty plea "would necessarily affect the consideration of the coerced confession claim, because a voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings"); *United States ex rel. McBride* v. *Fay*, 370 F. 2d, at 548; and *United States ex rel. Martin* v. *McMann*, 348 F. 2d 896, 898 (CA2 1965) (defendant's challenge to the voluntariness of his confession related to his claim that the confession was obtained in violation of his right to the assistance of counsel and without adequate warnings), with *Miller* v. *Hall*, 536 F. 2d, at 969 (no problem of interrelationship when exhausted claims involved allegations that the police lacked probable cause to search defendant's van and had no justification for failing to secure a search warrant, and unexhausted claim maintained that the arresting officer had committed perjury at the suppression hearing); and *United States ex rel. Levy* v. *McMann*, 394 F. 2d 402, 404 (CA2 1968).

The Court's interest in efficient administration of the federal courts therefore does not require dismissal of mixed habeas petitions. In fact, that concern militates *against* the approach taken by the Court today. In order to comply with the Court's ruling, a federal court now will have to review the record in a § 2254 proceeding at least summarily in order to determine whether all claims have been exhausted. In many cases a decision on the merits will involve only negligible additional effort. And in other cases the court may not realize that one of a number of claims is unexhausted until after substantial work has been done. If the district court must nevertheless dismiss the entire petition until all grounds for relief have been exhausted, the prisoner will likely return to federal court eventually, thereby necessitating duplicative examination of the record and consideration of the exhausted

claims—perhaps by another district judge. See JUSTICE STEVENS' dissenting opinion, *post*, at 545. Moreover, when the § 2254 petition does find its way back to federal court, the record on the exhausted grounds for relief may well be stale and resolution of the merits more difficult.[4]

The interest of the prisoner and of society in "preserv[ing] the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement,'" *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S., at 490, is the final policy consideration to be weighed in the balance. Compelling the habeas petitioner to repeat his journey through the entire state and federal legal process before receiving a ruling on his exhausted claims obviously entails substantial delay.[5] And if the prisoner must choose between undergoing that delay and forfeiting unexhausted claims, see *ante*, at 520–521, society is likewise forced to sacrifice either the swiftness of habeas or its availability to remedy all unconstitutional imprisonments.[6] Dismissing only unexhausted

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[4] A related federal interest mentioned by the Court is avoiding piecemeal litigation and encouraging a prisoner to bring all challenges to his state-court conviction in one § 2254 proceeding. As discussed in Part II, *infra*, however, the Court's approach cannot promote that interest because Congress has expressly permitted successive habeas petitions unless the subsequent petitions constitute "an abuse of the writ." 28 U. S. C. § 2254 Rule 9(b).

[5] In *United States ex rel. Irving* v. *Cassles*, 448 F. 2d 741, 742 (CA2 1971), cert. denied, 410 U. S. 925 (1973), and *United States ex rel. DeFlumer* v. *Mancusi*, 380 F. 2d 1018, 1019 (CA2 1967), for example, mixed habeas petitions were dismissed because the exhausted and unexhausted claims were interrelated. In each case, the prisoner was unable to obtain a federal-court judgment on the merits of his exhausted claims for years. See *United States ex rel. Irving* v. *Henderson*, 371 F. Supp. 1266 (SDNY 1974); *United States ex rel. DeFlumer* v. *Mancusi*, 443 F. 2d 940 (CA2), cert. denied, 404 U. S. 914 (1971).

[6] The petitioner warden insists, however, that improved judicial efficiency will benefit those prisoners with meritorious claims because their petitions will not be lost in the flood of frivolous § 2254 petitions. Even if the Court's approach were to contribute to the efficient administration of

grounds for habeas relief, while ruling on the merits of all unrelated exhausted claims, will diminish neither the promptness nor the efficacy of the remedy and, at the same time, will serve the state and federal interests described by the Court.[7]

II

The Court's misguided approach appears to be premised on the specter of "the sophisticated litigious prisoner intent upon a strategy of piecemeal litigation . . . ," whose aim is to have more than one day in court. *Galtieri* v. *Wainwright*, 582 F. 2d 348, 369 (CA5 1978) (en banc) (dissenting opinion). Even if it could be said that the Court's view accurately reflects reality, its ruling today will not frustrate the Perry Masons of the prison populations. To avoid dismissal, they will simply include only exhausted claims in each of many successive habeas petitions. Those subsequent petitions may be dismissed, as JUSTICE BRENNAN observes, only if the prisoner has "abused the writ" by deliberately choosing, for purposes of delay, not to include all his claims in one petition. See *post*, at 535–536 (opinion concurring in part and dissenting in part). And successive habeas petitions that meet the

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justice, the contours of the exhaustion doctrine have no relationship to the merits of a habeas petition: a prisoner with one substantial exhausted claim will be forced to return to state court to litigate his remaining challenges, whereas a petitioner with frivolous, but exhausted, claims will receive, it is to be hoped, a prompt ruling on the merits from the federal court. See STEVENS, J., dissenting, *post*, at 545.

[7] Even the Fifth and Ninth Circuits, which require dismissal of mixed habeas petitions in the typical case, do not follow the extreme position the Court takes today. The Ninth Circuit permits district courts to consider the exhausted grounds in a mixed petition if the prisoner has a reasonable explanation for failing to exhaust the other claims or if the state courts have delayed in ruling on those claims. See *Gonzales* v. *Stone*, 546 F. 2d 807, 810 (1976). The Fifth Circuit will review the merits of exhausted claims contained in a mixed petition if the district court has considered those claims. See *Galtieri* v. *Wainwright*, 582 F. 2d 348, 361–362 (1978) (en banc).

"abuse of the writ" standard have always been subject to dismissal, irrespective of the Court's treatment of mixed petitions today. The Court's ruling in this case therefore provides no additional incentive whatsoever to consolidate all grounds for relief in one § 2254 petition.

Instead of deterring the sophisticated habeas petitioner who understands, and wishes to circumvent, the rules of exhaustion, the Court's ruling will serve to trap the unwary *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine and whose only aim is to secure a new trial or release from prison. He will consolidate all conceivable grounds for relief in an attempt to accelerate review and minimize costs. But, under the Court's approach, if he unwittingly includes in a § 2254 motion a claim not yet presented to the state courts, he risks dismissal of the entire petition and substantial delay before a ruling on the merits of his exhausted claims.

The Court suggests that a prisoner who files a mixed habeas petition will have the option of amending or resubmitting his complaint after deleting the unexhausted claims. See *ante*, at 510, 520. To the extent that prisoners are permitted simply to strike unexhausted claims from a § 2254 petition and then proceed as if those claims had never been presented, I fail to understand what all the fuss is about. In that event, the Court's approach is virtually indistinguishable from that of the Court of Appeals, which directs the district court itself to dismiss unexhausted grounds for relief.

I fear, however, that prisoners who mistakenly submit mixed petitions may not be treated uniformly. A prisoner's opportunity to amend a § 2254 petition may depend on his awareness of the existence of that alternative or on a sympathetic district judge who informs him of the option and permits the amendment. See Fed. Rule Civ. Proc. 15(a). If the prisoner is required to refile the petition after striking the unexhausted claims, he may have to begin the process anew and thus encounter substantial delay before his com-

plaint again comes to the district court's attention. See STEVENS, J., *post*, at 546, n. 15.

Adopting a rule that will afford knowledgeable prisoners more favorable treatment is, I believe, antithetical to the purposes of the habeas writ. Instead of requiring a habeas petitioner to be familiar with the nuances of the exhaustion doctrine and the process of amending a complaint, I would simply permit the district court to dismiss unexhausted grounds for relief and consider exhausted claims on the merits.

III

Although I would affirm the Court of Appeals' ruling that the exhaustion doctrine requires dismissal of only the unexhausted claims in a mixed habeas petition, I would remand the case for reconsideration of the merits of respondent's constitutional arguments. As the Court notes, the District Court erred in considering both exhausted and unexhausted claims when ruling on Lundy's § 2254 petition. See *ante*, at 511–513. The Court of Appeals attempted to recharacterize the District Court's grant of relief as premised on only the exhausted claims and ignored the District Court's conclusion that the exhausted and unexhausted claims were interrelated. See App. 95–96.[8]

Even were the Court of Appeals' recharacterization accurate, that court affirmed the District Court on the ground that respondent's constitutional rights had been "seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial mis-

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[8] This Court implies approval of the District Court's finding of interrelatedness, see *ante*, at 519, but I am not convinced that the District Court's conclusion was compelled. Conceivably, habeas relief could be justified only on the basis of a determination that the cumulative impact of the four alleged errors so infected the trial as to violate respondent's due process rights. But Lundy's four claims, on their face, are distinct in terms of the factual allegations and legal conclusions on which they depend.

conduct." *Id.*, at 96. The court does not appear to have specified which allegations of prosecutorial misconduct it considered in reaching this conclusion, and the record does not reflect whether the court improperly took into account instances of purported misconduct that respondent has never challenged in state court. See *ante*, at 511–512, n. 3. This ambiguity is of some importance because the court's general statement does not indicate whether the court would have granted habeas relief on the confrontation claim alone, or whether its judgment is based on the combined effect of the limitation of cross-examination and the asserted prosecutorial misconduct.

I therefore would remand the case, directing that the courts below dismiss respondent's unexhausted claims and examine those that have been properly presented to the state courts in order to determine whether they are interrelated with the unexhausted grounds and, if not, whether they warrant collateral relief.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the opinion of the Court (Parts I, II, III–A, III–B, and IV, *ante*), but I do not join in the opinion of the plurality (Part III–C, *ante*). I agree with the Court's holding that the exhaustion requirement of 28 U. S. C. §§ 2254(b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Ante*, at 510. But I disagree with the plurality's view, in Part III–C, that a habeas petitioner must "risk forfeiting consideration of his unexhausted claims in federal court" if he "decides to proceed only with his exhausted claims and deliberately sets aside his

unexhausted claims" in the face of the district court's refusal to consider his "mixed" petition. *Ante*, at 520, 521. The issue of Rule 9(b)'s proper application to successive petitions brought as the result of our decision today is not before us—it was not among the questions presented by petitioner, nor was it briefed and argued by the parties. Therefore, the issue should not be addressed until we have a case presenting it. In any event, I disagree with the plurality's proposed disposition of the issue. In my view, Rule 9(b) cannot be read to permit dismissal of a subsequent petition under the circumstances described in the plurality's opinion.

I

The plurality recognizes, as it must, that in enacting Rule 9(b) Congress explicitly adopted the "abuse of the writ" standard announced in *Sanders* v. *United States*, 373 U. S. 1 (1963). *Ante*, at 521. The legislative history of Rule 9(b) illustrates the meaning of that standard. As transmitted by this Court to Congress, Rule 9(b) read as follows:

> "SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition is *not excusable*." H. R. Rep. No. 94–1471, p. 8 (1976) (emphasis added).

The interpretive gloss placed upon proposed Rule 9(b) by this Court's Advisory Committee on the Rules Governing § 2254 Cases in the United States District Courts was that:

> "With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:
>
> > ['']In either case, full consideration of the merits of the new application can be avoided only if there has

> been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> ['']Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.['']
>
> "373 U. S., at 17–18.
>
> "Subdivision (b) [of Rule 9] has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be *inexcusable*." Advisory Committee Note to Rule 9(b), 28 U. S. C., p. 273 (emphasis added).

But Congress did not believe that this Court's transmitted language, and the Advisory Committee Note explaining it, went far enough in protecting a state prisoner's right to gain habeas relief. In its Report on proposed Rule 9(b), the House Judiciary Committee stated that, in its view, "the 'not excusable' language [of the proposed Rule] created a new and undefined standard *that gave a judge too broad a discretion to dismiss a second or successive petition.*" H. R. Rep. No. 94–1471, *supra*, at 5 (emphasis added). The Judiciary Committee thus recommended that the words, "is not excusable," be replaced by the words, "constituted an abuse of the writ." *Id.*, at 5, 8. This change, the Committee believed, would bring Rule 9(b) "into conformity with existing law." *Id.*, at 5. It was in the Judiciary Committee's revised form—employing the "abusive" standard for dismissal—that Rule 9(b) became law.

II

It is plain that a proper construction of Rule 9(b) must be consistent with its legislative history. This necessarily entails an accurate interpretation of the *Sanders* standard, on which the Rule is based. It also requires consideration of

the explanatory language of the Advisory Committee, and Congress' subsequent strengthening amendment to the text of the Rule. But the plurality, entirely misreading *Sanders*, embraces an interpretation of the Rule 9(b) standard that is manifestly incorrect, and patently inconsistent with the Advisory Committee's exposition and Congress' expressed expectations.

The relevant language from *Sanders*, quoted by the plurality, *ante*, at 521, is as follows:

> "[I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." 373 U. S., at 18.

From this language the plurality concludes: "Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Ante*, at 521.

The plurality's conclusion simply distorts the meaning of the quoted language. *Sanders* was plainly concerned with "a prisoner *deliberately* withhold[ing] one of two grounds" for relief "in the hope of being granted two hearings rather than one or for some other such reason." *Sanders* also notes that waiver might be inferred where "the prisoner *deliberately abandons* one of his grounds at the first hearing." Finally, *Sanders* states that dismissal is appropriate either when the court is faced with "*needless* piecemeal litigation" or with

"collateral proceedings *whose only purpose is to vex, harass, or delay.*" Thus *Sanders* made it crystal clear that dismissal for "abuse of the writ" is *only* appropriate when a prisoner was free to include all of his claims in his first petition, but *knowingly* and *deliberately* chose not to do so in order to get more than "one bite at the apple." The plurality's interpretation obviously would allow dismissal in a much broader class of cases than *Sanders* permits.

This Court is free, of course, to overrule *Sanders*. But even that course would not support the plurality's conclusion. For Congress incorporated the "judge-made" *Sanders* principle into positive law when it enacted Rule 9(b). That principle, as explained by the Advisory Committee's Note, *at least* "requires that the [habeas] judge find petitioner's failure to have asserted the new grounds in the prior petition to be *inexcusable.*" Indeed, Congress went beyond the Advisory Committee's language, believing that the "inexcusable" standard made the dismissal of successive petitions too easy. Congress instead required the habeas court to find a successive petitioner's behavior "abusive" before the drastic remedy of dismissal could be employed. That is how Congress understood the *Sanders* principle, and the plurality is simply not free to ignore that understanding, because it is now embedded in the statutory language of Rule 9(b).

III

The plurality's attempt to apply its interpretation of *Sanders* only reinforces my conclusion that the plurality has misread that case. The plurality hypothesizes a prisoner who presents a "mixed" habeas petition that is dismissed without any examination of its claims on the merits, and who, after his exhausted claims are rejected, presents a second petition containing the previously unexhausted claims. The plurality then equates the position of such a prisoner with that of the "abusive" habeas petitioner discussed in the *Sanders* passage. But in my view, the position of the plurality's hypo-

thetical prisoner is obviously very different. If the habeas court refuses to entertain a "mixed" petition—as it must under the plurality's view—then the prisoner's "abandonment" of his unexhausted claims cannot in any meaningful sense be termed "deliberate," as that term was used in *Sanders*. There can be no "abandonment" when the prisoner *is not permitted to proceed* with his unexhausted claims. If he is to gain "speedy federal relief on his claims"—to which he is entitled, as the Court recognizes with its citation to *Braden*, *ante*, at 520—then the prisoner *must* proceed *only* with his exhausted claims. Thus the prisoner in such a case cannot be said to possess a "purpose to vex, harass, or delay," nor any "hope of being granted two hearings rather than one."

Moreover, the plurality's suggested treatment of its hypothetical prisoner flatly contradicts the Rule 9(b) standard as explained by the Advisory Committee, and *a fortiori* contradicts that standard as strengthened and extended by Congress. After the prisoner's first, "mixed" petition has been mandatorily dismissed without any scrutiny, after his exhausted claims have been rejected, and after he has then presented his previously unexhausted claims in a second petition, there is simply no way in which a habeas court could "find petitioner's failure to have asserted the new grounds in the prior petition to be *inexcusable*." On the contrary, petitioner's failure to have asserted the "new," previously unexhausted claims in the prior petition could only be found to have been *required by the habeas court itself*, as a condition for its consideration of the exhausted claims. If the plurality's interpretation of Rule 9(b) cannot satisfy the Advisory Committee's "inexcusable" standard, then it falls even further short of the higher, "abusive" standard eventually adopted by Congress.

IV

I conclude that when a prisoner's original, "mixed" habeas petition is dismissed without any examination of its claims on the merits, and when the prisoner later brings a second peti-

tion based on the previously unexhausted claims that had earlier been refused a hearing, then the remedy of dismissal for "abuse of the writ" cannot be employed against that second petition, absent unusual factual circumstances truly suggesting abuse. This conclusion is to my mind inescapably compelled not only by *Sanders*, but also by the Advisory Committee explanation of the Rule, and by Congress' subsequent incorporation of the higher, "abusive" standard into the Rule. The plurality's conclusion, in contrast, has no support whatever from any of these sources. Nor, of course, does it have the support of a majority of the Court.*

JUSTICE WHITE, concurring in part and dissenting in part.

I agree with most of JUSTICE BRENNAN's opinion; but like JUSTICE BLACKMUN, I would not require a "mixed" petition to be dismissed in its entirety, with leave to resubmit the exhausted claims. The trial judge cannot rule on the unexhausted issues and should dismiss them. But he should rule on the exhausted claims unless they are intertwined with those he must dismiss or unless the habeas petitioner prefers to have his entire petition dismissed. In any event, if the judge rules on those issues that are ripe and dismisses those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief.

JUSTICE STEVENS, dissenting.

This case raises important questions about the authority of federal judges. In my opinion the District Judge properly exercised his statutory duty to consider the merits of the claims advanced by respondent that previously had been rejected by the Tennessee courts. The District Judge ex-

*JUSTICE WHITE rejects the plurality's conclusion in Part III–C, *ante*, see *post*, this page, as does JUSTICE BLACKMUN, see *ante*, at 529. JUSTICE STEVENS does not reach this issue.

ceeded, however, what I regard as proper restraints on the scope of collateral review of state-court judgments. Ironically, instead of correcting his error, the Court today fashions a new rule of law that will merely delay the final disposition of this case and, as JUSTICE BLACKMUN demonstrates, impose unnecessary burdens on both state and federal judges.

An adequate explanation of my disapproval of the Court's adventure in unnecessary lawmaking requires some reference to the facts of this case and to my conception of the proper role of the writ of habeas corpus in the administration of justice in the United States.

I

Respondent was convicted in state court of rape and a crime against nature. The testimony of the victim was corroborated by another eyewitness who was present during the entire sadistic episode. The evidence of guilt is not merely sufficient; it is convincing. As is often the case in emotional, controverted, adversary proceedings, trial error occurred. Two of those errors—a remark by the prosecutor[1] and a limitation on defense counsel's cross-examination

[1] At trial, the prosecutor questioned the eyewitness concerning "difficulties" that her sister had encountered while dating the respondent. In response to an objection to the materiality of the inquiry, the prosecutor explained, in the presence of the jury, that "I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to." App. 17. The trial court excused the jury to determine the admissibility of the evidence; it ruled that the collateral inquiry was "too far removed to be material and relevant." *Id.*, at 22. After the jury had returned, the court instructed it to disregard the prosecutor's remarks.

Respondent objected to the prosecutor's statement on direct appeal. After reciting the challenged events, the Tennessee Court of Criminal Appeals recognized that "State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error." *Lundy*

of the victim[2]—were recognized by the Tennessee Court of Criminal Appeals, but held to be harmless in the context of the entire case. Because the state appellate court considered and rejected these two errors as a basis for setting aside his conviction, respondent has exhausted his state remedies with respect to these two claims.

In his application in federal court for a writ of habeas corpus, respondent alleged that these trial errors violated his constitutional rights to confront the witnesses against him and to obtain a fair trial. In his petition, respondent also al-

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v. *State*, 521 S. W. 2d 591, 595 (1974). The court ruled, however, that "in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt." *Ibid.*

[2] Defense counsel cross-examined the victim concerning her prior sexual activity. When the victim responded that she could not remember certain activity, counsel attempted to question her concerning statements that she apparently had made in an earlier interview with defense counsel. The prosecutor objected to this questioning on the ground that, during the interview, defense counsel had only disclosed that he was a lawyer involved in the case, and had not told the victim that he was counsel for the defendant. The trial court sustained the objection. The court permitted defense counsel to continue to question the victim concerning her prior sexual activity, but refused to permit him to refer to his earlier conversation with the victim. App. 13.

On appeal, respondent objected to the trial court's ruling, and also claimed that the prosecutor had prejudiced him by suggesting, before the jury, that defense counsel had acted unethically in not specifically identifying his involvement in the case. The state appellate court rejected respondent's claims, stating:

"We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case." 521 S. W. 2d, at 596.

leged that the prosecutor had impermissibly commented on his failure to testify[3] and that the trial judge had improperly instructed the jury that "every witness is presumed to swear the truth."[4] Because these two additional claims had not been presented to the Tennessee Court of Criminal Appeals, the Federal District Judge concluded that he could "not consider them in the constitutional framework." App. 88. He added, however, that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally."[5]

In considering the significance of respondent's two exhausted claims, the District Court thus evaluated them in the context of the entire trial record. That is precisely what the Tennessee Court of Criminal Appeals did in arriving at its conclusion that these claims, identified as error, were not sufficiently prejudicial to justify reversing the conviction and ordering a retrial.[6] In considering whether the error in these two exhausted claims was sufficient to justify a grant of ha-

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[3] In his closing argument, the prosecutor stated:

"The only story we've heard about what happened from about 8:15 of the night of March 16th until about four o'clock in the morning of March 17th came from the State's witnesses." App. 27.

[4] The judge instructed the jury:

"The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth." *Id.*, at 31.

[5] The court stated in full:

"Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally." *Id.*, at 88.

[6] The appellate court found the prosecutor's improper remark to have been harmless "in the context of the undisputed facts of this case"; the limitation of cross-examination harmless "in the context of this case." See nn. 1, 2, *supra*.

beas corpus relief, the federal court—like the state court—had a duty to look at the context in which the error occurred to determine whether it was either aggravated or mitigated by other aspects of the proceeding.[7] The state court and the federal court formed differing judgments based on that broad review. I happen to share the appraisal of the state court on the merits, but I believe that the procedure followed by the federal court was entirely correct.

The Court holds, however, that the District Court committed two procedural errors. "Unquestionably," according to the Court, it was wrong for the District Court to consider the portions of the trial record described in the unexhausted claims in evaluating those claims that had been exhausted. *Ante*, at 519. More fundamentally, according to the Court, it was wrong for the District Court even to consider the merits of the *exhausted* claims because the prisoner had included unexhausted claims in his pleadings. Both of the Court's holdings are unsatisfactory for the same basic reason: the Court assumes that the character of all claims alleged in habeas corpus petitions is the same. Under the Court's analysis, *any* unexhausted claim asserted in a habeas corpus petition—no matter how frivolous—is sufficient to command the district judge to postpone relief on a meritorious exhausted claim, no matter how obvious and outrageous the constitutional violation may be.

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[7] "Each case must be scrutinized on its particular facts to determine whether a trial error is harmless error or prejudicial error when viewed in the light of the trial record as a whole, not whether each isolated incident viewed by itself constitutes reversible error." *United States* v. *Grunberger*, 431 F. 2d 1062, 1069 (CA2 1970). Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240 ("Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice").

In my opinion claims of constitutional error are not fungible. There are at least four types. The one most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. In my opinion, each of the four claims asserted in this case falls in that category. The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. *Chapman* v. *California*, 386 U. S. 18, 22; *Harrington* v. *California*, 395 U. S. 250, 254. A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465.[8] The fourth category includes those er-

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[8] In my opinion a claim generally belongs in this category if the purpose and significance of the constitutional rule is such that the Court enforces it prospectively but not retroactively, cf. *Linkletter* v. *Walker*, 381 U. S. 618, or if the probable significance of the claim is belied by the fact that otherwise competent defense counsel did not raise a timely objection, cf. *Estelle* v. *Williams*, 425 U. S. 501, 508, n. 3; *Wainwright* v. *Sykes*, 433 U. S. 72, 95–97 (STEVENS, J., concurring).

I recognize the apparent incongruity in suggesting that there is a class of constitutional error—not constitutionally harmless—that does not render a criminal proceeding fundamentally unfair. It may be argued, with considerable force, that a rule of procedure that is not necessary to ensure fundamental fairness is not worthy of constitutional status. The fact that such a category of constitutional error exists, however, is demonstrated by the jurisprudence of this Court concerning the retroactive application of newly recognized constitutional rights. See, *e. g.*, *Linkletter* v. *Walker*, *supra* (exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643, not to be applied retroactively); *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (rule of *Griffin* v. *California*, 380 U. S. 609, forbidding adverse comment on the defendant's failure to testify); *Johnson* v. *New Jersey*, 384 U. S. 719 (guidelines for custodial interrogation established in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436); *Stovall* v. *Denno*, 388 U. S. 293 (rules requiring presence of counsel at pretrial identification

rors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained. This category cannot be defined precisely; concepts of "fundamental fairness" are not frozen in time. But the kind of error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence;[9] that the prosecutor knowingly made use of perjured testimony;[10] or that the conviction was based on a confession extorted from the defendant by brutal methods.[11] Errors of this kind justify collateral relief no matter how long a judgment may have been final[12] and even though they may not have been preserved properly in the original trial.[13]

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procedures); *DeStefano* v. *Woods*, 392 U. S. 631 (right to trial by jury in serious criminal cases and serious criminal contempts); *Michigan* v. *Payne*, 412 U. S. 47 (rule of *North Carolina* v. *Pearce*, 395 U. S. 711, requiring objective evidence on the record to justify greater sentence imposed after successful appeal). In ruling that a constitutional principle is not to be applied retroactively, the Court implicitly suggests that the right is not necessary to ensure the integrity of the underlying judgment; the Court certainly would not allow claims of such magnitude to remain unremedied.

It is possible that each of these decisions involves a general constitutional principle that—although not necessary to ensure fundamental fairness at trial—is typically vindicated through trial remedies. See, *e. g.*, *Linkletter* v. *Walker*, *supra*, at 639; *Tehan* v. *United States ex rel. Shott*, *supra*, at 415; but see *Stovall* v. *Denno*, *supra*, at 298; *DeStefano* v. *Woods*, *supra*, at 633. Whatever the correct explanation of these decisions may be, they demonstrate that the Court's constitutional jurisprudence has expanded beyond the concept of ensuring fundamental fairness to the accused. My point here is simply that this expansion need not, and should not, be applied to collateral attacks on final judgments.

[9] *Moore* v. *Dempsey*, 261 U. S. 86.

[10] *Mooney* v. *Holohan*, 294 U. S. 103.

[11] See *Brown* v. *Mississippi*, 297 U. S. 278 (direct appeal).

[12] See, *e. g.*, *DeMeerleer* v. *Michigan*, 329 U. S. 663; *Marino* v. *Ragen*, 332 U. S. 561.

[13] See *Wainwright* v. *Sykes*, *supra*, at 95–96, n. 3 (STEVENS, J., concurring). Justice Black noted in his opinion for the Court in *Chapman* v.

In this case, I think it is clear that neither the exhausted claims nor the unexhausted claims describe any error demonstrating that respondent's trial was fundamentally unfair. Since his lawyer found insufficient merit in the two unexhausted claims to object to the error at trial or to raise the claims on direct appeal,[14] I would expect that the Tennessee courts will consider them to have been waived as a matter of state law; thereafter, under the teaching of cases such as *Wainwright* v. *Sykes*, 433 U. S. 72, they undoubtedly will not support federal relief. This case is thus destined to return to the Federal District Court and the Court of Appeals where, it is safe to predict, those courts will once again come to the conclusion that the writ should issue. The additional procedure that the Court requires before considering the merits will be totally unproductive.

If my appraisal of respondent's exhausted claims is incorrect—if the trial actually was fundamentally unfair to the respondent—postponing relief until another round of review in the state and federal judicial systems has been completed is truly outrageous. The unnecessary delay will make it more difficult for the prosecutor to obtain a conviction on retrial if respondent is in fact guilty; if he is innocent, requiring him to languish in jail because he made a pleading error is callous indeed.

There are some situations in which a district judge should refuse to entertain a mixed petition until all of the prisoner's claims have been exhausted. If the unexhausted claim appears to involve error of the most serious kind and if it is reasonably clear that the exhausted claims do not, addressing the merits of the exhausted claims will merely delay the ulti-

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California, 386 U. S. 18, 23, that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." In support of this statement he cited *Payne* v. *Arkansas*, 356 U. S. 560 (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (right to counsel at trial); *Tumey* v. *Ohio*, 273 U. S. 510 (impartial judge).

[14] See App. 27, 35–38, 75, 88.

mate disposition of the case. Or if an evidentiary hearing is necessary to decide the merits of both the exhausted and unexhausted claims, a procedure that enables all fact questions to be resolved in the same hearing should be followed. I therefore would allow district judges to exercise discretion to determine whether the presence of an unexhausted claim in a habeas corpus application makes it inappropriate to consider the merits of a properly pleaded exhausted claim. The inflexible, mechanical rule the Court adopts today arbitrarily denies district judges the kind of authority they need to administer their calendars effectively.[15]

II

In recent years federal judges at times have lost sight of the true office of the great writ of habeas corpus. It is quite unlike the common-law writ of error that enabled a higher court to correct errors committed by a *nisi prius* tribunal in the trial of civil or criminal cases by ordering further proceedings whenever trial error was detected. The writ of habeas corpus is a fundamental guarantee of liberty.[16]

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[15] I do not believe that the Court's "total exhaustion" requirement is simply a harmless rule of procedure whose prospective application will do nothing more than require district judges to instruct state prisoners to redraft their pleadings with black magic markers. If that is the full import of the decision today, the Court disparages federal judges; the Court implies that a federal judge will not obey the statutory command to grant relief on only exhausted claims if an unexhausted claim lurks somewhere in the prisoner's pleadings. More importantly, the unnecessary delay that the Court causes in the disposition of this case will not be limited to the instant proceeding; a similar outcome will follow every time an appellate court disagrees with a district court's judgment that a petition contains only exhausted claims. Given the ambiguity of many habeas corpus applications filed by *pro se* applicants, such differing appraisals should not be uncommon.

[16] "The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean

The fact that federal judges have at times construed their power to issue writs of habeas corpus as though it were tantamount to the authority of an appellate court considering a direct appeal from a trial court judgment has had two unfortunate consequences. First, it has encouraged prisoners to file an ever-increasing volume of federal applications that often amount to little more than a request for further review of asserted grounds for reversal that already have been adequately considered and rejected on direct review. Second, it has led this Court into the business of creating special procedural rules for dealing with this flood of litigation. The doctrine of nonretroactivity, the emerging "cause and prejudice" doctrine, and today's "total exhaustion" rule are examples of judicial lawmaking that might well have been avoided by confining the availability of habeas corpus relief to cases that truly involve fundamental unfairness.

When that high standard is met, there should be no question about the retroactivity of the constitutional rule being enforced. Nor do I believe there is any need to fashion definitions of "cause" and "prejudice" to determine whether an error that was not preserved at trial or on direct appeal is subject to review in a collateral federal proceeding.[17] The

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that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. 'The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.' Mr. Chief Justice Chase, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments." *Brown* v. *Allen*, 344 U. S. 443, 512 (opinion of Frankfurter, J.).

[17] The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the state-court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer. Thus, in searching for fundamental unfairness in a trial record, I attach

availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim.[18]

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great importance to the character of the objection, if any, asserted by the defendant's counsel. But if such error is manifest, I would not wrestle with terms such as "cause" and "prejudice" to determine whether habeas corpus relief should be granted. Thus, in *Wainwright* v. *Sykes*, 433 U. S., at 94, I wrote separately because a straightforward analysis of the record revealed the lack of merit in the prisoner's claim. Had the record disclosed an error sufficiently serious to justify habeas corpus relief, I would not have joined a holding that an error of that character had been waived by a procedural default. As I pointed out in *Wainwright*, *supra*, at 95, even an express waiver by the defendant may be excused if the constitutional issue is sufficiently grave. That actually was the case in *Fay* v. *Noia*, 372 U. S. 391. There the Court held that habeas corpus relief was available notwithstanding the client's participation in the waiver decision, and notwithstanding the fact that the decision was made on a tactical basis. See 433 U. S., at 95, n. 3.

[18] It may be argued that limiting habeas corpus relief to claims involving the fundamental fairness of the underlying proceeding is no less "lawmaking" than engrafting a rule that a federal court may not entertain a habeas corpus application containing both exhausted and unexhausted claims. See *Stone* v. *Powell*, 428 U. S. 465, 522, 529 (BRENNAN, J., dissenting). It is interesting to note, however, that the Court unanimously has held that an error of law does not provide a basis for collateral attack on a federal judgment under 28 U. S. C. § 2255 unless the error constituted "'a fundamental defect which inherently results in a complete miscarriage of justice,'" *United States* v. *Timmreck*, 441 U. S. 780, 783 (quoting *Hill* v. *United States*, 368 U. S. 424, 428); see also *United States* v. *Addonizio*, 442 U. S. 178, 185, even though the statute authorizes a federal prisoner to petition for relief whenever he is "in custody under sentence . . . imposed in violation of the Constitution or *laws* of the United States . . . ." 28 U. S. C. § 2255 (emphasis added). See *Davis* v. *United States*, 417 U. S. 333, 343–344.

Although the two situations are not identical, I believe that the reasons that persuaded the Court to limit errors of law cognizable under 28 U. S. C. § 2255 also apply to constitutional errors under 28 U. S. C. § 2254. Section 2254 was enacted in 1948 as part of the revision and recodification of Title 28 of the United States Code. The Reviser's Notes concerning § 2254 provide simply that "[t]his new section is declaratory of existing law

The "total exhaustion" rule the Court crafts today demeans the high office of the great writ. Perhaps a rule of this kind would be an appropriate response to a flood of litigation requesting review of minor disputes. An assumption that most of these petitions are groundless might be thought to justify technical pleading requirements that would provide a mechanism for reducing the sheer number of cases in which the merits must be considered. But the Court's experience has taught us not only that most of these petitions lack merit, but also that there are cases in which serious injustice must

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as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, . . . 321 U. S. 114 . . .)." H. R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947). In 1948, constitutional rules of procedure were relatively few, those that did exist generally were not applicable to the States, and the scope of habeas corpus relief was narrow. As late as the decision in *Palko* v. *Connecticut*, 302 U. S. 319, 328, constitutional claims applicable to the States were limited to those hardships "so acute and shocking that our polity will not endure it"; to those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " *Ibid.* (quoting *Hebert* v. *Louisiana*, 272 U. S. 312, 316). In *Schechtman* v. *Foster*, 172 F. 2d 339, 341 (CA2 1949), cert. denied, 339 U. S. 924, Judge Learned Hand wrote for the court, in affirming a denial of a habeas corpus petition alleging intentional use of perjured testimony, that "[i]f the [state] judge who denied that [claim] did in fact consider the evidence as a whole, and if he decided that it was not, even prima facie, sufficient to make out a case of deliberate presentation by the prosecution of perjured testimony, [petitioner] was accorded the full measure of his constitutional rights. . . . [T]he District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony."

This Court has long since rejected these restrictive notions of the constitutional protections that are available to state criminal defendants. Nevertheless, the point remains that the law today is very different from what it was when the current habeas corpus statute was enacted in 1948. That statute was amended in 1966, but the amendments merely added to, and did not modify, the existing statutory language. Respected scholars may argue forcefully to the contrary, but in my opinion a limitation of habeas corpus relief to instances of fundamental unfairness is consistent with the intent of the Congress that enacted § 2254 in 1948.

be corrected by the issuance of the writ.[19] In such cases, the statutory requirement that adequate state remedies be exhausted must, of course, be honored. When a person's liberty is at stake, however, there surely is no justification for the creation of needless procedural hurdles.[20]

Procedural regularity is a matter of fundamental importance in the administration of justice. But procedural niceties that merely complicate and delay the resolution of disputes are another matter. In my opinion the federal habeas corpus statute should be construed to protect the former and, whenever possible, to avoid the latter.

I respectfully dissent.

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[19] "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others." *Brown* v. *Allen*, 344 U. S., at 498 (opinion of Frankfurter, J.).

[20] "[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley* v. *Municipal Court*, 411 U. S. 345, 350. Cf. *Marino* v. *Ragen*, 332 U. S., at 563–570 (Rutledge, J., concurring).

Syllabus

MARINE BANK *v.* WEAVER ET UX.

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

No. 80–1562. Argued January 11, 1982—Decided March 8, 1982

After respondents purchased a $50,000 certificate of deposit, with a 6-year maturity, from petitioner federally regulated bank, they pledged it to petitioner to guarantee a $65,000 loan made to a company that owed petitioner $33,000 for prior loans and was also overdrawn on its checking account. In consideration for guaranteeing the new loan, the company's owners entered into an agreement with respondents whereby respondents were to receive a share of the company's profits and other compensation. The new loan, rather than being used as working capital by the company as petitioner's officers allegedly told respondents it would, was applied to pay the company's overdue obligations to petitioner. Subsequently, the company became bankrupt, and petitioner disclosed its intention to claim the pledged certificate of deposit. Respondents then brought suit in Federal District Court, claiming that petitioner violated, *inter alia*, the antifraud provisions of § 10(b) of the Securities Exchange Act of 1934 (Act) by soliciting the loan guarantee while knowing, but not disclosing, the borrowing company's financial plight or petitioner's plans to repay itself from the guaranteed loan. The District Court granted summary judgment in petitioner's favor, holding that if a wrong occurred, it did not occur "in connection with the purchase or sale of any security" as required for liability under § 10(b). The Court of Appeals reversed, holding that it could reasonably be found that either the certificate of deposit or the agreement between respondents and the company's owners was a security.

Held: Neither the certificate of deposit nor the agreement in question is a security within the meaning of § 10(b). Pp. 555–561.

(a) While the definition of "security" in the Act is quite broad, Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud. Pp. 555–556.

(b) A certificate of deposit is not the functional equivalent of the withdrawable capital shares of a savings and loan association held to be securities in *Tcherepnin* v. *Knight*, 389 U. S. 332, nor is it similar to any other long-term debt obligation commonly found to be a security. The purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation as-

sumes the risk of the borrower's insolvency. Cf. *Teamsters* v. *Daniel*, 439 U. S. 551. Pp. 556–559.

(c) The agreement in question is not the type of instrument that comes to mind when the term "security" is used and does not fall within "the ordinary concept of a security." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, and *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, distinguished. The provision of the agreement giving respondents a share of the company's profits is not in itself sufficient to make the agreement a security. Pp. 559–560.

637 F. 2d 157, reversed and remanded.

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

Daniel L. R. Miller argued the cause for petitioner. With him on the brief was *Christine Hall McClure.*

Andrew J. Conner argued the cause and filed a brief for respondents.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether two instruments, a conventional certificate of deposit and a business agreement between two families, could be considered securities under the antifraud provisions of the federal securities laws.

I

Respondents, Sam and Alice Weaver, purchased a $50,000 certificate of deposit from petitioner Marine Bank on February 28, 1978. The certificate of deposit has a 6-year maturity, and it is insured by the Federal Deposit Insurance Cor-

*Briefs of *amici curiae* urging reversal were filed by *Acting Solicitor General Wallace, Stephen M. Shapiro, Ralph C. Ferrara, Frank L. Skillern, Jr.*, and *John E. Shockey* for the United States; and by *William H. Smith, Johanna M. Sabol*, and *Michael F. Crotty* for the American Bankers Association.

Leonard I. Schreiber filed a brief for Myrna Ayala as *amicus curiae* urging affirmance.

poration.[1] The Weavers subsequently pledged the certificate of deposit to Marine Bank on March 17, 1978, to guarantee a $65,000 loan made by the bank to Columbus Packing Co. Columbus was a wholesale slaughterhouse and retail meat market which owed the bank $33,000 at that time for prior loans and was also substantially overdrawn on its checking account with the bank.

In consideration for guaranteeing the bank's new loan, Columbus' owners, Raymond and Barbara Piccirillo, entered into an agreement with the Weavers. Under the terms of the agreement, the Weavers were to receive 50% of Columbus' net profits and $100 per month as long as they guaranteed the loan. It was also agreed that the Weavers could use Columbus' barn and pasture at the discretion of the Piccirillos, and that they had the right to veto future borrowing by Columbus.

The Weavers allege that bank officers told them Columbus would use the $65,000 loan as working capital but instead it was immediately applied to pay Columbus' overdue obligations. The bank kept approximately $42,800 to satisfy its prior loans and Columbus' overdrawn checking account. All but $3,800 of the remainder was disbursed to pay overdue taxes and to satisfy other creditors; the bank then refused to permit Columbus to overdraw its checking account. Columbus became bankrupt four months later. Although the bank had not yet resorted to the Weavers' certificate of deposit at the time this litigation commenced, it acknowledged that its

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[1] The certificate of deposit pays 7½% interest and provides that, if the bank permits early withdrawal, the depositor will earn interest at the bank's current savings passbook rate on the amount withdrawn, except that no interest will be paid for the three months prior to withdrawal. When the Weavers purchased the certificate of deposit, it could only be insured up to $40,000 by the FDIC. The ceiling on insured deposits is now $100,000. Act of Mar. 31, 1980, Pub. L. 96–221, 94 Stat. 147, § 308(b)(1), 12 U. S. C. § 1724(b) (1976 ed., Supp. IV).

other security was inadequate and that it intended to claim the pledged certificate of deposit.

These allegations were asserted in a complaint filed in the Federal District Court for the Western District of Pennsylvania in support of a claim that the bank violated § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b). The Weavers also pleaded pendent claims for violations of the Pennsylvania Securities Act and for common-law fraud by the bank. The Weavers alleged that bank officers actively solicited them to guarantee the $65,000 loan to Columbus while knowing, but not disclosing, Columbus' financial plight or the bank's plans to repay itself from the new loan guaranteed by the Weavers' pledged certificate of deposit. Had they known of Columbus' precarious financial condition and the bank's plans, the Weavers allege they would not have guaranteed the loan and pledged the certificate of deposit. The District Court granted summary judgment in favor of the bank. It concluded that if a wrong occurred it did not take place "in connection with the purchase or sale of any security," as required for liability under § 10(b). The District Court declined to exercise pendent jurisdiction over the state-law claims.

The Court of Appeals for the Third Circuit reversed. 637 F. 2d 157 (1980). A divided court held that a finder of fact could reasonably conclude that either the certificate of deposit or the agreement between the Weavers and the Piccirillos was a security.[2] It therefore remanded for further consideration of the claim based on the federal securities

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[2] The Court of Appeals also concluded that the pledge of a security is a sale, an issue on which the Federal Circuits were split. We held in *Rubin* v. *United States*, 449 U. S. 424 (1981), that a pledge of stock is equivalent to a sale for the purposes of the antifraud provisions of the federal securities laws. Accordingly, in determining whether fraud may have occurred here "in connection with the purchase or sale of any security," the only issue now before the Court is whether a *security* was involved.

laws. The Court of Appeals also reversed the District Court's dismissal of the pendent state-law claims.

We granted certiorari, 452 U. S. 904 (1981), and we reverse. We hold that neither the certificate of deposit nor the agreement between the Weavers and the Piccirillos is a security under the antifraud provisions of the federal securities laws. We remand the case to the Court of Appeals to determine whether the pendent state claims should now be entertained.

II

The definition of "security" in the Securities Exchange Act of 1934[3] is quite broad. The Act was adopted to restore investors' confidence in the financial markets,[4] and the term "security" was meant to include "the many types of instru-

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[3] Section 3(a)(10) of the 1934 Act, as set forth in 15 U. S. C. § 78c(a)(10), provides:

"(a) . . . When used in this chapter, unless the context otherwise requires—

. . . . . .

"(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity is likewise limited."

We have consistently held that the definition of "security" in the 1934 Act is essentially the same as the definition of "security" in § 2(1) of the Securities Act of 1933, 15 U. S. C. § 77(b)(1). *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 847, n. 12 (1975).

[4] Fitzgibbon, What is a Security? A Redefinition Based on Eligibility to Participate in the Financial Markets, 64 Minn. L. Rev. 893, 912–918 (1980).

ments that in our commercial world fall within the ordinary concept of a security." H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933); quoted in *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 847–848 (1975). The statutory definition excludes only currency and notes with a maturity of less than nine months. It includes ordinary stocks and bonds, along with the "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits . . . ." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 299 (1946). Thus, the coverage of the antifraud provisions of the securities laws is not limited to instruments traded at securities exchanges and over-the-counter markets, but extends to uncommon and irregular instruments. *Superintendent of Insurance of New York* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 10 (1971); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 351 (1943). We have repeatedly held that the test "'is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.'" *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202, 211 (1967), quoting *SEC* v. *C. M. Joiner Leasing Corp.*, *supra*, at 352–353.

The broad statutory definition is preceded, however, by the statement that the terms mentioned are not to be considered securities if "the context otherwise requires . . . ." Moreover, we are satisfied that Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud. *Great Western Bank & Trust* v. *Kotz*, 532 F. 2d 1252, 1253 (CA9 1976); *Bellah* v. *First National Bank*, 495 F. 2d 1109, 1114 (CA5 1974).

III

The Court of Appeals concluded that the certificate of deposit purchased by the Weavers might be a security. Examining the statutory definition, n. 3, *supra*, the court correctly

noted that the certificate of deposit is not expressly excluded from the definition since it is not currency and it has a maturity exceeding nine months.[5] It concluded, however, that the certificate of deposit was the functional equivalent of the withdrawable capital shares of a savings and loan association held to be securities in *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967). The court also reasoned that, from an investor's standpoint, a certificate of deposit is no different from any other long-term debt obligation.[6] Unless distinguishing features were found on remand, the court concluded that the certificate of deposit should be held to be a security.

Tcherepnin is not controlling. The withdrawable capital shares found there to be securities did not pay a fixed rate of interest; instead, purchasers received dividends based on the association's profits. Purchasers also received voting rights. In short, the withdrawable capital shares in *Tcherepnin* were much more like ordinary shares of stock and "the ordinary concept of a security," *supra*, at 556, than a certificate of deposit.

The Court of Appeals' also concluded that a certificate of deposit is similar to any other long-term debt obligation commonly found to be a security. In our view, however, there is an important difference between a bank certificate of deposit

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[5] The definition of a "security" in the 1934 Act, n. 3, *supra*, includes the term, "certificate of deposit, for a security." However, this term does not refer to certificates of deposit such as the Weavers purchased. Instead, "certificate of deposit, for a security" refers to instruments issued by protective committees in the course of corporate reorganizations. *Canadian Imperial Bank of Commerce* v. *Fingland*, 615 F. 2d 465, 468 (CA7 1980).

[6] In addition, the Court of Appeals noted that the Securities and Exchange Commission had taken the position that certificates of deposit are securities. However, the SEC has filed a brief as *amicus curiae* in this case, jointly with the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Office of the Comptroller of the Currency, which argues that the Weavers' certificate of deposit is not a security.

and other long-term debt obligations. This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry.[7] Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated.[8] In addition, deposits are insured by the Federal Deposit Insurance Corporation. Since its formation in 1933, nearly all depositors in failing banks insured by the FDIC have received payment in full, even payment for the portions of their deposits above the amount insured. 1980 Annual Report of the Federal Deposit Insurance Corporation 18–21 (1981).

We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long-term debt obligations. The Court of Appeals failed to give appropriate weight to the important fact that the purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency. The definition of "security" in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the con-

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[7] In *Teamsters* v. *Daniel*, 439 U. S. 551 (1979), we held that a noncontributory, compulsory pension plan was not a security. One of our reasons for our holding in *Daniel* was that the pension plan was regulated by the Employee Retirement Income Security Act of 1974 (ERISA): "The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans." *Id.*, at 569–570. Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirements of the federal securities laws as well.

[8] See, *e. g.*, 12 U. S. C. § 461(b) (1976 ed., Supp. IV) (reserve requirements); 12 U. S. C. §§ 161, 324, and 1817 (1976 ed. and Supp. IV) (reporting requirements); 12 U. S. C. §§ 481, 483, and 1820(b) (1976 ed. and Supp. IV) (inspection requirements); 12 CFR §§ 217.6 and 329.8 (1981) (advertising).

text otherwise requires. It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by the Weavers is not a security.[9]

IV

The Court of Appeals also held that a finder of fact could conclude that the separate agreement between the Weavers and the Piccirillos is a security. Examining the statutory language, n. 3, *supra*, the court found that the agreement might be a "certificate of interest or participation in any profit-sharing agreement" or an "investment contract." It stressed that the agreement gave the Weavers a share in the profits of the slaughterhouse which would result from the efforts of the Piccirillos. Accordingly, in that court's view, the agreement fell within the definition of "investment contract" stated in *Howey*, because "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U. S., at 301.

Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world, but the agreement between the Weavers and the Piccirillos is not the type of instrument that comes to mind when the term "security" is used and does not fall within "the ordinary concept of a security." *Supra*, at 556. The unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors, not a private transaction as in this case. In *Howey*, for example, 42 persons purchased interests in a citrus grove during a 4-month period. 328 U. S., at 295. In

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[9] We reject respondents' argument that the certificate of deposit was somehow transformed into a security when it was pledged, even though it was not a security when purchased.

C. M. Joiner Leasing, offers to sell oil leases were sent to over 1,000 prospects. 320 U. S., at 346. In *C. M. Joiner Leasing*, we noted that a security is an instrument in which there is "common trading." *Id.*, at 351. The instruments involved in *C. M. Joiner Leasing* and *Howey* had equivalent values to most persons and could have been traded publicly.

Here, in contrast, the Piccirillos distributed no prospectus to the Weavers or to other potential investors, and the unique agreement they negotiated was not designed to be traded publicly. The provision that the Weavers could use the barn and pastures of the slaughterhouse at the discretion of the Piccirillos underscores the unique character of the transaction. Similarly, the provision that the Weavers could veto future loans gave them a measure of control over the operation of the slaughterhouse not characteristic of a security. Although the agreement gave the Weavers a share of the Piccirillos' profits, if any, that provision alone is not sufficient to make that agreement a security. Accordingly, we hold that this unique agreement, negotiated one-on-one by the parties, is not a security.[10]

V

Whatever may be the consequences of these transactions, they did not occur in connection with the purchase or sale of "securities."[11] The Weavers allege that the bank manipulated them so that they would suffer the loss the bank would

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[10] Cf. *Great Western Bank & Trust* v. *Kotz*, 532 F. 2d 1252, 1260–1262 (CA9 1976) (Wright, J., concurring) (unsecured note, the terms of which were negotiated face-to-face, given to a bank in return for a business loan, is not a security).

[11] It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a "security" as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.

have borne from the failure of the Columbus Packing Co. Their pendent state-law claims against the bank are not before the Court since the Court of Appeals did not treat the issue of those claims. Accordingly, the case is remanded for consideration of whether the District Court should now entertain the pendent claims.

Reversed and remanded.

UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS ET AL. *v.* ROBINSON ET AL.

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

No. 81–61. Argued January 13, 1982—Decided March 8, 1982

A 1974 collective-bargaining agreement between the United Mine Workers of America and the Bituminous Coal Operators' Association increased health benefits, payable out of a trust fund financed by contributions from the operators, for widows of coal miners who died prior to the effective date of the agreement and who were receiving pensions when they died, but did not increase such benefits for widows of miners who died prior to the effective date and were still working at the time of death even though they were eligible for pensions. Respondents, widows of miners who died in 1967 and 1971, respectively, and were eligible for pensions but were still working at the time of their deaths, brought a class action in Federal District Court against the trustees of the fund, alleging that the requirement that a miner be receiving a pension at the time of his death in order to make his widow eligible for the increased health benefits had no rational relationship to the purposes of the trust fund and therefore was illegal under § 302 of the Labor Management Relations Act. The District Court denied relief. The Court of Appeals reversed, holding that § 302(c)(5), which requires jointly administered pension trusts to be maintained "for the sole and exclusive benefit of employees . . . and their families and dependents," means that eligibility rules fixed by a collective-bargaining agreement must meet a reasonableness standard, and that in this case the trustees were unable to produce an acceptable explanation for the discrimination between widows of pensioners and widows of pension-eligible miners.

Held: Section 302(c)(5) does not authorize federal courts to review for reasonableness the provisions of a collective-bargaining agreement, such as the provisions in question, allocating health benefits among potential beneficiaries of an employee benefit trust fund. Pp. 570–576.

(a) Section 302(c)(5)'s language embodies no reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. P. 570.

(b) This reading is amply supported by the legislative history, which indicates that § 302(c)(5) was meant to protect employees from the risk

that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to union leaders' private benefit. Pp. 570–572.

(c) Such interpretation is also supported by § 302(c)(5)'s other requirements prescribing the conditions that must be satisfied to exempt employer contributions to pension funds from a criminal sanction. P. 572.

(d) Absent conflict with federal law, the trustees here breached no fiduciary duties in administering the trust fund in question in accordance with the 1974 collective-bargaining agreement. Pp. 573–574.

(e) When neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract. Pp. 574–576.

205 U. S. App. D. C. 330, 640 F. 2d 416, reversed.

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

E. Calvin Golumbic argued the cause for petitioners. With him on the briefs was *William F. Hanrahan.*

Larry F. Sword argued the cause for respondents. With him on the brief was *John M. Rosenberg.**

JUSTICE STEVENS delivered the opinion of the Court.

This case involves a discrimination between two classes of widows of coal miners who died prior to December 6, 1974—those whose husbands were receiving pensions when they died and those whose husbands were still working although they were eligible for pensions. The 1974 collective-bargaining agreement between the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc., increased the health benefits for widows in the former class but

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*Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Laurence Gold, Julia Penny Clark,* and *George Kaufmann* for the AFL–CIO; and by *Charles P. O'Connor* and *James H. Lengel* for the Bituminous Coal Operators' Association, Inc.

Gill Deford, Neal S. Dudovitz, and *Bruce K. Miller* filed a brief for the National Black Lung Association as *amicus curiae* urging affirmance.

made no increase for those in the latter class. The United States Court of Appeals for the District of Columbia Circuit held that this discrimination was arbitrary and therefore violated § 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA).[1] 205 U. S. App. D. C. 330, 640 F. 2d 416 (1981). We granted certiorari to decide whether § 302(c)(5) authorizes federal courts to review for reasonableness the provisions of a collective-bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund. 454 U. S. 814.

I

A description of the origin of the discrimination may explain why the Court of Appeals considered it arbitrary. The

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[1] That section provides in relevant part:

"The provisions of this section [forbidding transfers between employer and representatives of employees] shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . . ; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pension or annuities . . . ." 61 Stat. 157, as amended, 29 U. S. C. § 186(c) (1976 ed., Supp. IV).

1950 collective-bargaining agreement between the union and the operators established a fund to provide pension, health, and other benefits for certain miners and their dependents. That agreement defined the operators' obligation to contribute to the fund but delegated the authority to define the amount of benefits and the conditions of eligibility to the trustees of the fund.[2] In 1967 the trustees adopted two resolutions governing benefits for widows. Under the first, a widow of a retired miner who was receiving a pension at the time of his death was entitled to a death benefit of $2,000 payable over a 2-year period, and a widow of a miner who was eligible for a pension but who was still working at the time of his death was entitled to a $5,000 benefit payable over a 5-year period.[3] The second resolution authorized hospital and medical-care benefits for unremarried widows of deceased miners while they were receiving the widows' benefit

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[2] The National Bituminous Coal Wage Agreement of 1950, in creating the United Mine Workers of America Welfare and Retirement Fund of 1950, provided in part:

"Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters." App. to Pet. for Cert. 78a.

[3] Resolution No. 68, adopted on January 19, 1967, established "a Widows and Survivors Benefit of five thousand dollars ($5,000.00) as a result of the death of miners who at the time of death were regularly employed in a classified job in the bituminous coal industry by coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said Agreement, and two thousand dollars ($2,000.00) in the event of the death of miners who at the time of death were receiving Trust Fund pensions and not employed outside the coal industry. . . ." App. to Pet. for Cert. 82a. The $5,000 benefit was payable in 60 monthly installments and the $2,000 benefit was payable in 22 monthly installments. *Id.*, at 85a.

authorized by the first resolution.[4] The effect of these two resolutions was to provide a greater health benefit for widows of working miners who were eligible for pensions than for widows of miners who were receiving pension benefits.

In 1974, because of their concerns about compliance with minimum funding standards of the recently enacted Employee Retirement Income Security Act (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1976 ed. and Supp. IV), and about the actuarial soundness of the 1950 fund, the union and the operators agreed to restructure the industry's benefit program. They agreed that the amount of benefits and the eligibility requirements, as well as the level of contributions, should be specified in their collective-bargaining agreement. They also decided to replace the single 1950 fund with four separate funds, two of which provided pension benefits while two others, the "1950 Benefit Trust" and the "1974 Benefit Trust," provided health and death benefits. The 1950 Benefit Trust, which is at issue in this case, extended lifetime health coverage to certain widows of miners who died before December 6, 1974, the effective date of the 1974 collective-bargaining agreement.[5]

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[4] Resolution No. 69, also adopted on January 19, 1967, provided in part: "The following persons shall be eligible for benefits herein provided for hospital and medical care . . . :

. . . . . .

"5. Unremarried widows and unmarried dependent children under twenty-two (22) years of age of deceased miners described in Subparagraph B of this Paragraph I as long as they are the recipients of Widows and Survivors Benefits provided in Paragraph II of Resolution No. 68." App. to Pet. for Cert. 90a.

[5] Article II, E(3), of the 1950 Benefit Trust provides that lifetime health benefits shall be provided to the survivors "of a miner who died . . . [p]rior to the effective date of this Plan . . . at a time when he was receiving a retirement or disability pension under the eligibility rules then in effect of the United Mine Workers of America Welfare and Retirement Fund of 1950." App. to Pet. for Cert. 114a. "By the trustee's interpretation, this clause applies to survivors of miners who died while collecting pensions and, as well, to survivors of those who, though not actually receiving re-

During the 1974 negotiations, the union originally demanded that all unremarried widows who were entitled to health benefits for either two years or five years under the old plan be extended lifetime health coverage. Both the amount and the uncertainty of the cost of such coverage for these widows concerned the operators. Relatively early in the negotiations they nevertheless accepted the demand as it related to widows of miners who would die after the agreement became effective, but they objected to the requested increase for widows of already deceased miners. The operators estimated that the latter class consisted of between 25,000 and 50,000 widows, whereas the union's estimate was approximately 40,000. Of that total, about 10% were believed to be widows of miners who had been working at the time of their death, even though eligible for pensions, and thus already had been entitled to five years of health benefits. In the final stages of the 1974 negotiations, after a strike had begun, the operators made a package proposal to the union that excluded this smaller group of perhaps 4,000 or 5,000 widows from any increased health benefits. Besides making it possible to conclude an otherwise acceptable, complex collective-bargaining agreement and to avoid a prolonged strike, the union received no separately identifiable *quid pro quo* for the rejection of this portion of its demands.

II

Respondents are widows of coal miners who died in 1967 and 1971, respectively. Their husbands were over age 55, had been employed in the industry for over 20 years, and had spent most of their careers in the employ of contributing em-

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tirement payments at death, had ceased work and applied for them. This construction, however, excludes widows and dependents of those miners who were eligible for pensions but who continued working and later died before applying for health-care benefits." 205 U. S. App. D. C. 330, 333, 640 F. 2d 416, 419 (1981) (footnotes omitted).

ployers. They were eligible for pensions but were still working at the time of their deaths. Under the 1950 plan, respondents were entitled to $5,000 death benefits and health benefits for five years. They received no additional benefits from the 1974 agreement. Had their husbands applied for the pensions for which they were eligible, they now would be entitled to lifetime health coverage.

On their own behalf and as representatives of a class of similarly situated widows and dependents of deceased coal miners, respondents brought this action against the trustees of the funds in the United States District Court for the District of Columbia.[6] They alleged that the requirement that a miner actually be receiving a pension for which he was eligible at the time of his death in order to make his survivors eligible for lifetime health benefits has no rational relationship with the purposes of the trust funds and therefore was illegal under § 302 of the LMRA. They prayed that the requirement be declared null and void and that the trustees be ordered to pay to them health benefits retrospectively and prospectively.

After certifying the respondents' class,[7] and after indicating that the plaintiffs had made a prima facie showing of arbitrariness, the court scheduled a hearing to give the petitioners an opportunity to prove that the discrimination against respondents was not arbitrary. At that hearing the District Court received documents prepared during the 1974 collec-

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[6] Federal district courts have jurisdiction to restrain violations of § 302. 29 U. S. C. § 186(e).

[7] "The class represents all surviving spouses and dependents of deceased miners who satisfied the age and service requirements for pension benefits at the time of death and who

"(1) were working in classified service in the coal industry at the time of death and had not applied for a pension, or

"(2) had applied for and were eligible to receive pension benefits but were not receiving such benefits at the time of death because of their return to classified service in the coal industry." 449 F. Supp. 941, 942 (1978).

tive-bargaining negotiations and heard the testimony of participants in those negotiations. Based on that evidence, the District Court found that "the question of whether or not to provide plaintiffs the benefits they now seek was the subject of explicit, informed and intense bargaining." App. to Pet. for Cert. 25a. The court rejected the argument that the eligibility requirement was arbitrary and capricious and held that "the trustees are bound to adhere to the terms of the agreement." *Ibid.* The court concluded:

> "Public policy dictates the limited role of courts in reviewing collectively bargained agreements. The familiar history of the anguished relations between the bargaining parties in this case only underscores the delicacy of the balance set in each agreement. Plaintiffs' relief, if indeed any is due, cannot come from the courts." *Ibid.*

A divided panel of the Court of Appeals reversed. Relying on the § 302(c)(5) requirement that jointly administered pension trusts be maintained "for the sole and exclusive benefit of the employees of [the contributing] employer, and their families and dependents," the court held that any rule denying benefits to employees on whose behalf significant contributions had been made must be explained to its satisfaction, particularly if benefits were authorized for others who had worked a lesser period of time for contributing employers. 205 U. S. App. D. C., at 335, 640 F. 2d, at 421. In this case, the trustees were unable to produce an acceptable explanation for the discrimination between widows of pensioners and widows of pension-eligible miners. Specifically, the court held that it was "not enough that the particular eligibility standards were adopted simply because that enabled resolution of a collective bargaining dispute." *Id.*, at 338, 640 F. 2d, at 424. Recognizing the legitimacy of a concern about actuarial soundness of pension trust funds, the court held that "financial integrity must be secured by methods dividing beneficiaries from nonbeneficiaries on lines reasonably

calculated to further the fund's purposes." *Id.*, at 337–338, 640 F. 2d, at 423–424.

Judge Robb, in dissent, agreed with the reasoning of the District Court and added the observation that the discrimination against widows of active miners was rational because those widows had received a larger death benefit than widows of pensioners, and because their needs may have been lesser than those of the families of pensioners since their husbands had continued to work after they were eligible for pensions.

III

The Court of Appeals held that the requirement in § 302(c)(5) that an employee benefit trust fund be maintained "for the sole and exclusive benefit of the employees . . . and their families and dependents" means that eligibility rules fixed by a collective-bargaining agreement must meet a reasonableness standard. The statutory language hardly embodies this reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of § 302(c)(5).

Just last Term, the Court reiterated that "the 'sole purpose' of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . .'" *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331 (quoting 93 Cong. Rec. 4678 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, p. 1305 (Leg. Hist. LMRA)). See *Arroyo* v. *United States*, 359 U. S. 419, 425–426.[8] Accord, *Walsh* v. *Schlecht*,

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[8] The Court in *Arroyo* stated:

"Those members of Congress who supported [§ 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with

429 U. S. 401, 410–411; *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 474 (Frankfurter, J., dissenting). This reading is amply supported by the legislative history. See, *e. g.*, 93 Cong. Rec. 4877 (1947), 2 Leg. Hist. LMRA, at 1312;[9] 93 Cong. Rec., at 4752–4753, 2 Leg. Hist. LMRA, at 1321–1322.[10] The section was meant to protect employees

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the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. See *United States* v. *Ryan*, 350 U. S. 299.

"Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892–4894, 4899, 5181, 5345–5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746–4747. To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established. See Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 290" (footnotes omitted).

[9] Senator Taft, the primary author of the LMRA, stated:

"Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages."

[10] Senator Ball, one of the sponsors of the floor amendment that became § 302, stated:

"All that is sought to be done by the amendment is to protect the rights of employees. After all, on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected. . . .

. . . . . .

"In other words, when the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting

from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

Our interpretation of the purpose of the "sole and exclusive benefit" requirement is reinforced by the other requirements of § 302(c)(5). Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials. Each of the specific conditions that must be satisfied to exempt employer contributions to pension funds from the criminal sanction is consistent with the nondiversion purpose. The fund must be established "for the sole and exclusive benefit" of employees and their families and dependents; contributions must be held in trust for that purpose and must be used exclusively for health, retirement, death, disability, or unemployment benefits; the basis for paying benefits must be specified in a written agreement; and the fund must be jointly administered by representatives of management and labor.[11] All the conditions in the section fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees. None of the conditions places any restriction on the allocation of the funds among the persons protected by § 302(c)(5).

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the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second."

[11] See *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 328–329; H. R. Rep. No. 510, 80th Cong., 1st Sess., 66–67 (1947), 1 Leg. Hist. LMRA, at 570–571.

The Court of Appeals did not attempt to ground its holding on the text or legislative history of § 302(c)(5). Rather, the court relied upon cases in which trustees of employee benefit trust funds, not the collective-bargaining agreement, fixed the eligibility rules and benefit levels. The Court of Appeals has held in those cases "that the Trustees have 'full authority . . . with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustees' broad discretion has been abused by the adoption of arbitrary or capricious standards." *Pete* v. *United Mine Workers of America Welfare & Retirement Fund of 1950*, 171 U. S. App. D. C. 1, 9, 517 F. 2d 1275, 1283 (1975) (en banc) (footnote omitted). Noting that "[t]he institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form," the court stated that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run." *Kosty* v. *Lewis*, 115 U. S. App. D. C. 343, 346, 319 F. 2d 744, 747 (1963), cert. denied, 375 U. S. 964. Those cases, however, provide no support for the Court of Appeals' holding in this case.[12] The petitioner trustees were not given "full authority" to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement. By the terms of the trust created by that agreement, the trustees are obligated to enforce these

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[12] In *NLRB* v. *Amax Coal Co.*, *supra*, at 330, the Court held that in enacting § 302(c)(5) "Congress intended to impose on trustees traditional fiduciary duties." The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity are authorized to enforce those duties. It is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA. See *Arroyo* v. *United States*, 359 U. S. 419, 426–427.

determinations unless modification is required to comply with applicable federal law.[13] The common law of trusts does not alter this obligation. See *NLRB* v. *Amax Coal Co.*, 453 U. S., at 336–337; Restatement (Second) of Trusts § 164 (1959). Cf. 29 U. S. C. § 1104(a)(1)(D) (1976 ed., Supp. IV). Absent conflict with federal law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective-bargaining agreement.

Section 302(c)(5) plainly does not impose the Court of Appeals' reasonableness requirement, and respondents do not offer any alternative federal law to sustain the court's holding. There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective-bargaining agreements because the union need not "affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in be-

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[13] "The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

"They are also authorized and directed, after adquate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

"(a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

. . . . . .

"(d) to comply with all applicable court or government decisions or ruling." National Bituminous Coal Wage Agreement of 1974, art. XX, § (h)(5), App. to Pet. for Cert. 106a.

half of those whom it does represent." *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 181, n. 20.[14] Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective-bargaining agreement.

The substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive standards of the ERISA. The terms of any collective-bargaining agreement must comply with federal laws that prohibit discrimination on grounds of race, color, religion, sex, or national origin;[15] that protect veterans;[16] that regulate certain industries;[17] and that preserve our competitive economy.[18] Obviously, an agreement must also be substantively consistent with the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*[19] Moreover, in the collective-bargain-

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[14] We also recognized that these persons are not without protection: "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916–920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U. S. 195, 200–201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 470 (1960)." 404 U. S., at 181, n. 20.

[15] See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (Title VII of the Civil Rights Act of 1964); *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (Equal Pay Act).

[16] See, *e. g.*, *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275, 285.

[17] See, *e. g.*, *Norfolk & Western R. Co.* v. *Nemitz*, 404 U. S. 37.

[18] See, *e. g.*, *Mine Workers* v. *Pennington*, 381 U. S. 657.

[19] See, *e. g.*, *NLRB* v. *Magnavox Co.*, 415 U. S. 322; *Radio Officers* v. *NLRB*, 347 U. S. 17.

ing process, the union must fairly represent the interests of all employees in the unit.[20] But when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract.[21]

The record in this case discloses no violation of § 302(c)(5) or of any other federal law. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

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[20] See, *e. g.*, *Vaca* v. *Sipes*, 386 U. S. 171, 177; *Syres* v. *Oil Workers*, 350 U. S. 892; *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192. See also *Railroad Trainmen* v. *Howard*, 343 U. S. 768.

[21] See, *e. g.*, *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 218–219; *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 105–108; *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488; *Teamsters* v. *Oliver*, 358 U. S. 283, 295–296; *NLRB* v. *American National Ins. Co.*, 343 U. S. 395, 404.

Syllabus

BREAD POLITICAL ACTION COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80–1481. Argued January 19, 1982—Decided March 8, 1982

Section 310(a) of the Federal Election Campaign Act of 1971 lists three categories of plaintiffs who may challenge the constitutionality of any provision of the Act in a federal district court action in which the district court must certify all questions of constitutionality to the court of appeals sitting en banc: (1) the Federal Election Commission, (2) "the national committee of any political party," and (3) "any individual eligible to vote in any election for the office of President." Appellants, two trade associations and three political action committees (PAC's), filed an action in Federal District Court, challenging the validity of the provisions of the Act limiting the extent to which such associations and their PAC's may solicit funds for political purposes, and sought expedited consideration of the action under § 310(a). The District Court denied such consideration on the ground that appellants were not within any of the three categories listed as eligible to invoke § 310(a)'s expedited procedures. The Court of Appeals reversed and remanded, holding that § 310(a) is available for use by plaintiffs whether they belong to an enumerated category or not, and on subsequent certification from the District Court upheld the challenged solicitation provisions.

Held: Only parties belonging to one of the three categories listed in § 310(a) may invoke its expedited procedures, and since appellants are not within any of those categories, they may not invoke such procedures. The text of § 310(a) states plainly enough which plaintiffs may invoke its special procedures. This plain language controls the construction of § 310(a), absent "clear evidence" of a "clearly expressed" contrary congressional intent, and appellants have not met the burden of showing such "clear evidence" of a contrary intent. The fact that Congress wanted a broad class of questions to be speedily resolved does not imply that it intended the courts to augment the enumeration of qualified plaintiffs. Nor is there any merit to appellants' contention that Congress specified the three enumerated classes of plaintiffs simply to remove any doubts about their standing, but not to exclude others by implication. Pp. 580–585.

635 F. 2d 621, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Jeffrey Cole argued the cause for appellants. With him on the briefs was *Stanley T. Kaleczyc.*

Charles N. Steele argued the cause for appellees. With him on the brief was *Richard B. Bader.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Section 310(a) of the Federal Election Campaign Act of 1971 (FECA), 88 Stat. 1285, as amended, 2 U. S. C. § 437h(a) (1976 ed., Supp. IV), lists three categories of plaintiffs who may challenge the constitutional validity of FECA in specially expedited suits: (1) the Federal Election Commission (FEC), (2) "the national committee of any political party," and (3) "any individual eligible to vote in any election for the office of President." In this case, we address a question we expressly reserved in *California Medical Assn.* v. *FEC*, 453 U. S. 182, 187, n. 6 (1981): whether a party not belonging to one of the three categories listed in § 437h(a) may nonetheless invoke its procedures.

I

The appellants are two trade associations and three political action committees (PAC's): the National Restaurant Association and its associated PAC, the Restaurateurs Political Action Committee, the National Lumber and Building Material Dealers Association and its associated PAC, the Lumber Dealers Political Action Committee, and the Bread Political Action Committee, the PAC associated with the American Bakers Association. In order to challenge the validity of 2 U. S. C. § 441b(b)(4)(D), which has the effect of limiting the extent to which trade associations and their PAC's may solicit funds for political purposes,[1] the appellants filed an ac-

[1] Title 2 U. S. C. § 441b(b)(4)(D) permits an incorporated trade association to solicit contributions to its (PAC) only from

"the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved

tion in the United States District Court for the Northern District of Illinois, seeking expedited consideration of their suit under the procedures set forth in § 437h.[2] The District Court denied certification under § 437h on the ground that the plaintiff trade associations and PAC's do not belong to

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by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year."

Other provisions of FECA permit a trade association to solicit contributions to its PAC from its members, § 441b(b)(4)(C), and from its own executive and administrative personnel and their families, § 441b(b)(4)(A).

[2] That section provides:

"(a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc

"The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

"(b) Appeal to Supreme Court; time for appeal

"Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

"(c) Advancement on appellate docket and expedited disposition of certified questions

"It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section." 2 U. S. C. §§ 437h(a)–(c) (1976 ed. and Supp. IV).

The grant of standing to the three listed categories of plaintiffs is similar to the grant Congress had adopted earlier in 26 U. S. C. § 9011(b) authorizing the "Commission, the national committee of any political party, and individuals eligible to vote for President" to bring suits to implement or construe the Presidential Election Campaign Fund Act, 26 U. S. C. §§ 9001–9013.

any of the three categories of plaintiffs listed in § 437h(a) as eligible to invoke its expedited procedures. On an interlocutory appeal from this ruling, a panel of the Court of Appeals reversed, holding that § 437h(a) is available for use by plaintiffs whether they belong to an enumerated category or not. 591 F. 2d 29 (CA7 1979). On remand, the District Court, as required by § 437h, first made findings of fact and then certified the case back to the Court of Appeals sitting en banc for a determination on the constitutional questions raised by the appellants. The en banc court declined to overrule the earlier panel decision regarding the reach of § 437h(a), and proceeded to the merits of the appellants' claims, upholding the constitutionality of the challenged provisions. 635 F. 2d 621 (CA7 1980). The present appeal to this Court followed, confronting us with the question whether § 437h(a) should be construed to permit parties, such as the appellants, who do not belong to one of its three specifically enumerated classes, nonetheless to invoke its procedures.

II

Our analysis of this issue of statutory construction "must begin with the language of the statute itself," *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 187 (1980), and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Moreover, when the statute to be construed creates, as § 437h does, a class of cases that command the immediate attention of this Court and of the courts of appeals sitting en banc, displacing existing caseloads and calling court of appeals judges away from their normal duties for expedited en banc sittings, close construction of statutory language takes on added importance. As we have said: "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes'; and we are particularly

prone to accord 'strict construction of statutes authorizing appeals' to this Court." *Palmore* v. *United States*, 411 U. S. 389, 396 (1973) (citations omitted). In short, the plain language of § 437h(a) controls its construction, at least in the absence of "clear evidence," *United States* v. *Apfelbaum*, 445 U. S. 115, 121 (1980), of a "clearly expressed legislative intention to the contrary," *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, *supra*, at 108.

The text of § 437h(a) states plainly enough which plaintiffs may invoke its special procedures: "The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." Thus, § 437h(a) affords its unique system of expedited review to three carefully chosen classes of persons who might meet the minimum standing requirements of Art. III. The only artificial persons expressly entitled to invoke § 437h(a) are the Federal Election Commission, which is charged with enforcing the Act, and the national committees of political parties, which play a central role in the political process.

In the face of the obvious meaning of the language of § 437h(a), the appellants urge what they concede to be an "expansive construction" of the section. Reply Brief for Appellants 3. Indeed, the construction they advocate could not be more expansive, for they apparently argue that Congress intended the class of permissible plaintiffs to be defined by the outermost limits of Art. III. The appellants, however, fall far short of providing "clear evidence" of a "clearly expressed legislative intention" that the unique expedited procedures of § 437h be afforded to parties other than those belonging to the three listed categories.

In fact, the section's legislative history is too brief and ambiguous to provide much solace to either side of the present controversy. When Senator Buckley introduced the section during the deliberations on the Federal Election Campaign Act Amendments of 1974, he limited his explanation to the following comments:

> "[I]t is a modification that I am sure will prove acceptable to the managers of the bill. It merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time." 120 Cong. Rec. 10562 (1974).[3]

In the House, Representative Frenzel echoed this theme in responding to a question from another Member of the House about the constitutionality of the Amendments:

> "Any time we pass legislation in this field we are causing constitutional doubts to be raised. I have many myself. I think the gentleman has pointed out a good one. We have done the best we could to bring out a bill which we hope may pass the constitutional test. But, we do not doubt that some questions will be raised quickly.
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> "I do call the attention of the gentleman to the fact that any *individual* under this bill has a direct method to raise these questions and to have those considered as quickly as possible by the Supreme Court." *Id.*, at 35140 (emphasis added).

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[3] Perhaps because Senator Buckley's intent as expressed in the legislative history remains uncertain, the appellants have submitted to this Court affidavits from Senator Buckley and David A. Keene, the Executive Assistant to the Senator who prepared the original draft of § 437h, expressing the belief that the amendment was not intended to exclude organizations from challenging the constitutionality of the Act. See Affidavit of James Buckley (Nov. 11, 1977), reprinted at App. 110, 112; Affidavit of David A. Keene (Oct. 21, 1977), reprinted at App. 106, 109.

We cannot give probative weight to these affidavits, however, because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act.'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974), quoting *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 639, n. 34 (1967). See also *Quern* v. *Mandley*, 436 U. S. 725, 736, n. 10 (1978), in which we noted that "*post hoc* observations by a single member of Congress carry little if any weight."

These brief remarks by two Members of Congress nearly exhaust the legislative history of the section. The appellants nevertheless suggest that these comments suffice to prove that, in passing § 437h, Congress focused solely on expediting the resolution of all disputes over the constitutionality of FECA, and was unconcerned with the identity of the challenging plaintiffs. In support of this view, the appellants point out that in the first sentence of § 437h(a) Congress authorized suits to challenge "any" provision of the Act, while the second sentence requires the district courts to certify "all" constitutional questions under the Act to the court of appeals sitting en banc. According to the appellants, the fact that Congress expressly extended § 437h to "all" constitutional questions about "any" provision of the Act compels the inference that Congress also intended that § 437h be afforded to any and all plaintiffs, even those not expressly listed in the Act.

The obvious fact that Congress wanted a broad class of questions to be speedily resolved, however, scarcely implies that Congress intended the courts to augment Congress' enumeration of qualified plaintiffs. Indeed, if it suggests anything, the structure of the Act suggests that Congress knew how to specify that "all" constitutional questions about "any" provision of the Act may be raised, and therefore could as easily have directed that "any" person might invoke the unique procedures of § 437h. But Congress did not do so. Instead, it went to the trouble of specifying that only two precisely defined types of artificial entities and one class of natural persons could bring these actions.

Reaching out for some support, the appellants hypothesize that Congress specified the three enumerated classes to remove any doubts about their standing, but not to exclude others by implication. According to the appellants, absent explicit congressional authorization, the members of the three listed classes might not meet the prudential standing requirements this Court imposes. See, *e. g.*, *Warth* v. *Seldin*, 422 U. S. 490, 498–501 (1975). This argument, however, puts

the appellants in the awkward position of simultaneously noting that express congressional authorization is required to overcome prudential standing limitations, while urging us to read an implicit grant of standing into congressional silence. Of course, had Congress intended the result the appellants desire, it could easily have achieved it by expressly granting standing to the limits of Art. III, and then listing as specific examples the three classes now enumerated in § 437h(a). Instead, Congress gave no affirmative indication that it meant to include in its grant any parties beyond the three listed classes.

For these reasons, we cannot impute to Congress the intention to confer standing on the broadest class imaginable. We do not assume the maximum jurisdiction permitted by the Constitution, absent a clearer mandate from Congress than here expressed. We therefore hold that only parties meeting the express requirements of § 437h(a) may invoke its procedures. Because the appellants do not meet these requirements, they may not invoke the expedited procedures of § 437h.

The appellants complain that the practical result of this ruling may be that some provisions of FECA will escape expedited review, thereby defeating Congress' intent that the courts pass as quickly as possible on the validity of FECA. Without a clearer indication of congressional intent than provided by the extremely sketchy legislative history of § 437h, however, we believe the best evidence of what Congress wanted is found in the statute itself, where Congress listed only three types of parties who may invoke the expedited procedures of § 437h. Others, evidently, are remitted to the usual remedies.

We note, moreover, that our decision today raises no threat that an aggrieved party with standing will be unable to litigate questions arising under FECA, since our holding affects only the availability of the extraordinary procedures afforded by § 437h. Section 437g, for example, permits ei-

ther the Commission or, under the proper circumstances, a private person to bring a civil action to enforce the Act, and such suits are themselves given expedited treatment under § 437g(a)(10), being advanced on the calendar ahead of all other actions except those given even higher priority by either § 437g or § 437h. Thus, any challenge, constitutional or nonconstitutional, may be raised as a defense in an enforcement action, and will be afforded expedited review.[4] Furthermore, plaintiffs meeting the usual standing requirements can challenge provisions of the Act under the federal-question jurisdiction granted the federal courts by 28 U. S. C. § 1331 (1976 ed., Supp. IV).[5]

In sum, the appellants have not met the burden of showing such "clear expression" or "clear evidence" of congressional intent to make the procedures of § 437h available to categories of plaintiffs other than those listed in that section. Accordingly, we reverse and remand for proceedings consistent with this opinion.

So ordered.

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[4] The appellants suggest that an anomaly is thereby created, unless parties not listed in § 437h(a) can invoke that section's procedures, because nonconstitutional challenges raised as defenses will be granted expedited service under 2 U. S. C. § 437g(a)(10) (1976 ed., Supp. IV), while constitutional challenges brought by plaintiffs not listed in § 437h(a) will be treated like any other case on the docket. No evidence exists that Congress ever pondered this subtlety, or, if it did, what it thought about it. Suffice it to say that we do not consider the possibility that Congress may have seen fit to expedite claims raised by defendants, but not similar claims raised by some plaintiffs, to shed much light on Congress' purpose in enumerating three specific classes of eligible plaintiffs in § 437h(a).

[5] We express no opinion, however, on the question whether the appellants meet the standing requirements under § 1331.

WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* TORNA

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

No. 81–362. Decided March 22, 1982

Held: The Federal District Court properly dismissed respondent state prisoner's habeas corpus petition asserting that he had been denied his right to the effective assistance of counsel because an application for certiorari—filed by his retained counsel in the Florida Supreme Court to review the Florida District Court of Appeal's affirmance of respondent's state conviction—had been dismissed as not having been timely filed. Respondent did not contest the District Court's finding that review by the Florida Supreme Court was discretionary. Since a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals, *Ross* v. *Moffitt*, 417 U. S. 600, respondent could not be deprived of the effective assistance of counsel by his retained counsel's failure to file a timely application.

Certiorari granted; 649 F. 2d 290, reversed.

PER CURIAM.

Respondent is in custody pursuant to several felony convictions that were affirmed by the Third District Court of Appeal of Florida. *Torna* v. *State*, 358 So. 2d 1109 (1978). The Florida Supreme Court dismissed an application for a writ of certiorari, on the ground that the application was not filed timely.[1] 362 So. 2d 1057 (1978). A petition for rehearing and clarification was later denied. App. to Pet. for Cert. A–15.

Respondent thereafter filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, contending that he had been denied his right to the effective assistance of counsel by the failure of his retained

[1] "It appearing to the Court that the notice was not timely filed, it is ordered that the cause is hereby dismissed sua sponte, subject to reinstatement if timeliness is established on proper motion *filed* within fifteen days from the date of this order. See Fla. R. App. P. 9.120." App. to Pet. for Cert. A–13.

counsel to file the application for certiorari timely. The District Court denied the petition on the ground that the failure to file a timely application for certiorari did not render counsel's actions "so grossly deficient as to render the proceedings fundamentally unfair." *Id.*, at A–22. In reaching this conclusion, the District Court noted that review by the Florida Supreme Court was discretionary; "[f]ailure of counsel to timely petition for certiorari to the Supreme Court, therefore, only prevented [respondent] from applying for further discretionary review." *Id.*, at A–28. The Court of Appeals reversed. 649 F. 2d 290 (CA5 1981).[2]

In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), this Court held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court. Respondent does not contest the finding of the District Court that he had no absolute right to appeal his convictions to the Florida Supreme Court.[3] Since respondent had no constitutional right to counsel, he

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[2] Citing its decision in *Pressley* v. *Wainwright*, 540 F. 2d 818 (1976), cert. denied, 430 U. S. 987 (1977), the court first noted that "the failure of court-appointed counsel to file a timely notice of certiorari in the Florida Supreme Court has been held to constitute ineffective assistance." 649 F. 2d, at 291. On the basis of the recent decision in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), the court then stated that "there is no distinction between court-appointed and privately retained counsel in the evaluation of a claim of ineffective assistance." 649 F. 2d, at 292. Finally, the court quoted its recent decision in *Perez* v. *Wainwright*, 640 F. 2d 596, 598 (1981), for the proposition that "'when a lawyer . . . does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal.'" 649 F. 2d, at 292. On the basis of these statements, the court reversed "the district court's denial of the writ of habeas corpus," *ibid.*, and remanded the case to the District Court for further proceedings consistent with its opinion.

[3] Like this Court, the Florida Supreme Court has a limited mandatory appellate jurisdiction. See Fla. Const., Art. V, § 3. Respondent has never contended, however, that he had a right of review under that jurisdiction. Thus, we need not determine the extent of the right to counsel in such a case.

could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely.[4] The District Court was correct in dismissing the petition.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, and the judgment of the Court of Appeals is therefore reversed.

It is so ordered.

JUSTICE BRENNAN would set the case for oral argument.

JUSTICE MARSHALL, dissenting.

The majority predicates its decision in this case on *Ross* v. *Moffitt*, 417 U. S. 600 (1974), which held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals. The majority reasons that because respondent had no constitutional right to counsel, his lawyer's failure to file a timely appeal did not violate his right to effective assistance of counsel. In my view, however, *Ross* v. *Moffitt* was improperly decided. See *id.*, at 619–621 (Douglas, J., dissenting, joined by BRENNAN and MARSHALL, JJ.). I believe that a defendant does have a constitutional right to counsel to pursue discretionary state appeals. Particularly where a criminal conviction is challenged on constitutional grounds, permissive review in the highest state court may be the most meaningful review a conviction will receive. Moreover, where a defendant seeks discretionary review, the assistance of an attorney is vital. Because I disagree with the Court's position in *Ross* v. *Moffitt*, I disagree with its conclusion in this case also.

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[4] Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation—even if implicating a due process interest—was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law.

Even if I believed that *Ross* v. *Moffitt* were correctly decided, however, I would dissent from the majority's conclusion that habeas corpus provides no recourse to a criminal defendant who has been denied his right to seek discretionary review because of his attorney's error. Although respondent's Sixth Amendment right to effective assistance of counsel may not have been infringed, he was denied his right to due process. Respondent's counsel promised him that he would seek review in the Florida Supreme Court. Respondent reasonably relied on that promise. Counsel nonetheless failed to file a timely application.* As a result, respondent was deprived of his right to seek discretionary review by the State's highest court. As I suggested above, this loss is significant. I would hold that when a defendant can show that he reasonably relied on his attorney's promise to seek discretionary review, due process requires the State to consider his application, even when the application is untimely. To deny the right to seek discretionary review simply because of counsel's error is fundamentally unfair. Requiring the state courts to consider untimely applications when a defendant can show that he reasonably relied on his counsel will not impose a heavy burden. The State is not required to grant the application; it is simply barred from dismissing the application on the ground that it was not timely filed.

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*Notice of the intent to apply for discretionary review was due in the office of the Clerk for the District Court of Appeal, Third District of Florida, on July 17, 1978. It was filed one day late, on July 18, 1978. According to respondent, a secretary in his attorney's office attempted to deliver the required papers on July 14, 1981. She became lost while traveling to the Clerk's office, and did not arrive until after it had closed. Because she did not realize that she could have placed the papers in a night depository box, she took them home and placed them in the mail. Record 29–30. To deny respondent the right to seek discretionary review, where he reasonably relied on his counsel's promise to apply for such review, and where counsel failed to comply with this promise only because of circumstances beyond his control, would be doubly unfair.

The majority argues that even if deprivation of the right to petition the Florida Supreme Court for review implicates a due process interest, there was no state action here. It reasons that the deprivation of this right was caused by respondent's counsel—a private retained attorney—and not by the State. *Ante*, at 588, n. 4. In my view, however, there was sufficient state involvement to satisfy the requirements of the Fourteenth Amendment. The majority's position is inconsistent with *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). In that case, the Court rejected the respondent's assertion that the failings of retained counsel at a criminal trial could not provide a basis for federal habeas corpus relief, because his conduct does not involve state action. It held that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. "When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty." *Id.*, at 343. "[T]he State's conduct of a criminal trial itself implicates the State in the defendant's conviction." *Id.*, at 344.

It is true that *Cuyler* v. *Sullivan* involved a challenge to the conduct of a private attorney during the trial, while this case involves a challenge to the post-trial conduct of a private attorney. However, post-trial proceedings are an integral part of the criminal process. In my view, the State is just as much implicated in those proceedings as in the trial itself. Here, for example, Florida was responsible for structuring the procedure by which criminal convictions are reviewed. In particular, it designed the rules governing the right to seek discretionary review, including the rule that applications are automatically rejected when filed out of time. Under the circumstances, I think it clear that the state-action requirement is satisfied.

Per Curiam

SUMNER, WARDEN *v.* MATA

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

No. 81–844. Decided March 22, 1982

Title 28 U. S. C. § 2254(d) requires federal courts in habeas corpus proceedings to accord a presumption of correctness to state-court findings of fact unless specified factors are present. In earlier proceedings in this case, this Court held that the Court of Appeals had not followed § 2254(d) in concluding—contrary to the California Court of Appeal's decision on respondent's appeal from his state murder conviction—that pretrial photographic lineup procedures used by the state police were so impermissibly suggestive as to deprive respondent of due process. The case was remanded so that the federal court could review its determination and either apply the statutory presumption of correctness of the state-court findings or explain why the presumption did not apply in light of the factors listed in § 2254(d). The Court of Appeals then concluded that § 2254(d) was irrelevant in this case because its findings of fact did not differ from those of the state court, the disagreement being over the constitutional significance of certain facts. It reinstated its conclusion that the pretrial procedures were impermissibly suggestive and that respondent therefore was entitled to release or a new trial.

Held: The case must be remanded again. The ultimate question as to the constitutionality of the pretrial identification procedures is a mixed question of law and fact that is not governed by § 2254(d). In deciding this question the federal courts may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. However, the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption. Thus, the circumstances of the pretrial identification procedures in this case present questions of fact as to which the statutory presumption applies. The Court of Appeals should either apply the presumption or explain why it is not applicable in view of the factors listed in the statute.

Certiorari granted; 649 F. 2d 713, vacated and remanded.

PER CURIAM.

This is the second time that this matter has come before us. In *Sumner* v. *Mata*, 449 U. S. 539 (1981), decided last Term, we held that 28 U. S. C. § 2254(d) requires federal courts in

habeas proceedings to accord a presumption of correctness to state-court findings of fact. This requirement could not be plainer. The statute explicitly provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct." Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact "is not fairly supported by the record" may the presumption properly be viewed as inapplicable or rebutted.[1]

We held further that the presumption of correctness is

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[1] Section 2254(d) provides:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal

equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact, and we held that if a federal court concludes that the presumption of correctness does not control, it must provide a written explanation of the reasoning that led it to conclude that one or more of the first seven factors listed in § 2254(d) were present, or the "reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" 449 U. S., at 551.

Applying these general principles to the case at hand, we found in our decision last Term that the Court of Appeals for the Ninth Circuit had neither applied the presumption of correctness nor explained why it had not. See *Mata* v. *Sumner*, 611 F. 2d 754 (CA9 1979). Instead, the court had made findings of fact that were "considerably at odds" with the findings made by the California Court of Appeal without any mention whatsoever of § 2254(d). 449 U. S., at 543.

In reaching the conclusion that the Court of Appeals had not followed § 2254(d), we rejected the argument, advanced by respondent Mata, that the findings of fact made by the Court of Appeals and the California court were not in conflict.[2] Mata was convicted in 1973 in state trial court of the

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court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances repectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

[2] Respondent argued: "All of the facts set forth in the opinion [of the Court of Appeals] are drawn from the record and do not contradict any finding of primary fact made by the California Court of Appeal." Brief for Respondent, O. T. 1980, No. 79–1601, pp. 19–20.

first-degree murder of a fellow inmate. There were three witnesses to the murder, each of whom identified Mata as a participant in the killing.[3] On appeal to the California Court of Appeal, Mata argued for the first time that the photographic lineup procedure used by the state police was so impermissibly suggestive as to deprive him of due process. After examining the evidence,[4] the California Court of Appeal rejected this assertion. It concluded that the pretrial procedures had not been unfair under the test stated by this Court in *Simmons* v. *United States*, 390 U. S. 377 (1968):

> "Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteris-

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[3] Two other inmates—Salvadore Vargas and David Gallegos—were also convicted of taking part in the murder.

[4] The California Court of Appeal summarized the pretrial procedures as follows:

"Three inmate witnesses testified that they saw the stabbing take place. All three—Childress, Almengor, and Allen—identified all three defendants . . . . The witnesses were shown a number of photographs of Tehachapi inmates in an attempt to identify the slayers. Almengor was interviewed and shown photos on October 19, 1972, the day of the incident. He made a possible identification of appellant Vargas, but made possible misidentifications of the other two participants. On October 30, 1972, more recent photos were presented to Almengor and he identified all the appellants. On October 27, 1972, Allen was shown photographs but stated he could not make an identification because the photographs were old. On October 30, 1972, more photos were presented to Allen and he identified all three appellants. On that date Childress also selected all three appellants from photographs shown to him.

"Appellants argue that the witnesses Almengor and Allen were housed in the same segregation unit with appellants, that they were aware that appellants were removed from the segregation unit to have their pictures taken and that this makes their identification inadmissible. But they make no showing, and the record supports none, that the witnesses were in fact influenced in their identification by this action of the investigating officers." App. to Pet. for Cert. C–4 to C–6.

> tics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." App. to Pet. for Cert. C–8.

The Court of Appeals for the Ninth Circuit reached a different conclusion,[5] and did so on the basis of factfindings that were clearly in conflict with those made by the state court. We noted that the Court of Appeals had relied, *inter alia*, on its own conflicting findings that "(1) the circumstances surrounding the witnesses' observation of the crime were such that there was a grave likelihood of misidentification; (2) the witnesses had failed to give sufficiently detailed descriptions of the assailant; and (3) considerable pressure from both prison officials and prison factions had been brought to bear on the witnesses." *Sumner* v. *Mata*, 449 U. S., at 543.[6]

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[5] The decision of the Court of Appeals for the Ninth Circuit differed not only with that of the California Court of Appeal on direct appeal but also with the decision of three levels of state courts in state habeas proceedings and with the decision of the Federal District Court in federal habeas proceedings.

[6] In dissent JUSTICE BRENNAN argued that there was no conflict between the facts as found by the state court and as found by the Court of Appeals. He argued that the California court's finding that the witnesses had an opportunity to view the killing was not in conflict with a finding by the Court of Appeals that the witnesses were "quite likely" distracted at the time of the killing. He argued further that the California court's finding that the descriptions given by the witnesses were "accurate" was not in conflict with a finding that these descriptions were not detailed. Finally, the dissent appears to have considered that the existence of influence by prison officials was a not a question of fact but of law. 449 U. S., at 556. It is obvious that a majority of the Court did not find this reasoning persuasive. On our remand, the Court of Appeals apparently adopted JUSTICE BRENNAN's dissenting views. See 649 F. 2d 713, 716 (CA9 1981).

We concluded that the "findings made by the Court of Appeals for the Ninth Circuit are considerably at odds with the findings made by the California Court of Appeal." *Ibid.* We remanded so that the Court of Appeals could review its determination of the issue and either apply the statutory presumption or explain why the presumption did not apply in light of the factors listed in § 2254(d). We expressed no view as to whether the procedures had been impermissibly suggestive. That was a question for the Court of Appeals to decide in the first instance after complying with § 2254(d).

On remand, the Court of Appeals found that it was not necessary for it to apply the presumption of correctness or explain why the presumption should not be applied. 649 F. 2d 713 (CA9 1981). Rather, agreeing with the argument advanced by Mata and the dissenting opinion in *Sumner* v. *Mata*, *supra*, the court concluded that § 2254(d) was simply irrelevant in this case because its factfindings in no way differed from those of the state court.[7] It argued that its disagreement with the state court was "over the *legal and constitutional significance* of certain facts" and not over the facts themselves. 649 F. 2d, at 716. It found that whether or not the pretrial photographic identification procedure used in this case was impermissibly suggestive was a mixed question of law and fact as to which the presumption of correctness did not apply. And it reinstated its conclusion that the pretrial procedures had been impermissibly suggestive and that Mata therefore was entitled to release or a new trial.[8]

We have again reviewed this case and conclude that the

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[7] "Lest the reviewing court 'be left to guess' as to our reasons for granting habeas relief notwithstanding the provisions of § 2254(d), we reiterate: As our original analysis indicates . . . we substantially agree with the 'historical' or 'basic' facts adduced by the California Court of Appeal Fifth Appellate District . . . . We disagree, however, with the application of the *Simmons* standard . . . to the totality of the circumstances of this case." *Id.*, at 717.

[8] Judge Sneed dissented from the Court of Appeals' original decision,

Court of Appeals apparently misunderstood the terms of our remand. Nor did it comply with the requirements of § 2254(d). We agree with the Court of Appeals that the ultimate question as to the constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact that is not governed by § 2254(d).[9] In deciding this question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption as our earlier opinion made clear. Thus, whether the witnesses in this case had an opportunity to observe the crime or were too distracted; whether the witnesses gave a detailed, accurate description; and whether the witnesses were under pressure from prison officials or others are all questions of fact as to which the statutory presumption applies.[10]

Of course, the federal courts are not necessarily bound by the state court's findings. Section 2254(d) permits a federal court to conclude, for example, that a state finding was "not fairly supported by the record." But the statute does require the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the fac-

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and he dissented again "respectfully, and to some degree sorrowfully." *Ibid.*

[9] Cf. *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Neil* v. *Biggers*, 409 U. S. 188, 193, n. 3 (1972).

[10] In *Neil* v. *Biggers*, *supra*, at 199–200, we noted that "the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Each of these "factors" requires a finding of historical fact as to which § 2254(d) applies. The ultimate conclusion as to whether the facts as found state a constitutional violation is a mixed question of law and fact as to which the statutory presumption does not apply.

tors listed in § 2254(d) is found. Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the factfindings made by the state courts. To adopt the Court of Appeals' view would be to deprive this statutory command of its important significance.

Our remand directed the Court of Appeals to re-examine its findings in light of the statutory presumption. We pointed the way by identifying certain of its findings that we considered to be at odds with the findings of the California Court of Appeal. We asked the Court of Appeals to apply the statutory presumption or explain why the presumption was not applicable in view of the factors listed in the statute. The Court of Appeals did neither. Accordingly, we again must remand. Again we note that "we are not to be understood as agreeing or disagreeing with the majority of the Court of Appeals on the merits of the issue of impermissibly suggestive identification procedures." 449 U. S., at 552.[11]

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted, the judgment of the Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In my view, the opinion of the Court of Appeals for the Ninth Circuit not only accords with the views I expressed last Term, which, as the Court points out, *ante*, at 595, n. 6,

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[11] Because we remand for failure to comply with § 2254(d), we do not reach the second question presented in the petition for certiorari as to whether the Court of Appeals applied the proper legal standard in determining that the pretrial identification procedures used in this case were constitutionally defective.

did not prevail, but also with the principles expressed in the Court's opinion last Term and restated by the Court today. It is on this basis that I dissent from the Court's second, and in this instance summary,* vacation.

When this case was before us last Term, I expressed the view that it was unnecessary for the Court of Appeals to explain its failure to consider the restrictions of § 2254(d), because "the difference between the Court of Appeals for the Ninth Circuit and the California Court of Appeal was over the applicable *legal standard*, and not over the particular *facts* of the case," rendering § 2254(d) obviously inapplicable. *Sumner* v. *Mata*, 449 U. S. 539, 558–559 (1981). The Court disagreed, holding that in all cases federal courts must apply § 2254(d) or explain why it was inapplicable: "No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." 449 U. S., at 552. But I thought then, and the Court today agrees, that § 2254(d) is inapplicable to the ultimate question whether pretrial identification procedures are "impermissibly suggestive," *Simmons* v. *United States*, 390 U. S. 377, 384 (1968). *Ante*, at 597.

The Court's explicit recognition that § 2254(d) does not govern the ultimate question as to the constitutionality of the pretrial identification procedures used in this case renders all the more confounding the Court's present disposition. Following this Court's directive on remand, the Court of Appeals clarified the basis for its original opinion: Section 2254 (d) was inapplicable because the federal court "substantially agree[d] with the 'historical' or 'basic' facts adduced by the

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*Although a case in which a lower court misunderstands the terms of our remand might in some instances be an appropriate candidate for summary reversal, in this case, where there is no unanimous agreement that the remand was not complied with, I would not reverse without plenary consideration.

California Court of Appeal," but disagreed with "the *legal and constitutional significance* of certain facts," and thus the "*legal* conclusion" of the state court. 649 F. 2d 713, 716–717 (1981).

I can only interpret this second vacation as evincing either the suspicion that the Court of Appeals, despite its protestations to the contrary, actually relied on factual findings inconsistent with those of the state court or that the Court of Appeals failed to distinguish its ultimate conclusion from subsidiary questions of fact. The unfairness of such suspicion is manifest. There is no reason to think, borrowing from this Court's declaration to the Court of Appeals last Term, that, despite this Court's difference of opinion, the judges of the Ninth Circuit are "not doing their mortal best to discharge their oath of office." 449 U. S., at 549.

There is no basis for disbelieving the Court of Appeals' assurance that it has accepted the factual findings of the California Court of Appeal and that it granted relief only because it concluded that the pretrial identification procedures employed in this case were, as a matter of law, unconstitutional. Accordingly, I dissent and would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

Once again the Court's preoccupation with procedural niceties has needlessly complicated the disposition of a federal habeas corpus petition. Cf. *Rose* v. *Lundy*, *ante*, p. 509. Lurking in the background of this case is the question whether the failure to conduct a lineup has any bearing on the validity of a photographic identification. The Court may one day confront that question. For the present, however, it is more concerned with the Court of Appeals' misunderstanding of the ill-defined mandate of *Sumner* v. *Mata*, 449 U. S. 539, and 28 U. S. C. § 2254(d).

We now seem to agree that § 2254(d) applies to a "basic, primary, or historical fact" and that it does not apply to a "mixed question of law and fact." The articulation of this

proposition certainly is an improvement on the Court's opinion of last Term, which understandably confounded the Court of Appeals on remand. Judge Sneed in dissent read—incorrectly, it turns out—the Court's opinion to apply § 2254(d) to mixed questions of law and fact. The panel majority read—correctly, it turns out—the Court's opinion to apply § 2254(d) only to historical facts. The panel majority held that § 2254(d) simply was not implicated in this case because there was no conflict between its findings of historical facts and those of the California Court of Appeal. The disagreement today is whether that holding is correct. In my opinion, this question is more difficult than either the *per curiam* or JUSTICE BRENNAN's dissent indicates.* Indeed, the difficulty of the analysis behooves this Court either to "poin[t] the

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*The California Court of Appeal and the Court of Appeals for the Ninth Circuit worked from the same state trial court record. The state court made the rather brief findings "that there is no showing of influence by the investigating officers: that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate." App. to Pet. for Cert. C–8. The federal court analyzed the evidence in greater detail. It found that although the fight among witnesses and the perpetrators of the crime "would have at least provided an opportunity for the witnesses to observe the perpetrators of the crime[,] . . . the violence accompanying the incident and the threat presented by the knife would have, quite likely, diverted the witnesses' attention"; that "the descriptions of the assailants were clearly not detailed descriptions"; and that "considerable pressure from both the prison officers and opposing prison factions had admittedly been brought to bear on both witnesses." *Mata* v. *Sumner*, 611 F. 2d 754, 758–759 (1979).

Putting aside the problem of separating findings of historical fact from answers to mixed questions of law and fact, it is mostly an ineffectual exercise to attempt to decide whether the two sets of findings are conflicting. The first and second of the three findings of the federal court seem to supplement, but not contradict, the roughly corresponding findings of the state court. The third does conflict with the state court's determination that there was "no showing of influence," but the reason for the conflict is fully explained by the federal court's reference to evidence in the record that the state court apparently overlooked or ignored. The Court of Appeals might have better complied with § 2254(d) by referring to this explanation. See § 2254(d)(8). In any event, since neither appellate court

way" in a more extensive and reasoned fashion or to rely upon the good faith and good sense of the federal courts in applying the rather straightforward principle of § 2254(d) even though in particular cases its application might be unclear. The Court does neither today. Instead, it merely delays, for the sake of a procedural nicety, either the habeas corpus relief to which the Court of Appeals has held the respondent is entitled or a consideration of the merits of the only significant question that the petitioner has raised. I respectfully dissent from the Court's summary disposition.

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had the benefit of findings of fact by the judge who heard the evidence, it is a strange use of our scarce resources to review such trivial differences between two appellate courts' analyses of this trial record.

Per Curiam

FLETCHER, SUPERINTENDENT, BELL COUNTY FORESTRY CAMP *v.* WEIR

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

No. 81–1049. Decided March 22, 1982

Held: Respondent was not denied due process of law under the Fourteenth Amendment by the prosecutor's use, at respondent's state-court trial which resulted in a conviction for first-degree manslaughter, of his postarrest silence for impeachment purposes—the record not indicating that respondent had been given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436, during the period in which he remained silent immediately after his arrest. In testifying in his own defense, respondent stated for the first time that he acted in self-defense in stabbing the victim and that the stabbing was accidental. The prosecutor then cross-examined him as to why he had failed to advance his exculpatory explanation to the arresting officers. Absent the sort of affirmative assurances embodied in the *Miranda* warnings—which at least implicitly assure the defendant that his silence will not be used against him—a State does not violate due process by permitting cross-examination as to postarrest silence when a defendant chooses to take the stand. *Doyle* v. *Ohio*, 426 U. S. 610 (where *Miranda* warnings were given), distinguished.

Certiorari granted; 658 F. 2d 1126, reversed and remanded.

PER CURIAM.

In the course of a fight in a nightclub parking lot, Ronnie Buchanan pinned respondent Weir to the ground. Buchanan then jumped to his feet and shouted that he had been stabbed; he ultimately died from his stab wounds. Respondent immediately left the scene, and did not report the incident to the police.

At his trial for intentional murder, respondent took the stand in his own defense. He admitted stabbing Buchanan, but claimed that he acted in self-defense and that the stabbing was accidental. This in-court statement was the first occasion on which respondent offered an exculpatory version of the stabbing. The prosecutor cross-examined him as to

why he had, when arrested, failed either to advance his exculpatory explanation to the arresting officers or to disclose the location of the knife he had used to stab Buchanan. Respondent was ultimately found guilty by a jury of first-degree manslaughter. The conviction was affirmed on appeal to the Supreme Court of Kentucky.

The United States District Court for the Western District of Kentucky then granted respondent a writ of habeas corpus, and the Court of Appeals for the Sixth Circuit affirmed. 658 F. 2d 1126 (1981). The Court of Appeals concluded that respondent was denied due process of law guaranteed by the Fourteenth Amendment when the prosecutor used his post-arrest silence for impeachment purposes.[1] Although it did not appear from the record that the arresting officers had immediately read respondent his *Miranda* warnings,[2] the court concluded that a defendant cannot be impeached by use of his postarrest silence even if no *Miranda* warnings had been given. The court held that "it is inherently unfair to allow cross-examination concerning post-arrest silence," 658 F. 2d, at 1130, and rejected the contention that our decision in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), applied only where the police had read *Miranda* warnings to a defendant. Because we think that the Court of Appeals gave an overly broad reading to our decision in *Doyle* v. *Ohio*, *supra*, we reverse its judgment.

One year prior to our decision in *Doyle*, we held in the exercise of our supervisory power over the federal courts that silence following the giving of *Miranda* warnings was ordi-

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[1] During cross-examination, the prosecutor also questioned respondent concerning his failure *prior to his arrest* to report the incident to the police and offer his exculpatory story. Relying on our decision in *Jenkins* v. *Anderson*, 447 U. S. 231 (1980), the Court of Appeals correctly held that there was no constitutional impropriety in the prosecutor's use of respondent's pre-arrest silence for impeachment purposes.

[2] *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

narily so ambiguous as to have little probative value. *United States* v. *Hale*, 422 U. S. 171 (1975). There we said:

> "In light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof." *Id.*, at 180.

The principles which evolved on the basis of decisional law dealing with appeals within the federal court system are not, of course, necessarily based on any constitutional principle. Where they are not, the States are free to follow or to disregard them so long as the state procedure as a whole remains consistent with due process of law. See *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973). The year after our decision in *Hale*, we were called upon to decide an issue similar to that presented in *Hale* in the context of a state criminal proceeding. While recognizing the importance of cross-examination and of exposing fabricated defenses, we held in *Doyle* v. *Ohio*, *supra*, that because of the nature of *Miranda* warnings it would be a violation of due process to allow comment on the silence which the warnings may well have encouraged:

> "[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.*, at 618 (footnote omitted).

The significant difference between the present case and *Doyle* is that the record does not indicate that respondent Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. The majority of the Court of Appeals recognized the difference,

but sought to extend *Doyle* to cover Weir's situation by stating that "[w]e think an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." 658 F. 2d, at 1131. We think that this broadening of *Doyle* is unsupported by the reasoning of that case and contrary to our post-*Doyle* decisions.

In *Jenkins* v. *Anderson*, 447 U. S. 231, 239 (1980), a case dealing with pre-arrest silence, we said:

> "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative."

In *Jenkins*, as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him. In *Roberts* v. *United States*, 445 U. S. 552, 561 (1980), we observed that the post-conviction, presentencing silence of the defendant did not resemble "postarrest silence that may be induced by the assurances contained in *Miranda* warnings." In *Jenkins*, we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his *Miranda* warnings, commenting that no governmental action induced the defendant to remain silent before his arrest. 447 U. S., at 239–240. Finally, in *Anderson* v. *Charles*, 447 U. S. 404, 407–408 (1980), we explained that use of silence for impeachment was fundamentally unfair in *Doyle* because "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances."

In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

The motion of respondent for leave to proceed *in forma pauperis* is granted.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN would set the case for oral argument.

JUSTICE MARSHALL dissents from the summary reversal of this case.

U. S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL., *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

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

No. 80–518. Argued October 6, 1981—Decided March 23, 1982

Respondent Riley (hereafter respondent) awoke on the morning of November 20, 1975, with severe pains in his neck, shoulders, and arms. Subsequently, he filed a claim for disability benefits under the Longshoremen's and Harbor Workers' Compensation Act (Act), alleging that he suffered an accidental injury in the course of his employment on November 19, 1975, when he was lifting duct work and felt a sharp pain in his neck. The Administrative Law Judge found that the accident never occurred and denied the claim, and the Benefits Review Board affirmed. The Court of Appeals vacated the Board's decision, holding that respondent suffered an "injury" when he awakened in pain on November 20, and that under § 20(a) of the Act—which provides that in any proceeding for the enforcement of a claim for compensation under the Act "it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of [the Act]"—respondent was entitled to a presumption that the injury was "employment-bred."

Held:

1. The Court of Appeals erred in invoking the § 20(a) presumption in support of a claim that respondent did not make, he having claimed that he was injured at work and not that the "injury" occurred at home and that it was somehow "employment-bred." In this case there is no reason to depart from the specific statutory direction that a claim be made and that the presumption, however construed, attach to the claim. Pp. 612–615.

2. The Court of Appeals also erred in its use of the term "injury" as including respondent's attack of pain occurring on the morning of November 20. The Act defines "injury" as an "accidental injury . . . arising out of and in the course of employment," so that a prima facie "claim for compensation," to which the § 20(a) presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment. Here, however, the "injury" noticed by the Court of Appeals arose in bed, not in the course of employment. The statutory presumption is no substitute for the allegations necessary to state a prima facie case. Pp. 615–616.

200 U. S. App. D. C. 402, 627 F. 2d 455, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 617. O'CONNOR, J., took no part in the consideration or decision of the case.

Richard W. Galiher, Jr., argued the cause for petitioners. With him on the briefs were *Richard W. Galiher*, *William H. Clarke*, and *Frank J. Martell*.

James F. Green argued the cause for respondents. With him on the brief for respondent Riley were *Karl N. Marshall*, *Martin E. Gerel*, *James A. Mannino*, *Mark L. Schaffer*, and *Wayne M. Mansulla*.*

JUSTICE STEVENS delivered the opinion of the Court.

In the early morning of November 20, 1975, respondent Ralph Riley awoke with severe pains in his neck, shoulders, and arms, which later were attributed by physicians to an exacerbation of an arthritic condition. The United States Court of Appeals for the District of Columbia Circuit held that this "injury" was sufficient to invoke the "statutory presumption of compensability,"[1] § 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. (part 2) 1436, 33 U. S. C. § 920(a), and vacated the administrative denial of disability benefits. We granted certiorari, 450 U. S. 979, and we now reverse.

**John C. Duncan III* filed a brief for the American Insurance Association as *amicus curiae*.

[1] "Injury" and "statutory presumption of compensability" are terms employed by the Court of Appeals. See *Riley* v. *U. S. Industries/Federal Sheet Metal, Inc.*, 200 U. S. App. D. C. 402, 627 F. 2d 455 (1980). As we explain below, the use of the term "injury" to describe Riley's early morning attack of pain is incorrect. We do not decide the scope of the § 20(a) presumption, or, *a fortiori*, the appropriateness of the Court of Appeals' characterization of it.

Contending that he was permanently and totally disabled by the arthritic condition,[2] Riley's retained counsel filed with the Deputy Commissioner a claim for compensation under the Act. See 33 U. S. C. § 913. On standard form LS–203, in response to the direction to "[d]escribe in full how the accident occurred,"[3] Riley wrote that on November 19, 1975, he was "[l]ifting duct work with co-worker, weighing approximately 500 pounds, felt sharp pain in neck and sat down." App. 111.

An evidentiary hearing was convened before an Administrative Law Judge. After construing the evidence in a light most favorable to Riley and resolving all doubts in his favor, the Administrative Law Judge found "that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and Sutherland [Riley's co-worker] gave false testimony as to the happening of the accident." App. to Pet. for Cert. 24A.

A divided panel of the Benefits Review Board affirmed the denial of disability benefits, holding that the Administrative Law Judge's findings were supported by substantial evidence. In dissent, Member Miller stated:

> "The Act does not require that claimant prove an accident in order to establish a claim. To the contrary, compensation is payable under the Act if claimant is disabled because of *injury* which is causally related to his employment. 33 U. S. C. §§ 902(10), 902(2)." 9 BRBS 936, 940 (1979) (emphasis in original).

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[2] Apparently, it is undisputed that Riley is permanently and totally disabled. Brief for Respondent Riley 5, n.

[3] The form continues with a further instruction:

"Relate the events which resulted in the injury or occupational disease. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on reverse." App. 111.

Member Miller defined an injury as "something go[ne] wrong within the human frame." *Ibid.* Riley suffered such an injury when he awoke on November 20 with severe pain. Therefore, Member Miller would have remanded the case for a determination of "the real issue in this case," which "is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment." *Ibid.* That determination was to be made in light of the § 20(a) presumption, which "places the burden on employer to prove by substantial evidence that claimant's injury did not arise out of or in the course of employment." *Ibid.*

On Riley's petition for review, the Court of Appeals vacated the decision of the Benefits Review Board, agreeing with Member Miller's position. *Riley* v. *U. S. Industries/Federal Sheet Metal, Inc.*, 200 U. S. App. D. C. 402, 627 F. 2d 455 (1980). The court stated that "it can hardly be disputed that petitioner suffered an 'injury' when he awakened in pain on November 20, 1975." *Id.*, at 405, 627 F. 2d, at 458. The court then turned its "attention to the statutory presumption and the range of situations to which this Court has applied it." *Ibid.* It construed its earlier cases as holding "that an injury need not have occurred during working hours" and "need not be traceable to any particular work-related incident to be compensable." *Id.*, at 405–406, 627 F. 2d, at 458–459.[4]

> "The foregoing cases make clear the pervasive scope of the statutory presumption of compensability. Indeed, no decision of this Court has ever failed to apply the pre-

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[4] The cases cited by the Court of Appeals do not support this proposition. In *Butler* v. *District Parking Management Co.*, 124 U. S. App. D. C. 195, 363 F. 2d 682 (1966), the claimant became ill at work and the illness was diagnosed as a schizophrenic reaction. In *Wheatley* v. *Adler*, 132 U. S. App. D. C. 177, 407 F. 2d 307 (1968), the employee collapsed from a heart attack at work. In *Mitchell* v. *Woodworth*, 146 U. S. App. D. C. 21, 449 F. 2d 1097 (1971), the employee died of a cerebral vascular accident shortly after collapsing at work.

> sumption to any facet of any claim before it. We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment." *Id.*, at 406, 627 F. 2d, at 459.

The question for remand was not whether Riley's "injury" stemmed from a "work-related incident," but whether it was "'employment-bred.'" *Ibid.*

The Court of Appeals erred because it overlooked (1) the statutory language that relates the § 20(a) presumption to the employee's claim, and (2) the statutory definition of the term "injury."

I

The Court of Appeals' first error was its invocation of the § 20(a) presumption in support of a claim that was not made by Riley. Riley claimed that he suffered an injury at work on November 19 when he was lifting duct work and felt a sharp pain in his neck. The Administrative Law Judge found as a matter of fact that the accident had not occurred; this finding is no longer challenged. The Court of Appeals' theory of recovery was that Riley suffered an injury at home in bed on November 20 and that Riley was entitled to a presumption that this injury was "employment-bred."

Section 20(a), 44 Stat. (part 2) 1436, provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act." The coverage of the presumption is debatable,[5] but one thing is clear: the pre-

[5] We need not resolve that debate in this case. It seems fair to assume, however, that the § 20(a) presumption is of the same nature as the presumption created by § 20(d) of the Act, 33 U. S. C. § 920(d), as construed in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285–287, and the presumption de-

sumption applies to the claim. Even if a claimant has an unfettered right to amend his claim to conform to the proof, the presumption by its terms cannot apply to a claim that has never been made.

Section 13 of the Act, 33 U. S. C. § 913, provides that a claimant must timely file a claim with the Deputy Commissioner. The content of the claim is not specified in that section. But § 12(b), 33 U. S. C. § 912(b), requires that the claimant timely give the Deputy Commissioner and his employer notice of his injury, and provides further that "[s]uch notice . . . shall contain . . . a statement of the time, place, nature, and cause of the injury."[6] The claim, like the notice required by § 12 and like the pleadings required in any type of litigation, serves the purposes of notifying the adverse party of the allegations and of confining the issues to be tried and adjudicated.[7]

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fined in Rule 301 of the Federal Rules of Evidence. See also *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248.

[6] "This statement must be more than a mere declaration that the employee has received an injury or is suffering from an illness that is related to his employment; it must contain enough details about the nature and extent of the injury or disease to allow the employer to conduct a prompt and complete investigation of the claim so that no prejudice will ensue." 1A E. Jhirad, A. Sann, N. Golden, & B. Chase, Benedict on Admiralty § 71, p. 4–5 (7th ed. 1981).

[7] See generally F. James & G. Hazard, Civil Procedure § 2.1 (2d ed. 1977). Of course, the workmen's compensation process is much more simplified than modern civil litigation. Indeed, this is one of the hallmarks of the system:

"The adjective law of workmen's compensation, like the substantive, takes its tone from the beneficent and remedial character of the legislation. Procedure is generally summary and informal. . . . The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. . . . On the other hand, as every lawyer knows, there is a point beyond which the sweeping-aside of 'technicalities' cannot go, since evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the

In Riley's claim, he alleged that he suffered an accidental injury in the course of his employment on November 19. No claim has ever been made that the "injury" occurred at home and that it was somehow "employment-bred." Even if such a vague claim stated a prima facie case of compensability, the statutory presumption does not require the administrative law judge to address and the employer to rebut every conceivable theory of recovery. At least when the claimant is represented by counsel,[8] as Riley was, there is no reason to depart from the specific statutory direction that a claim be

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merits of a case." 3 A. Larson, The Law of Workmen's Compensation § 78.10, p. 15–2 (1976).

Professor Larson writes that an informal substitute for a claim may be acceptable if it "identif[ies] the claimant, indicate[s] that a compensable injury has occurred, and convey[s] the idea that compensation is expected," *id.*, § 78.11, p. 15–9; that "considerable liberality is usually shown in allowing amendment of pleadings to correct . . . defects," unless the "effect is one of undue surprise or prejudice to the opposing party," *id.*, at 15–11; and that "wide latitude is allowed" as to variance between pleading and proof, "[b]ut if the variance is so great that the defendant is prejudiced by having to deal at the hearing with an injury entirely different from the one pleaded, the variance may be held fatal," *id.*, at 15–13—15–14. Riley had the benefit of these liberal pleading rules; nonetheless, the Court of Appeals applied the statutory presumption to a claim that was not fairly supported by the existing claim or by the evidentiary record. As Professor Larson warns, "[n]o amount of informality can alter the elementary requirement that the claimant allege and prove the substance of all essential elements in his case." *Id.*, at 15–12.

[8] "If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final." 33 U. S. C. § 928(a).

made and that the presumption, however construed, attach to the claim.

II

The Court of Appeals' second error was its incorrect use of the term "injury." The court stated that Riley's attack of pain in the early morning of November 20 was an "injury" compensable under the Act if the employer did not disprove by substantial evidence that the "injury" was "employment-bred." The fact that "'something unexpectedly goes wrong with the human frame,'" 200 U. S. App. D. C., at 405, 627 F. 2d, at 458 (quoting *Wheatley* v. *Adler*, 132 U. S. App. D. C. 177, 183, 407 F. 2d 307, 313 (1968)), however, does not establish an "injury" within the meaning of the Act. The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer.

Section 3(a) provides that "[c]ompensation shall be payable under this Act in respect of disability . . . of an employee, but only if the disability . . . results from an injury." 44 Stat. (part 2) 1426, as amended, 33 U. S. C. § 903(a). Injury is defined as an "accidental injury . . . arising out of and in the course of employment." 33 U. S. C. § 902(2). Arising "out of" *and* "in the course of" employment are separate elements: the former refers to injury causation; the latter refers to the time, place, and circumstances of the injury.[9] Not only must the injury have been caused by the employment, it also must have arisen during the employment.

A prima facie "claim for compensation," to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment.[10] The "injury" noticed by the Court of Appeals, how-

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[9] See, *e. g.*, *Ward & Gow* v. *Krinsky*, 259 U. S. 503; *Thom* v. *Sinclair*, [1917] A. C. 127; 1A Benedict on Admiralty, *supra*, § 43; 1 A. Larson, *supra*, § 6.10, at 3–2—3–3 (1978).

[10] The Act was enacted to create a federal workmen's compensation statute for maritime employments after this Court held that state workmen's compensation statutes constitutionally could not apply to injured maritime workers. See generally *Nogueira* v. *New York, N. H. & H. R. Co.*, 281

ever, arose in bed, not in the course of employment. Even if the Court of Appeals simply mislabeled the early morning attack of pain as the "injury" itself rather than as a manifestation of an earlier injury, the claim envisioned by the Court of Appeals did not allege any facts that would establish that Riley suffered an injury that arose in the course of employment. The statutory presumption is no substitute for the allegations necessary to state a prima facie case.

III

Riley's claim stated a prima facie case of compensability; if the Administrative Law Judge had believed Riley's allegations, he would have found that Riley's attack of pain in the early morning of November 20 was caused by an injury suffered when Riley was lifting duct work on the job on November 19. The judge, however, disbelieved Riley's allegations and marshaled substantial evidence to support his findings. The statutory presumption did not require him to adjudicate any claim that was not made, and the Court of Appeals erred in remanding for that purpose. Nor could the statutory presumption have aided Riley had he made the claim envisioned by the Court of Appeals—that he suffered an "injury" at home—for such a claim omits the requirement that a compensable injury arise in the course of employment.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

U. S. 128. Workmen's compensation legislation has never been intended to provide life or disability insurance for covered employees. The required connection between the death or disability and employment distinguishes the workmen's compensation program from such an insurance program, and the separate requirements that the injury arise out of and in the course of employment are the means for assuring, to the extent possible, that the work connection is proved. See W. Dodd, Administration of Workmen's Compensation 681 (1936); see generally *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 422–424.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 920(a), provides that "it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat [a] claim [for compensation] comes within the provisions of this chapter." The central issue before us is whether this provision requires the employer in a compensation hearing to offer "substantial evidence" refuting the existence of a causal relationship between a compensation claimant's injury and his employment. The question has been fully briefed and argued, but the Court does not address it. For me, however, the answer is clear and controls the proper disposition of this case.

By its terms, and quite in contrast to the practice in judicial proceedings, § 20(a) requires the employer to take the initial steps to disprove his liability. This preliminary shifting of the burden to the employer exemplifies the "humanitarian nature of the Act," *O'Keeffe* v. *Smith Associates*, 380 U. S. 359, 362 (1965) *(per curiam)*, and the "strong legislative policy favoring awards in arguable cases," *Wheatley* v. *Adler*, 132 U. S. App. D. C. 177, 183, 407 F. 2d 307, 313 (1968) (en banc). Section 20(a) is clearly broad enough to encompass the question of causation. "The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *In re District of Columbia Workmen's Compensation Act*, 180 U. S. App. D. C. 216, 223, 554 F. 2d 1075, 1082 (1976). To defeat a claim for compensation, the employer must rebut the presumption of compensability by offering substantial evidence that the claim is not one "arising out of and in the course of employment." 33 U. S. C. §§ 902(2), 903; see *Marra Bros., Inc.* v. *Cardillo*, 154 F. 2d 357 (CA3 1946). Only after the employer offers such substantial evi-

dence does the presumption fall "out of the case." *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286 (1935).

The statutory presumption thus defines the basic agenda for the hearing before the Office of Workers' Compensation Programs (OWCP), and the factfinding required before the OWCP may deny a compensation claim. In this case, there is no serious dispute that respondent Riley suffered some disabling injury.[1] See *Riley* v. *U. S. Industries/Federal Sheet Metal, Inc.*, 200 U. S. App. D. C. 402, 406, n. 3, 627 F. 2d 455, 459, n. 3 (1980). Riley has an arthritic neck condition, and "the pain [he] suffered . . . was due to an exacerbation of his arthritic neck condition." *Id.*, at 405, 627 F. 2d, at 458. Given the existence of this condition, and the statutory presumption, the relevant inquiry was whether the employer had shown that the condition was not sufficiently work-related to render the employer accountable.[2] No such finding was ever entered. Rather, the Administrative Law Judge and the Benefits Review Board focused exclusively on the testimony of Riley and his co-worker that something happened to Riley while lifting duct work on November 19, 1975, causing an immediate pain in his neck. The Administrative

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[1] It may be that the opinion for the Court of Appeals suffered from failing to distinguish between the use of the term "injury" in its ordinary meaning, and in its specialized meaning under the Act. See 33 U. S. C. § 902(2). But there is absolutely no basis for the suggestion in Part II of the Court's opinion that the Court of Appeals thought it sufficient to ground a compensation claim on an "injury" that "arose in bed, not in the course of employment." *Ante*, at 616. The suggestion is plainly wrong; virtually every aspect of the opinion for the Court of Appeals reaffirms that the issue before the Administrative Law Judge and the Benefits Review Board was whether there existed some causal connection between the claimant's disability and his employment.

[2] In practice, the two tests of "arising out of" and "in the course of" tend to merge into a single determination of work-relatedness. See 1A A. Larson, The Law of Workmen's Compensation §§ 29.00–29.10, pp. 5–354—5–357 (1979). The dissenting member of the Benefits Review Board Panel thus properly described "the real issue in this case" as "whether claimant's injury is causally related to his employment." 9 BRBS 936, 940 (1979).

Law Judge concluded only that no such incident occurred; the Benefits Review Board affirmed that finding.

Had the Administrative Law Judge credited the testimony of Riley with respect to the November 19 incident, it would surely have strengthened Riley's position that the exacerbation of his arthritic neck condition was work-related. But the finding that this incident did not occur hardly demonstrates that Riley's disability did not arise out of and in the course of employment. An injury need not be traceable to a single event at work in order to be compensable. "Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been 'employment bred.'"[3] *Id.*, at 406, 627 F. 2d, at 459.

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[3] It is surely plausible that there was a causal relation between the exacerbation of Riley's arthritic neck condition and the overhead sheet metal duct work that he was engaged in until the night he awoke in bed in pain. But however logical this connection might be in some lay sense, it could hardly assure Riley of recovery. The term "substantial" is relative, and the quantum and type of evidence required of the employer correspond to the specificity of the claimaint's evidence and allegations. The evidence necessary to overcome the presumption is least when the claim rests—as this one apparently did once the testimony respecting the November 19 accident was rejected—on little more than some arguable link between the disabling condition and the nature of the work.

There appears to be little in the abbreviated record before this Court directly supporting this broader theory of recovery. Although one physician testified that "[t]he man is certainly disabled from working," App. 130, this statement was made in the course of questioning about the possible effects of the alleged November 19 incident. Another doctor, describing Riley's condition shortly after he entered the hospital, noted: "[M]ost of his work is overhead type and involves quite a bit of hyperextention of the neck. That means that most of his work he will have to do with his neck bending upwards." *Id.*, at 158. That same doctor, however, referred repeatedly to Riley's assertion that he felt pain as a result of bending or twisting his neck while lifting duct work in November 1975, and rendered his diagnosis on that basis. See *id.*, at 162–169. Although Riley hardly proved his theory by this medical evidence, given the nature of the injury and the nature of his work, Riley clearly made the "initial demonstration of employment-connection [that] will give the presumption a foothold." 1 A. Larson, *supra*, § 10.33, at 3–121 (1978).

Absent a finding excluding this possibility, compensation could not be denied. In addition, the failure of the Administrative Law Judge to focus on the broader issue of the injury's work-relatedness suggests that he may have failed to conduct the proceedings with proper attentiveness to the basic issue in a case such as this: namely, had the claimant been disabled as a result of his employment? Because the agency did not make the crucial finding, the Court of Appeals quite properly remanded this case so that the necessary determination could be made.

II

Rather than allow a remand so that the normal process of administrative adjudication might run its course, the Court discerns a dispositive procedural requirement within the Act. The Court places its emphasis on the language of § 20(a):

> "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat *the claim* comes within the provisions of this Act." (Emphasis added.)

Unremarkably, the Court reads this language as applying the presumption to the "claim for compensation." But quite remarkably, and without any support in precedent or the language of the Act, the Court construes the words "claim for compensation" to mean some sort of legal document, or at least some stated theory, setting forth a prima facie case for compensation, upon which all further proceedings must be based, and to which the presumption may attach.

The Court appears to glean its understanding of the word "claim" from the meaning assigned to the term "claim for relief" by Rule 8(a) of the Federal Rules of Civil Procedure. The Court concedes, as it must, that this understanding of the word "claim" finds no direct authority in the LHWCA itself. The Act does require the employee to file a timely "claim" with the Deputy Commissioner. 33 U. S. C.

§ 913(a). See *ante*, at 613. But it is clear that the referred-to "claim" is nothing more than a simple request for payment,[4] carrying with it the implicit assertion of an entitlement to compensation. To the extent an allegation of "time, place, nature, and cause of injury" is statutorily required, it is only in connection with the *notice* to the employer referred to by § 12.[5] 33 U. S. C. § 912.

Moreover, the Court's reliance on a written pleading requirement is wholly out of step with the sensible informality with which the Act is administered.[6] Under the present regime of administrative enforcement, issues are not narrowed through pleadings, but rather through a mixture of formal

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[4] This definition of "claim" comports with its accustomed meaning in the context of comparable compensation statutes. For example, "claim" is defined for purposes of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 *et seq.* (1976 ed. and Supp. IV), as "a written assertion of entitlement to benefits under [the Act], submitted in a form and manner authorized by the provisions of this subchapter." 20 CFR § 725.101(a)(16) (1981). See also 20 CFR § 10.5(a)(7) (1981) (Federal Employees' Compensation Act, 5 U. S. C. § 8101 *et seq.*).

[5] The Court's reliance on the notice requirement of § 12 to suggest that the *claim* encompass some allegation of "time, place, and manner," so that the Court can in turn conclude that the statutory presumption applies to what is alleged in the "claim," is a patchwork job. The "claim" is something entirely apart from the § 12 notice. Indeed, § 12(d) employs the very distinction that the Court seeks to blur: "Failure to give such *notice* shall not bar any *claim* under this chapter" where the employer had actual notice, the Deputy Commissioner excuses such notice, or where no objection was raised to the failure "before the deputy commissioner at the first hearing of a claim for compensation . . . ." 33 U. S. C. § 912(d).

[6] For example, the regulations provide that "[t]he order in which evidence and allegations shall be presented and the procedures at the hearings generally . . . shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing." 20 CFR § 702.338 (1981). That same regulation provides that "[i]f the adminstrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may . . . at any time, prior to the filing of the compensation order, reopen the hearing for the receipt of such evidence."

and informal prehearing procedures. 20 CFR §§ 702.311–702.317 (1981). The regulations governing the administration of the Act reflect the method chosen by the agency charged with administering the Act for addressing the practical problems of issue narrowing that inevitably arise in the course of administrative proceedings. In addition to the prehearing conference report, which sets forth the issues for the hearing, the parties are required to submit a prehearing statement defining the issues to be considered. See § 702.317. Nevertheless, the employee's failure to raise a particular issue at the prehearing conference, or in his prehearing statement, does not preclude him from raising that issue at the formal hearing. See § 702.336(a). In addition, "[a]t any time prior to the filing of the compensation order . . . the administrative law judge may in his discretion" reopen the hearing to consider a new issue. § 702.336(b).[7]

Apparently the Court is of the view that its imported definition of "claim" is necessary to protect employers from being called into a compensation hearing without any warning of the basis upon which compensation is sought; on this argument, the employer would otherwise be forced to offer evidence refuting every conceivable basis upon which an employee's claim might be grounded. I do not share the Court's fear. The Act already contains sufficient accommodation to such legitimate employer concerns: in the form of a *statutory* notice requirement, in the practical manner in which the presumption of compensability has historically

[7] Although I do not profess expertise in the administration of the LHWCA, it does seem to me that this provision might have relevance in a case, such as the present one, where the administrative law judge intends to reject the claimaint's principal theory of the case, but where a second theory should be more fully explored before the question of compensation is finally determined. Of course, I would leave questions regarding the application of this and all other regulations governing LHWCA proceedings for the Review Board to resolve on remand. See also 20 CFR § 702.336(a) (1981).

been applied, and in the good-sense application of agency regulations and case management principles by the administrative officials charged with the execution of this Act's provisions. In sum, I am confident, as the Court apparently is not, that any legitimate claim of surprise by the employer in this or in any other case may be fairly considered within the framework of the governing regulations, and resolved in a manner that effectuates the humanitarian purposes of this Act. Rather than rely on some fictive legal analysis to dispose of the case "as a matter of law," by intertwining the problem of notice with the § 20(a) presumption, I would leave all such questions of proof and notice for the agency on remand, as did the Court of Appeals.

III

As Justice Douglas once had occasion to remind us, "[t]he problems under this Act should rest mainly with the Courts of Appeals." *O'Keeffe* v. *Smith Associates*, 380 U. S., at 371 *(dubitante)*. The Court's treatment of the relatively simple issues raised by the present case underscores the wisdom of that counsel of deference. The Court of Appeals concluded below that the relevant issues were never resolved by the Administrative Law Judge. I can hardly disagree. Therefore, I dissent.

LANE, CORRECTIONS DIRECTOR *v.* WILLIAMS ET AL.

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

No. 80–1240. Argued December 1, 1981—Decided March 23, 1982

In 1975, both respondents pleaded guilty in unrelated Illinois state-court prosecutions for burglary, an offense punishable at that time by imprisonment for an indeterminate term of years and a mandatory 3-year parole term. Neither respondent, during his plea acceptance hearing, was informed that his negotiated sentence included the mandatory parole term. Each respondent completed his prison sentence, was released on parole, and was then reincarcerated for parole violation. While in custody, each filed petitions for federal habeas corpus, which were consolidated in the District Court, alleging that the failure of the trial courts to advise them of the mandatory parole requirement before accepting their guilty pleas deprived them of due process of law. The District Court found for respondents and, in accordance with the relief requested by them, merely ordered their release through "specific performance" of the plea bargains rather than nullifying the guilty pleas and allowing them to plead anew. After a remand from the Court of Appeals based on a question as to exhaustion of state remedies, the District Court ultimately again entered judgment for respondents. Since they had already been discharged from custody, the court simply entered an order "declaring void the mandatory parole term[s]." The Court of Appeals affirmed.

Held: Respondents' claims for relief are moot. Assuming that the failure to advise respondents of the mandatory parole requirement rendered their guilty pleas void, they could have sought to have their convictions set aside and to plead anew, and this case would not then be moot. Such relief would free them from all consequences flowing from their convictions as well as subject them to reconviction with a possibly greater sentence, thus preserving a live controversy to determine whether a constitutional violation had occurred and whether respondents were entitled to the relief sought. However, by seeking "specific enforcement" of the plea agreement by elimination of the mandatory parole term from their sentences, respondents instead elected to attack only their sentences and to remedy the alleged constitutional violation by removing the consequence that gave rise to the constitutional harm. Since their parole terms have now expired, they are no longer subject to any direct re-

straint as a result of the parole terms, and the case is moot. Neither the doctrine that an attack on a criminal conviction is not rendered moot by the fact that the underlying sentence has expired, nor the doctrine that a case is not moot where it is "capable of repetition, yet evading review," is applicable here. Pp. 630–634.

633 F. 2d 71, vacated.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 634.

Michael B. Weinstein, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Tyrone C. Fahner*, Attorney General, and *Herbert L. Caplan* and *Melbourn A. Noel, Jr.*, Assistant Attorneys General.

Martha A. Mills, by appointment of the Court, 453 U. S. 921, argued the cause and filed a brief for respondents.

JUSTICE STEVENS delivered the opinion of the Court.

In 1975, respondents pleaded guilty in Illinois state court to a charge of burglary, an offense punishable at that time by imprisonment for an indeterminate term of years and a mandatory 3-year parole term. We granted certiorari to consider whether the failure of the trial court to advise respondents of that mandatory parole requirement before accepting their guilty pleas deprived them of due process of law. We are unable to reach that question, however, because we find that respondents' claims for relief are moot.

I

On March 11, 1975, respondent Lawrence Williams appeared in Illinois state court and pleaded guilty to a single count of burglary. Before accepting the guilty plea, the trial judge elicited Williams' understanding of the terms of a plea agreement, in which his attorney and the prosecutor had

agreed that Williams would receive an indeterminate sentence of from one to two years in prison in exchange for pleading guilty. The judge informed Williams that he would impose the bargained sentence, and advised him of both the nature of the charge against him and the constitutional rights that he would waive by pleading guilty. After the prosecutor established a factual basis for the plea, Williams indicated that he understood his rights and wished to plead guilty.

At the time that Williams pleaded guilty, Illinois law required every indeterminate sentence for certain felonies, including burglary, to include a special parole term in addition to the term of imprisonment.[1] During the plea acceptance hearing, neither the trial judge, the prosecutor, nor defense counsel informed Williams that his negotiated sentence included a mandatory parole term of three years.

Williams was discharged from prison on May 20, 1976, and released on parole. On March 3, 1977, he was arrested for

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[1] See Ill. Rev. Stat., ch. 38, ¶ 1005–8–1 (1975). The mandatory parole requirement was first imposed by the Illinois Legislature in 1972. 1972 Ill. Laws, P. A. 77–2097, § 5–8–1. At the time that Williams pleaded guilty, the mandatory parole term for the offense of burglary was three years; however, Illinois law also provided that "[t]he Parole and Pardon Board may enter an order releasing and discharging a parolee from parole and his commitment to the Department when it determines that he is likely to remain at liberty without committing another offense." § 3–3–8 (current version Ill. Rev. Stat., ch. 38, ¶ 1003–3–8 (Supp. 1980)). In 1978 the parole requirement was amended by the Illinois Legislature and reduced, for the offense in question, to two years. 1977 Ill. Laws, P. A. 80–1099, § 3.

In *People* v. *Wills*, 61 Ill. 2d 105, 330 N. E. 2d 505 (1975), cert. denied, 423 U. S. 999, the Illinois Supreme Court held that the mandatory parole term is one of the consequences of a guilty plea that must be explained to the defendant before such a plea may be accepted. The court also held, however, that its decision should not be applied retroactively; thus, during the period between January 1, 1973, when the mandatory parole requirement became effective, and May 19, 1975, when *Wills* was decided, there was no state-law requirement that a defendant be advised of the parole requirement before pleading guilty.

reasons that do not appear in the record and, on March 16, 1977, he was returned to prison as a parole violator. While in custody, Williams filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. He alleged that he "was not informed" that a mandatory parole term had attached to his sentence until two months before his discharge from prison and that "his present incarceration is therefore in violation of the Due Process Clause of the 14th Amendment to the U. S. Constitution." App. 12. Williams' petition did not ask the federal court to set aside his conviction and allow him to plead anew. It requested an order "freeing him from the present control" of the Warden and from "all future liability" under his original sentence.[2]

On January 4, 1978, the District Court found that Williams' guilty plea had been induced unfairly in violation of the Due Process Clause of the Fourteenth Amendment and ordered Williams released from custody. *United States ex rel. Williams* v. *Morris*, 447 F. Supp. 95 (1978). The court expressly "opted for specific performance" of the plea bargain "rather than nullification of the guilty plea." *Id.*, at 101. The relief granted was precisely what Williams had requested.

Williams was not, however, immediately released from custody. The District Court entered a stay to give the State an opportunity to file a motion for reconsideration. Before that stay was lifted, Williams was released from prison on a special 6-month "supervisory release term." The District Court subsequently denied the State's motion to reconsider and the State appealed.[3] While that appeal was pending,

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[2] The petition also requested "[a]ny further relief that [the] Court deems appropriate and just in this [m]atter." App. 13.

[3] Although the denial of the motion to reconsider is dated January 27, 1978, it was not entered until February 2, 1978. Williams was released on February 1, 1978.

Williams' 6-month release term expired and he was released from the custody of the Illinois Department of Corrections.

The facts concerning respondent Southall are similar. Pursuant to a plea bargain with the prosecutor that was accepted in advance by an Illinois trial court, Southall pleaded guilty to a single charge of burglary and was sentenced to prison for a minimum period of one year and a maximum period not to exceed three years. The transcript of the plea acceptance proceeding contains no statement by the prosecutor, Southall's public defender, or the trial judge that the bargained and imposed sentence included the mandatory 3-year parole term. Like respondent Williams, Southall completed his sentence, was released on parole, and later declared a parole violator.[4] While reincarcerated, he filed a petition for habeas corpus in federal court, seeking his "immediate release." App. 65.[5] His case was consolidated in the District Court with that of respondent Williams.

The District Court found "Southall's situation to be factually indistinguishable from Williams'." 447 F. Supp., at 102. The court thus granted Southall's petition for a writ of habeas corpus. The State filed an appeal from that decision, but discharged Southall in compliance with the decision of the District Court.[6]

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[4] Southall began serving his sentence on October 8, 1974, the date of his arrest. He was released on parole on September 22, 1975. On October 8, 1976—well within the 3-year period that Southall was told he could be subject to the control of the Illinois Department of Corrections—he was declared a parole violator "as of November 1, 1975." The record does not disclose the nature of this parole violation.

[5] Southall did not allege that he did not know of the parole requirement at the time he pleaded guilty. Southall simply alleged that "[he] was not previously aware that [he] would be detained on violation of mandatory parole." *Id.*, at 65.

[6] The District Court's original order commanding Southall's release was stayed until further order of the court, to permit the State to file the motion for reconsideration. Although the record does not contain an order terminating the stay, the Court of Appeals subsequently indicated that Southall had been released pursuant to the District Court's order. 594 F. 2d 614, 615 (CA7 1979).

The Court of Appeals reversed on the ground that respondents had failed to exhaust an available state remedy. 594 F. 2d 614 (CA7 1979). Before reaching that decision, however, the court requested the parties to submit supplemental briefs on the issue of mootness. The court concluded that the cases were not moot. It noted that Southall's mandatory parole term extended beyond the date of its decision and thus could be reinstated. While Williams' parole term had expired, the court concluded that the controversy was still alive because "there remain collateral consequences which might have lingering effects since [Williams was] found guilty of [a] violatio[n] of the mandatory parole"; that violation "would remain upon [his] recor[d] with various possible adverse consequences." *Id.*, at 615.[7] Moreover, the court found the issue to be capable of repetition, yet evading review; "[i]t is obvious that because of the short terms often remaining in the mandatory parole terms that the same issue may be expected to be raised as to other petitioners similarly situated with doubtful expectations of resolution." *Ibid.*

After the Court of Appeals had rendered its decision, respondent Southall was discharged from the custody of the Illinois Department of Corrections.[8] On remand, the District Court concluded that, as a result of an intervening decision of the Illinois Supreme Court, exhaustion of state remedies would be futile. 483 F. Supp. 775 (1980). The court again entered judgment for respondents; since they had already

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[7] The court did not identify these collateral effects or adverse consequences. It found the situation "similar in principle," however, to that considered in *Carafas* v. *LaVallee*, 391 U. S. 234.

[8] In subsequent proceedings in the District Court, some uncertainty existed concerning the current effect of the parole term on Southall, since he had been returned to custody after committing a new offense. In its brief in this Court, however, the State declares that, as to the sentence at issue here, Southall was "totally discharged from the custody of the Illinois Department of Corrections as of October 24, 1979." Brief for Petitioner 10. Our holding that his case is moot is based on the understanding that the State may not subject Southall to any further detention or restraint as a result of the mandatory parole term at issue in this case.

been released from custody, the court simply entered an order "declaring void the mandatory parole terms." App. 39. The Court of Appeals affirmed that decision, 633 F. 2d 71 (1980), and we granted the State's petition for certiorari. *Sub nom. Franzen* v. *Williams*, 452 U. S. 914.

II

Respondents claim that their constitutional rights were violated when the trial court accepted their guilty pleas without informing them of the mandatory parole requirement. Assuming, for the sake of argument, that the court's failure to advise respondents of this consequence rendered their guilty pleas void,[9] respondents could seek to remedy this error in two quite different ways. They might ask the District Court to set aside their convictions and give them an opportunity to plead anew; in that event, they might either plead not guilty and stand trial or they might try to negotiate a different plea bargain properly armed with the information that any sentence they received would include a special parole term. Alternatively, they could seek relief in the nature of "specific enforcement" of the plea agreement as they understood it; in that event, the elimination of the mandatory parole term from their sentences would remove any possible harmful consequence from the trial court's incomplete advice.

If respondents had sought the opportunity to plead anew, this case would not be moot. Such relief would free respondents from all consequences flowing from their convictions, as well as subject them to reconviction with a possibly greater sentence. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711. Thus, a live controversy would remain to determine whether

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[9] Cf. *Boykin* v. *Alabama*, 395 U. S. 238; *Santobello* v. *New York*, 404 U. S. 257; *Henderson* v. *Morgan*, 426 U. S. 637. We do not decide whether, to establish such a constitutional violation, respondents must claim that they in fact did not know of the parole requirement at the time they pleaded guilty or that they would not have pleaded guilty had they known of this consequence.

a constitutional violation in fact had occurred and whether respondents were entitled to the relief that they sought.[10]

Since respondents had completed their previously imposed sentences, however, they did not seek the opportunity to plead anew.[11] Rather, they sought to remedy the alleged constitutional violation by removing the consequence that gave rise to the constitutional harm. In the course of their attack, that consequence expired of its own accord. Respondents are no longer subject to any direct restraint as a result of the parole term. They may not be imprisoned on the lesser showing needed to establish a parole violation than to prove a criminal offense. Their liberty or freedom of movement is not in any way curtailed by a parole term that has expired.

Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot. "Nullification of a conviction may have important benefits for a defendant . . . but urging in a habeas corpus proceeding the correction of a sentence already served is another matter." *North Carolina* v. *Rice*, 404 U. S. 244, 248.

The Court of Appeals, relying on *Carafas* v. *LaVallee*, 391 U. S. 234, concluded that respondents' parole violations had sufficient "collateral effects" to warrant an exercise of federal

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[10] Since this relief would free respondents from collateral, as well as direct, consequences of a criminal conviction, the case would not be moot even if the previous sentence had been served and the State indicated that it would not seek a retrial. *Carafas* v. *LaVallee*, *supra*.

[11] Williams' general prayer for "[a]ny further relief that [the] Court deems appropriate and just in this [m]atter"—or the fact that the District Court may have inherent power to fashion an appropriate remedy for the violation of a constitutional right—is not equivalent to a specific request by respondents to set aside their convictions. We need not decide here whether respondents would ever be entitled to relief other than the opportunity to plead anew. Unless respondents requested such relief, however, it surely would not be appropriate to enter an order that would subject them to the risk of retrial after their sentences had been served.

habeas corpus relief. In *Carafas* we held that an attack on a criminal conviction was not rendered moot by the fact that the underlying sentence had expired. On the basis of New York law, we noted that "[i]n consequence of [the petitioner's] conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror." *Id.*, at 237 (footnotes omitted). These substantial civil penalties were sufficient to ensure that the litigant had "'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.'" *Ibid.* (quoting *Fiswick* v. *United States*, 329 U. S. 211, 222). In *Sibron* v. *New York*, 392 U. S. 40, 57, we stated that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

The doctrine of *Carafas* and *Sibron* is not applicable in this case. No civil disabilities such as those present in *Carafas* result from a finding that an individual has violated parole.[12] At most, certain nonstatutory consequences may occur; employment prospects, or the sentence imposed in a future criminal proceeding, could be affected. Cf. *People* v. *Halterman*, 45 Ill. App. 3d 605, 608, 359 N. E. 2d 1223, 1225 (1977).[13] The discretionary decisions that are made by an

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[12] The State of Illinois has chosen to define narrowly the collateral civil penalties that attach even to a conviction of a criminal offense; generally, collateral consequences do not extend beyond the completion of the sentence or the release from imprisonment. See Ill. Rev. Stat., ch. 38, ¶ 1005–5–5 (Supp. 1980).

[13] In his dissenting opinion, JUSTICE MARSHALL argues that this case is not moot because a possibility exists under state law that respondents' parole violations may be considered in a subsequent parole determination. This "collateral consequence" is insufficient to bring this case within the doctrine of *Carafas*. That case concerned existing civil disabilities; as a result of the petitioner's conviction, he was presently barred from holding certain offices, voting in state elections, and serving as a juror. This case

employer or a sentencing judge, however, are not governed by the mere presence or absence of a recorded violation of parole; these decisions may take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation. Any disabilities that flow from whatever respondents did to evoke revocation of parole are not removed—or even affected—by a District Court order that simply recites that their parole terms are "void." [14]

Respondents have never attacked, on either substantive or procedural grounds, the finding that they violated the terms of their parole. Respondent Williams simply sought an order "freeing him from the present control" of the Warden and from "all future liability" under his original sentence; Southall sought his "immediate release" from custody. Through the mere passage of time, respondents have obtained all the relief that they sought. In these circumstances, no live controversy remains.

The Court of Appeals also held that this case was not moot because it was "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515.

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involves no such disability. The parole violations that remain a part of respondents' records cannot affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole. Respondents themselves are able—and indeed required by law—to prevent such a possibility from occurring. Moreover, the existence of a prior parole violation does not render an individual ineligible for parole under Illinois law. It is simply one factor, among many, that may be considered by the parole authority in determining whether there is a substantial risk that the parole candidate will not conform to reasonable conditions of parole.

Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid.

[14] The District Court's order did not require the Warden to expunge or make any change in any portion of respondents' records. Nor have respondents ever requested such relief.

That doctrine, however, is applicable only when there is "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149; *Murphy* v. *Hunt*, *ante*, at 482. Respondents are now acutely aware of the fact that a criminal sentence in Illinois will include a special parole term; any future guilty plea will not be open to the same constitutional attack. The possibility that other persons may litigate a similar claim does not save this case from mootness.

The judgment of the Court of Appeals is vacated. The case should be dismissed as moot.

It is so ordered.

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

The majority announces today that this case is moot because, in its view, no collateral consequences flow from respondents' parole revocations, which were based on findings that respondents had violated the conditions of parole terms declared void by the courts below. I dissent from this holding because I believe it is contrary to this Court's precedents and because it ignores the fact that the State of Illinois does attach collateral consequences to parole revocations, a fact recognized both in the State's brief to the Court of Appeals on the issue of mootness and in state-court decisions in analogous cases.

I

The majority recognizes that in habeas corpus challenges to criminal convictions, the case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron* v. *New York*, 392 U. S. 40, 57 (1968). This Court has consistently refused to canvass state law to ascertain "the actual existence of specific collateral consequences," and has presumed that such consequences exist. *Id.*, at 55

(discussing *United States* v. *Morgan*, 346 U. S. 502 (1954), and *Pollard* v. *United States*, 352 U. S. 354 (1957)). See also *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238 (1968).

Today, the majority finds the *Carafas* doctrine inapplicable, arguing that because respondents did not seek to set aside their convictions, their situation is analogous to that of a defendant who seeks habeas corpus review to correct a sentence already served. See *North Carolina* v. *Rice*, 404 U. S. 244 (1971) *(per curiam)*. Had respondents served the allegedly void mandatory parole term without incident, I might agree that *North Carolina* v. *Rice* controls and join the majority's conclusion that the consequence of the constitutional violation "expired of its own accord." *Ante*, at 631. Here, however, respondents were found to have violated the conditions of their parole. Therefore, unlike the situation in *North Carolina* v. *Rice*, respondents seek more than a mere reduction in sentence after the sentence has been completed: they seek to have the parole term declared void, or expunged, in order to avoid the future consequences that attach to parole violations. If collateral consequences do attach to parole violations, both the State and respondents have a live interest in this Court's review of the lower courts' holdings that the alleged constitutional violations rendered the guilty pleas void and that respondents were entitled to specific performance of the pleas, in the form of a declaration that the mandatory parole terms were void and should be expunged.

The existence of a live controversy in this case turns on whether collateral consequences attach to parole violations. Because this determination involves a difficult question of state law, I believe that the doctrine of *Sibron* and *Carafas* should be applied. This doctrine avoids placing a federal court in the awkward position of determining questions of state law not directly before it. By presuming the existence of collateral consequences, federal courts are not required to predict the manner in which a State may use convictions or

parole violations in future proceedings. An erroneous determination that collateral consequences do not attach not only injures the individuals challenging the constitutionality of the guilty pleas, but also hinders the State's ability to use these violations in future proceedings. Today's opinion is an unfortunate example of such an erroneous interpretation.

II

The majority's decision is apparently based on a cursory examination of Illinois statutes. Finding no statutory civil disabilities, the majority glibly dismisses nonstatutory consequences as "discretionary decisions" that would remain whether or not the parole terms were declared void or expunged. *Ante*, at 632–633.[1] This reasoning has no basis in

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[1] The majority makes a cryptic reference to the fact that respondents did not request the District Court to expunge or make any change in their records. *Ante*, at 633, n. 14. The failure to make this request is easily explained on several grounds and is irrelevant to the question whether this case is moot. The respondents did request that the District Court "expunge" the parole terms on which the violations were based. This "expungement" would have the effect of removing respondents' parole-violation status and would relieve respondents of the collateral consequences flowing from this status. Any further "expungement" that respondents might obtain should be requested in future state proceedings. The State of Illinois has a very limited expungement procedure that would not cover the expungement to which the majority apparently refers. See Ill. Rev. Stat., ch. 38, ¶ 206–5 (Supp. 1980) (person, not convicted of any previous criminal offense, who is acquitted or released without conviction may petition the court for expungement of arrest records).

Furthermore, the State of Illinois has no procedure to expunge convictions that are later reversed or vacated on appeal, but this fact, or the failure of a habeas petitioner to request that a federal district court accord him relief that is unavailable under state law, would hardly render moot a habeas petition to set aside a conviction unconstitutionally obtained. The Illinois courts may not consider a reversed conviction in aggravation of sentence, despite the fact that the records of this conviction have not been officially "expunged." See, *e. g.*, *People* v. *Wunnenberg*, 87 Ill. App. 3d 32, 409 N. E. 2d 101 (1980); *People* v. *Chellew*, 20 Ill. App. 3d 963, 313 N. E. 2d 284 (1974).

Illinois law and appears to derive from nothing more than judicial intuition.

Several collateral consequences attach to parole violations under Illinois law.[2] First, a sentencing judge may consider parole violations in aggravation of sentence. The majority makes the unwarranted assumption that declaring void the parole term upon which a violation is based has no effect because a sentencing judge would consider the conduct underlying the violation, and not the violation itself, in deciding whether to enhance a sentence. However, as the majority recognizes, there is no way for this Court to determine the basis for respondents' parole revocation. Under Illinois law, the Prisoner Review Board is given substantial discretion in setting conditions of parole. See Ill. Rev. Stat., ch. 38, ¶ 1003–3–7 (Supp. 1980).[3] Conditions of parole may prohibit

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[2] Of course, the existence of express statutory civil disabilities is not a prerequisite to holding that a habeas challenge to a criminal conviction is not moot. See, *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 54–57 (1968) (discussing *Fiswick* v. *United States*, 392 U. S. 211 (1946)); *United States* v. *Morgan*, 346 U. S. 502 (1954); *Pollard* v. *United States*, 352 U. S. 354 (1957)).

[3] Paragraph 1003–3–7 provides:

"(a) The conditions of parole or mandatory supervised release shall be such as the Prisoner Review Board deems necessary to assist the subject in leading a law-abiding life. The conditions of every parole and mandatory supervised release are that the subject:

"(1) not violate any criminal statute . . . ; and

"(2) refrain from possessing a firearm or other dangerous weapon.

"(b) The Board may *in addition to other conditions* require that the subject:

"(1) work or pursue a course of study or vocational training;

"(2) undergo medical or psychiatric treatment, or treatment for drug addiction or alcoholism;

"(3) attend or reside in a facility established for the instruction or residence of persons on probation or parole;

"(4) support his dependents;

"(5) report to an agent of the Department of Corrections;

"(6) permit the agent to visit him at his home or elsewhere to the extent necessary to discharge his duties . . ." (emphasis added).

[Footnote 3 is continued on page 638]

conduct that is otherwise innocent and may affirmatively require the parolee to engage in specified work or rehabilitation programs. Parole may be revoked upon a finding that the parolee has violated *any* of these parole conditions. See Ill. Rev. Stat., ch. 38, ¶1003–3–9 (Supp. 1980); Illinois Prisoner Review Board, Rules Governing Parole 9–10, 13–16 (1979), 3 Ill. Register 144, 162–166 (1979). Therefore, conduct giving rise to a parole violation may be completely innocuous but for the fact that it was prohibited or required as a condition of parole, and it may be entirely irrelevant to a sentencing decision once the parole term is declared void.

Moreover, it is not clear under Illinois law whether a sentencing judge would consider the conduct underlying a parole violation, even if the conduct is not otherwise innocent, where the parole term itself is declared void. In a similar context, the Illinois appellate courts have held that trial courts may not consider a reversed conviction in aggravation of sentence, even where the court, in remanding for a new trial, noted that the evidence was sufficient to support the verdict beyond a reasonable doubt and the matter was never retried. See, *e. g.*, *People* v. *Chellew*, 20 Ill. App. 3d 963, 313 N. E. 2d 284 (1974). Cf. *People* v. *Wunnenberg*, 87 Ill. App. 3d 32, 34, 409 N. E. 2d 101, 103 (1980). The Illinois courts have also held that review of probation revocation is not rendered moot merely because the defendant has served his entire sentence. See *People* v. *Halterman*, 45 Ill. App. 3d 605, 608, 359 N. E. 2d 1223, 1225 (1977) (challenge to probation revocation not moot because "the fact that the defendant has had his probation revoked might be submitted to another judge for his consideration in sentencing the defendant if he has the misfortune of again being convicted of some crime"). These cases do not conclusively demonstrate that a judge would not consider the conduct underlying the violation

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See also Illinois Prisoner Review Board, Rules Governing Parole 9–12 (1979), 3 Ill. Register 158–160 (1979).

of a void parole term in aggravation of sentence. However, they cast serious doubt on the validity of the majority's assumption to the contrary. Furthermore, the State argued to the Court of Appeals that the case was not moot because the State "is deeply interested in whether or not it can use the parole violation status of [respondents] for sentencing purposes should they ever again come into contact with the criminal justice system." Additional Memorandum for Appellants in Nos. 78–1321, 78–1322, 78–1323, 78–1380 (CA7), p. 5 (Mem. to Court of Appeals). This argument at least implies that the State would not use this status for sentencing purposes after a court had declared the parole terms void.

Second, the majority completely overlooks an important collateral consequence that attaches to parole violations should the respondents ever have the misfortune of returning to prison. In rules promulgated by the Prisoner Review Board pursuant to Ill. Rev. Stat., ch. 38, ¶¶ 1003–3–1, 1003–3–2 (Supp. 1980), the State of Illinois has set forth fairly specific criteria upon which parole may be denied. See Illinois Prisoner Review Board, Rules Governing Parole (1979), 3 Ill. Register 144–169 (1979). The Rules provide in relevant part:

> "V. BASIS FOR DENYING PAROLE
>
> In accordance with statute, the Board shall not parole a candidate if it determines that:
>
> "A. There is a substantial risk that the candidate will not conform to reasonable conditions of parole based on one or more of the following factors:
>
> "1. Existence of prior adult felony convictions (mitigating as well as aggravating factors to be considered).
>
> "2. An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
>
> "*3. Prior adult parole or probation violations within five years prior to the present offense.*
>
> "4. Refusal to be supervised on parole.

"5. No means of financial support or no place of residence. (Continuance not to exceed six months to seek resolution of problem.)

"6. A psychiatric examination determines the candidate is not likely to conform." Illinois Prisoner Review Board, Rules Governing Parole 6 (1979), 3 Ill. Register 153 (1979) (emphasis added).

Under these rules, parole may be denied simply on the basis of a prior parole violation; the conduct underlying the parole violation is apparently irrelevant unless it falls within one of the other criteria listed in that section. We have no reason to assume that the conduct underlying respondents' violations would fall within one of the other factors, or that the Prisoner Review Board would deny parole based on a parole violation notwithstanding the fact that the parole term had been declared void. In fact, the State argued to the Court of Appeals that the case was not moot because respondents "still have a substantial stake in ensuring that their parole terms are, indeed, expunged," because the parole violations would be burdensome if respondents were ever again considered for parole. Mem. to Court of Appeals 5. See also *United States ex rel. Howell* v. *Wolff*, No. 78 C 951 (ND Ill. Aug. 9, 1978) (unpublished opinion of Judge Leighton, reprinted in App. to Mem. to Court of Appeals) (finding case not moot due to potential burden on future parole decision from parole-violation status).

III

Today's decision, in which the majority undertakes a cursory and misleading examination of state law, starkly demonstrates the wisdom of applying the doctrine of *Carafas* and *Sibron* to the determination whether a State attaches collateral consequences to parole violations. I would apply that doctrine, presume the existence of collateral consequences, and reach the merits of this case. Even if the doctrine of

Carafas and *Sibron* does not apply, an examination of state law reveals that the majority is wrong in concluding that actual collateral consequences do not attach under state law; there are sufficient collateral consequences flowing from parole-violation status that both the State and the respondents have a live interest in this Court's resolution of the constitutional question. Therefore, I dissent from the majority's conclusion that this case is moot.

McELROY *v.* UNITED STATES

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

No. 80–6680. Argued January 12, 1982—Decided March 23, 1982

Petitioner was convicted in Federal District Court of two counts of violating 18 U. S. C. § 2314, which prohibits the transportation "in interstate or foreign commerce [of] any . . . forged . . . securities . . . , knowing the same to have been . . . forged." The proof at trial showed that blank checks had been stolen in Ohio and that several months later petitioner used two of the checks, on which signatures had been forged, to pay for a car and for a boat and trailer purchased in separate transactions in Pennsylvania. The trial court instructed the jury that in order to find petitioner guilty, it must find that he transported the checks in a forged condition in "interstate commerce," and that such transportation could take place entirely within Pennsylvania if it was a "continuation of the movement that began out of state." The court rejected petitioner's objection to the instruction on the asserted ground that under § 2314 the Government had the burden of proving that the checks had been forged in Ohio before being transported across state lines to Pennsylvania. The Court of Appeals affirmed petitioner's convictions.

Held: Section 2314 does not require proof that the securities were forged before being taken across state lines, and thus the trial court's jury instructions were correct. Pp. 647–659.

(a) Use of the past tense "forged" in § 2314 does not establish Congress' intent to prohibit only the transportation of securities that were forged before crossing state lines. Congress' use of the phrase "interstate commerce" rather than "state borders," as well as the legislative history of the phrase, shows that Congress intended it to be as broad in scope as this Court's decisions holding that interstate commerce begins well before state lines are crossed and ends only when movement of the item in question has ceased in the destination State. Moreover, § 2314's purpose of aiding the States in detection and punishment of criminals who evade state authorities by using channels of interstate commerce supports the conclusion that Congress could not have intended to require federal prosecutors to prove that the securities had been forged before crossing state lines. Pp. 648–656.

(b) The language of § 2314 does not raise significant questions of ambiguity sufficient to warrant application of the principle of lenity and con-

struction in petitioner's favor. *United States* v. *Bass*, 404 U. S. 336, distinguished. Pp. 657–658.

644 F. 2d 274, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 659.

Thomas S. White argued the cause for petitioner. With him on the brief was *George E. Schumacher*.

Carter G. Phillips argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *Joel M. Gershowitz*.

JUSTICE O'CONNOR delivered the opinion of the Court.

The petitioner was convicted of two counts of transporting a forged security in interstate commerce in violation of 18 U. S. C. § 2314. He challenges his conviction on the ground that the statute requires proof, concededly lacking at trial, that the securities had been forged before being taken across state lines. Because of a conflict among the Circuits on this issue of statutory construction, we granted certiorari. 454 U. S. 815 (1981). For the reasons stated below, we affirm the petitioner's conviction.

I

Petitioner Charles McElroy was indicted by a federal grand jury on three counts. Counts 1 and 3 charged that on two occasions the petitioner transported in interstate commerce falsely made and forged securities from Ohio to Pennsylvania in violation of 18 U. S. C. § 2314, the National Stolen Property Act.[1] Count 2 charged McElroy with trans-

[1] Title 18 U. S. C. § 2314 provides in pertinent part:

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited se-

porting a stolen car in interstate commerce from Pennsylvania to Ohio in violation of 18 U. S. C. § 2312.[2]

According to the proof at trial, several blank checks[3] were stolen from Local 125 of the Laborers' International Union in Youngstown, Ohio, in late March or early April 1977. After the Union discovered the theft, it closed the account on which the checks were drawn. Seventeen months later, in October 1978, the petitioner ordered a used Corvette from the Don Allen Chevrolet Agency in Pittsburgh, Pa., for $6,706. Using the name "William Jones," the petitioner told the salesman that he lived in Warrenville Heights, Ohio, but worked in the Pittsburgh area. The petitioner returned the next day and paid for the car with one of the stolen Union checks, on which a signature had been forged. After learning the following day from the drawee bank in Ohio that the account had been closed, the dealership made no effort to negotiate the check. This transaction formed the basis for count 1 (transportation of a forged check in interstate commerce) and count 2 (transportation of a stolen vehicle, the Corvette, in interstate commerce) of the indictment.

In December 1978, the petitioner sought to purchase a boat and trailer from the Rini Marine Sales Co. in Beaver Falls, Pa. Adhering to his previously successful scheme, he used the fictitious name "William Jones" and gave an Ohio address for his residence. One week after his initial inquiry he paid for a boat and trailer with one of the stolen Union checks, on

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curities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited . . .

. . . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[2] Title 18 U. S. C. § 2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

[3] Title 18 U. S. C. § 2311 states that, as used in §§ 2311–2318, the term "[s]ecurities includes any . . . check."

which a signature had been forged. Too late, Philip Rini, the owner of Rini Marine Sales, became suspicious and telephoned the Youngstown, Ohio, bank only to learn that the check had been stolen and the signature forged. He, too, abandoned hope of negotiating the check, and turned to the Federal Bureau of Investigation for help. Count 3 arose from this transaction.

At the conclusion of the Government's case, the petitioner moved for a judgment of acquittal on all three counts on the ground that the Government had not submitted sufficient evidence for the case to go to the jury. The petitioner contended that he was entitled to an acquittal on count 2 because the Government failed to submit any evidence showing that the petitioner had transported the Corvette from Pennsylvania to Ohio, and on counts 1 and 3 because the Government had not adduced any evidence showing that the petitioner had caused the stolen checks to be brought through interstate commerce into Pennsylvania. The trial court denied these motions.[4]

After the petitioner rested,[5] the trial court instructed the jury that in order to find the petitioner guilty on counts 1 and 3, it must find that he transported the check in a forged condition in "interstate commerce," and that such transportation could take place entirely within the State of Pennsylvania if it was a "continuation of the movement that began out of state." Tr. 164A.[6] The petitioner unsuccessfully objected

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[4] Tr. 68A–78A.

[5] The petitioner introduced no evidence.

[6] The entire instruction on this issue was as follows:

"Well, [interstate commerce] means any movement or transportation of these forged checks from one state into another, and it includes all continuing movements of said forged check while in the second state, in this case Pennsylvania, until the movement of said forged check has ceased.

"Now, the Government must show that the checks were transported in interstate commerce in a forged condition. However, the transportation within the destination state here, Pennsylvania, may be considered trans-

to this instruction, contending that under § 2314 the Government had the burden of proving that the check was forged in Ohio before it was transported across the state line to Pennsylvania. Tr. 92A. The petitioner was convicted on all three counts, and sentenced to serve seven years on each of counts 1 and 3 and five years on count 2, the sentences on all three counts to run concurrently.

The Court of Appeals, sitting en banc, vacated the judgment on count 2, holding that the Government had presented insufficient evidence to sustain a conviction.[7] 644 F. 2d 274 (CA3 1981) (en banc). The court affirmed the judgment on counts 1 and 3, however, holding that the Government had

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portation in interstate commerce if it is a continuation of the movement that began out of state.

"The Government need not exclude every speculative possibility that the transportation may have been interrupted at some point, nor need the Government show each step in the security's movement in interstate commerce.

"Now, if you believe that the Government has shown that the Defendant transported the checks while they were in a forged condition within the State of Pennsylvania, the requirements of the law are satisfied if that transportation was part of interstate commerce. In other words, the check had to originate at sometime in Ohio and had to have been transported at sometime in Pennsylvania in order to effect interstate commerce. So the Government must prove this Defendant transported the checks involved in Counts 1 and 3 of the indictment in interstate commerce between Ohio and Pennsylvania, but need not prove the place in Ohio from which the checks started or from where the Defendant started." *Id.*, at 164A–165A.

After some discussion at the bench with the lawyers, the judge further instructed the jury:

"As to Counts 1 and 3, the Government must prove with evidence that convinces you beyond a reasonable doubt that the Defendant caused the transportation of the two checks in question, that is, in Counts 1 and 3, the check to Rini, the check to Don Allen Chevrolet, in interstate commerce, from Ohio to Pennsylvania." *Id.*, at 181A.

[7] That part of the Court of Appeals' judgment vacating the conviction on count 2 is not before this Court.

presented sufficient evidence to sustain the convictions, and that the trial judge correctly had instructed the jury that the Government need not prove that the stolen checks had been forged before crossing state lines. "It is immaterial whether the signatures were forged in Ohio or in Pennsylvania. If at any point in the interstate movement the check was in a forged condition, the statute was satisfied." *Id.*, at 279. All but one judge agreed with the majority's construction of the phrase "interstate commerce" as used in § 2314.[8]

II

The question presented by this case is one of statutory construction.[9] The petitioner claims that the language and legislative history of § 2314 demonstrate congressional intent to limit the reach of that provision to those persons who transport forged securities across state lines. As a fallback position, the petitioner contends that § 2314's use of the expression "interstate commerce" is sufficiently ambiguous to

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[8] Judge Adams, joined by Chief Judge Seitz, concurred in the majority opinion on counts 1 and 3, but dissented from the court's holding that the conviction on count 2 should be vacated. Although he agreed that the trial judge correctly had instructed the jury on counts 1 and 3, Judge Garth dissented from the affirmance on those counts, arguing that the Government had presented insufficient evidence to sustain the convictions. Judge Higginbotham concurred with the majority opinion on count 2, but dissented from its holdings on counts 1 and 3. He reasoned that § 2314 was ambiguous, and that consequently the principle of lenity required the court to construe the statute strictly against the Government and hold that the statute was violated only if the security had been forged before crossing state lines.

[9] The petitioner concedes that Congress has authority under the Commerce Clause, Art. I, § 8, cl. 3 (which provides in part that "Congress shall have Power . . . To regulate Commerce . . . among the several States"), to enact a criminal statute prohibiting the transportation in interstate commerce of a security that was not forged until after crossing state lines. Consequently, the issue in the present case is the meaning that Congress ascribed to the phrase "interstate commerce" in § 2314.

require this Court to apply the principle of lenity and construe the provision in the petitioner's favor.[10]

A

Petitioner bases his initial argument on Congress' use of the past tense "forged" in § 2314, from which he urges us to infer that Congress intended to prohibit only the transportation of securities that were forged before entering the stream of interstate commerce, that is, before crossing state lines. Fundamental to the petitioner's argument is the unarticulated assumption that "interstate commerce," as used in the section, does not continue after the security has crossed the state border. However, if subsequent movement of the check in the destination State constitutes interstate commerce, then a forgery of the check in the course of that movement involves transportation of a forged security in interstate commerce in violation of § 2314. Thus, the validity of the petitioner's argument turns on whether the statutory phrase "interstate commerce" comprehends movement of a forged security within the destination State.

The paragraph of § 2314 under which the petitioner was convicted prohibits the "transport[ation] in interstate or foreign commerce [of] any . . . forged . . . securities . . . , knowing the same to have been . . . forged." Title 18 U.S.C. § 10 provides that the "term 'interstate commerce,' as used in this title, includes commerce between one State . . . and another State." On their face, these two provisions are not limited to unlawful activities that occur while crossing state borders, but seemingly have a broader reach. In particular, the lan-

[10] Although the petitioner challenged the sufficiency of the evidence on counts 1 and 3 in his petition for writ of certiorari, this Court limited the grant of certiorari to the statutory construction issue. Thus, we accept the Court of Appeals' conclusion that the evidence was sufficient to sustain the jury's finding that "on each occasion [the petitioner] made a trip from Ohio to Pennsylvania, carrying with him a check that was forged either in Ohio or Pennsylvania." 644 F. 2d 274, 279 (CA3 1981).

guage of § 10 suggests that crossing state lines is not the sole manifestation of "interstate commerce."[11]

The origin of the "interstate commerce" element of § 2314 was the National Motor Vehicle Theft Act (Dyer Act), 41 Stat. 324,[12] which was enacted in 1919 to provide "severe pun-

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[11] The predecessor of 18 U. S. C. § 10 was § 2(b) of the Dyer Act, which stated that the term "interstate commerce" "shall include transportation from one State . . . to another State." 41 Stat. 325.

[12] The Act provided in part:

"SEC. 2. That . . . :

. . . . . .

"(b) The term 'interstate or foreign commerce' as used in this Act shall include transportation from one State . . . to another State . . . .

"SEC. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both."

The Act was expanded in 1934 to cover other types of stolen property, see National Stolen Property Act, 48 Stat. 794, and in 1939 to cover forged securities. See Act of Aug. 3, 1939, 53 Stat. 1178. Sections 3 and 4 were later codified as 18 U. S. C. §§ 2312 and 2313 respectively. None of the legislative Reports or debates concerning these amendments, however, contains any explanation of the "interstate commerce" requirement. See H. R. Rep. No. 1462, 73d Cong., 2d Sess., 2 (1934) (stating that the new Act was "designed to punish interstate transportation of stolen property, securities, or money," and that it was "drafted to follow the language of the Dyer Act, the constitutionality of which has frequently been upheld in the Federal courts"); S. Rep. No. 538, 73d Cong., 2d Sess., 1 (1934) (approving a Justice Department memorandum stating that the purpose of the Act is "to provide a penalty for knowingly transporting stolen property in interstate or foreign commerce"); H. R. Rep. No. 422, 76th Cong., 1st Sess., 1 (1939) (stating that the bill "widens the scope of the National Stolen Property Act of 1934 . . . by making its provisions applicable to embezzled property, securities and money"); S. Rep. No. 674, 76th Cong., 1st Sess., 2 (1939) (approving a letter from the Attorney General stating in part that

ishment of those guilty of the stealing of automobiles in interstate or foreign commerce." H. R. Rep. No. 312, 66th Cong., 1st Sess., 1 (1919). See S. Rep. No. 202, 66th Cong., 1st Sess., 1 (1919) (describing the bill as designed to "punish the transportation of stolen motor vehicles in interstate or foreign commerce"). Representative Dyer, the sponsor of the bill that was enacted, defended Congress' authority to enact the proposed law, noting that the courts had upheld a variety of regulatory statutes enacted under the Commerce Clause, including a criminal statute declaring unlawful the "[l]arceny of goods from railroad cars being transported in interstate commerce." 58 Cong. Rec. 5472 (1919).[13] In response to a question from Representative Anderson concerning possible differences in the meaning of "interstate commerce" in §§ 2 and 4 of the Act, Representative Dyer replied:

> "[I]f there is any difference there, which I do not see, the matter would be construed by the Supreme Court, which has passed many times upon what is meant by interstate and foreign commerce." *Ibid.*[14]

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the "principal purposes of the pending bill are to extend the existing law to property that has been embezzled, and also to forged or counterfeited securities").

[13] Obviously, Representative Dyer believed that a federal crime would be committed even though the larceny did not occur at the exact moment that the railroad car crossed a state line. It is fair to conclude from this example that he understood "interstate commerce," as used in the Dyer Act, to have a broader meaning than transportation across state lines.

[14] The entire colloquy between Representatives Dyer and Anderson is as follows:

"Mr. ANDERSON. I will ask the gentleman whether the committee meant the same thing in its definition of interstate commerce in section 2 as it meant in section 4?

"Mr. DYER. I think so. If the gentleman will point out wherein it differs, I shall be glad.

"Mr. ANDERSON. In the definition under section 2 interstate commerce means transportation from one State to another, while if you refer to

Plainly, Representative Dyer, the chief sponsor of the bill, believed that the statutory meaning of "interstate commerce" could be found in previous Supreme Court decisions using the

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section 4 you find there you have a vehicle or motor car constituting interstate or foreign commerce, and you scarcely have a sensible section.

"Mr. DYER. I will say to the gentleman that if there is any difference there, which I do not see, the matter would be construed by the Supreme Court, which has passed many times upon what is meant by interstate and foreign commerce. I think it really is not necessary to put the definition in this bill. It was done at the request of some of the members of the committee. The Supreme Court has decided many times what is interstate commerce. I do not think myself that any definition is necessary." 58 Cong. Rec. 5472 (1919).

Of course, the definition to which Representative Dyer refers stated that interstate commerce "shall *include* transportation from one State . . . to another State." 41 Stat. 325 (emphasis added). The dissenting opinion entirely ignores Congress' use of the word "include" in the 1919 Act, choosing instead to read the definition as if Congress' only "objective . . . was to proscribe the transportation of a stolen automobile from one State to another." *Post*, at 666.

In the 1934 National Stolen Property Act, 48 Stat. 794, Congress expanded the coverage of the Dyer Act, and in § 2(a) provided that "[t]he term 'interstate . . . commerce' shall mean transportation from one State . . . to any State." The House Report makes clear that the "bill is drafted to follow the language of the Dyer Act, the constitutionality of which has frequently been upheld in the Federal courts." H. R. Rep. No. 1462, 73d Cong., 2d Sess., 2 (1934). Although a "change of [statutory] language is some evidence of a change of purpose," *Johnson* v. *United States*, 225 U. S. 405, 415 (1912), the inference of a change of intent is only "a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence." *United States* v. *Dickerson*, 310 U. S. 554, 561 (1940). Because the legislative history contains no indication that the variation in the language had changed the meaning of "interstate commerce," and more importantly, because the House Report states that the language of the 1934 Act was drafted to follow the language of the Dyer Act, we conclude that Congress intended nothing by the change in language. Moreover, in 1948, Congress made an additional modification in the definition of "interstate commerce," this time resubstituting the word "include" and substituting the word "commerce" for the word "transportation" to "avoid the narrower connotation" of the latter word. H. R. Rep. No. 304, 80th Cong., 1st Sess., A7 (1947). If any inference can be drawn

phrase to define the scope of congressional authority under the Commerce Clause. See also H. R. Rep. No. 312, 66th Cong., 1st Sess., 3–4 (1919) (justifying Congress' authority to enact the Dyer Act by reference to this Court's decisions holding that Congress has plenary power under the Commerce Clause to regulate interstate commerce).

Although the House Report accompanying the bill, as well as several Members of Congress during the debates, stated that the Act would prevent the transportation of stolen automobiles across state lines,[15] Congress' use of the more general

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from these changes, both in 1934 and in 1948, it is only that Congress intended no substantive change in the meaning of "interstate commerce."

[15] See H. R. Rep. No. 312, 66th Cong., 1st Sess., 1 (1919) (noting that "[t]hieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines"); *id.*, at 3 ("The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not be questioned"); *id.*, at 4 ("No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another"); 58 Cong. Rec. 5470 (1919) (remarks of Rep. Dyer) (stating that "this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State"); *id.*, at 5472 (remarks of Rep. Dyer) ("Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another"); *id.*, at 5473 (remarks of Rep. Reavis) (stating that he would support a broader bill that would make it a "felony to transport stolen property of any kind from one State to another"); *ibid.* (remarks of Rep. Igoe) ("The offense sought to be reached in the act is the transportation, the taking it across the line, taking it from one State to another"); *id.*, at 6433 (remarks of Sen. Cummins) (stating that the "bill is for the purpose of giving the Federal courts jurisdiction for the punishment of" thieves who carry stolen automobiles across state lines).

None of these statements, however, purports to limit the statutory definition of interstate commerce to the act of crossing state lines. Nor is there any basis to believe that Congress used the phrase "interstate commerce" in the statute interchangeably with " 'interstate transportation' . . . or some such phrase focusing on state lines." STEVENS, J., dissenting,

phrase "interstate commerce" and its reliance on this Court's constitutional decisions defining the scope of "interstate commerce" indicate that Congress intended the statutory phrase to be as broad as this Court had used that phrase in Commerce Clause decisions before 1919.[16] In those decisions, this Court had made clear that interstate commerce begins well before state lines are crossed, and ends only when movement of the item in question has ceased in the destination State.[17] We conclude, therefore, that in § 2314 Congress in-

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post, at 663–664. While Congress may have been concerned principally with thieves who cross state borders with stolen cars, it did not so limit the language of the statute. Instead, Congress drafted a more comprehensive statute that would reach criminals who use interstate channels to avoid detection and punishment.

The dissenting opinion's alternative explanation—that Congress used the expression "'interstate commerce' merely to indicate the source of its authority," *post*, at 665—is also unpersuasive. Although supporters of the bill were careful to justify its constitutionality, nothing in the statutory language or the legislative history indicates that Congress used the constitutionally significant term "interstate commerce" in the bill merely to point to its authority to enact such legislation. Rather, the most rational inference is that Congress used the term to specify the types of activities proscribed by the Act—thefts involving "interstate commerce" as that term had been interpreted by this Court.

[16] Some Circuits have even indicated that the statutory phrase "interstate commerce" is coextensive with congressional authority under the Commerce Clause. See *United States* v. *Roselli*, 432 F. 2d 879, 891 (CA9 1970) ("The sole reason for conditioning [§ 2314's] prohibitions upon use of interstate commerce is to provide a constitutional basis for the exercise of federal power"), cert. denied, 401 U. S. 924 (1971); *United States* v. *Ludwig*, 523 F. 2d 705, 707 (CA8 1975) (same), cert. denied, 423 U. S. 1076 (1976).

[17] See *Champion* v. *Ames*, 188 U. S. 321, 358 (1903) (illustrating that a regulatory statute enacted under the Commerce Clause can take the form of a prohibition, the Court stated that "it cannot be doubted that Congress, under its power to regulate commerce, may . . . provide for [cattle to be] inspected before transportation begins"); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 527 (1911) (goods are in "interstate . . . commerce when they have 'actually started in the course of transportation to another

tended to proscribe the transportation of a forged security at any and all times during the course of its movement in interstate commerce, and that the stream of interstate commerce may continue after a state border has been crossed. Consequently, the trial judge in this case correctly instructed the jury that McElroy's transportation of the forged check within Pennsylvania would violate § 2314 if the jury found that movement to be a "continuation of the movement that began out of state." Tr. 164A.[18]

Moreover, the purpose underlying § 2314 leads us to conclude that Congress did not intend to require federal prosecutors to prove that the securities had been forged before crossing state lines. In *United States* v. *Sheridan*, 329 U. S. 379, 384 (1946), this Court observed that in § 2314 Congress "contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent" (footnote omitted).

State, or [are] delivered to a carrier for transportation'") (quoting *Coe* v. *Errol*, 116 U. S. 517, 525 (1886)); *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 122–123 (1913); *Illinois Central R. Co.* v. *Fuentes*, 236 U. S. 157, 163 (1915) ("generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end").

The House Report on the Dyer Act cited *Champion* v. *Ames*, *supra*, to justify Congress' constitutional authority to enact the Dyer Act. H. R. Rep. No. 312, 66th Cong., 1st Sess., 4 (1919).

[18] Even though Congress did not address the meaning of "interstate commerce" in the 1934 and 1939 extensions of the Dyer Act, there is no reason to believe that Congress abandoned its original meaning. In fact, because the Supreme Court between 1919 and 1939 continued to define interstate commerce more broadly than merely as commerce crossing state lines, see, *e. g.*, *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366 (1922); *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95 (1929), there is ample reason to believe that Congress intended § 2314 to have the same reach as its predecessor section in the Dyer Act.

Given this broad purpose, we find it difficult to believe, absent some indication in the statute itself or the legislative history, that Congress would have undercut sharply that purpose by hobbling federal prosecutors in their effort to combat crime in interstate commerce. Under the petitioner's proposed construction, a patient forger easily could evade the reach of federal law, yet operate in the channels of interstate commerce.[19] As the Government points out in its brief,

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[19] The facts of the present case illustrate this point. The petitioner, who lived in Ohio at the time he forged the Union checks, see Tr. 16A, brought the stolen checks from Ohio into Pennsylvania. He forged them at an unknown time and place to purchase a boat and a car. Requiring prosecutors to prove on which side of the border the petitioner forged the checks, when in fact the petitioner had transported the forged checks in continuation of a longer interstate journey, serves no purpose. In addition, as the supporters of the Dyer Act recognized, federal authority may be necessary to investigate fully the crime and to compel witnesses from other States to testify. See 58 Cong. Rec. 5475 (1919) (remarks of Rep. Newton) ("all the witnesses from anywhere in the United States can be compelled to appear and testify [before the grand jury], and a full and complete investigation can be had in every case, and when a case is called for trial, the barrier of the State line having been swept away, the witnesses will be compelled to appear and testify in open court"). Absent federal jurisdiction, it may have been impossible, or at the least extraordinarily difficult, to compel Union and bank officials from Ohio to testify in a Pennsylvania state court that the checks had been stolen, when they had been stolen, when the bank account had been closed, that the signature on the checks had been forged, and that the petitioner had no authority to write those checks.

There is no foundation for the fear expressed in the dissenting opinion that our decision today is a broad expansion of federal jurisdiction in criminal law. *Post*, at 660. The implications of this case are limited by the facts and its holding that the forged check was transported in interstate commerce only because that transportation was a continuation of a longer journey that began out of state. If the entire transaction—obtaining and forging the checks, purchasing the car and boat, and returning the checks to the bank for collection—had occurred solely within Ohio, it seems clear that the checks would not have been "transport[ed] in interstate commerce." In light of today's limited holding, the dissent's suggestion that we are overburdening limited federal prosecutorial resources, *post*, at 674, is misplaced.

moreover, the petitioner's construction produces the anomalous result that no federal crime would have been committed in this case until the *victims* returned the forged checks to the out-of-state drawee bank for payment. Brief for United States 18, n. 11.[20] While Congress could have written the statute to produce this result, there is no basis for us to adopt such a limited reading.[21]

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[20] See also *Pereira* v. *United States*, 347 U. S. 1, 9 (1954) (holding that since the fraudulently obtained checks had to be sent to an out-of-state bank for collection, the petitioner was guilty of violating § 2314 because he "'caused' [the check] to be transported in interstate commerce").

[21] The cases cited by the petitioner in support of his position do not dissuade us from our conclusion, for none of the cases based its holding on an analysis of the language, legislative history, or purpose of § 2314. In *United States* v. *Owens*, 460 F. 2d 467, 469 (CA5 1972), for example, the court simply quoted the pertinent language of § 2314 and held, without analysis or citation to authority, that it "is obvious that to prove the commission of an offense under this portion of section 2314 the Government must show that the instrument traveled interstate in its forged or altered condition." See *United States* v. *Hilyer*, 543 F. 2d 41, 43 (CA8 1976) (citing only *Owens* for the proposition that § 2314 requires proof that the security was forged before crossing state lines); *United States* v. *Sparrow*, 635 F. 2d 794, 796 (CA10 1980) (en banc) (citing only *Owens* and *Hilyer* for its holding that "the plain meaning of [§ 2314] requires the prosecution to show that the security was in a forged or altered condition at the time of its interstate passage"), cert. denied, 450 U. S. 1004 (1981).

We note that our holding today is consistent with other cases construing similar federal statutes designed to combat theft in the channels of interstate commerce. In *United States* v. *Ajlouny*, 629 F. 2d 830 (CA2 1980), cert. denied, 449 U. S. 1111 (1981), the court reviewed a challenge to a conviction under the "foreign commerce" aspect of the first paragraph of § 2314 (transportation of stolen goods in interstate or foreign commerce). In that case, the defendant had been arrested shortly before he shipped stolen telephone equipment from New York to Doha, Qatar. The court rejected the defendant's claim that no federal offense had occurred because no international boundary had been crossed, holding that "Congress was not aiming only at stolen goods moving across a technical boundary line, but also wanted to reach shipments in the course of such a crossing." 629 F. 2d, at 837.

In *Barfield* v. *United States*, 229 F. 2d 936 (CA5 1956), the defendant challenged his conviction under 18 U. S. C. § 2312, which prohibits the in-

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The petitioner argues alternatively that even if a reading of § 2314 does not clearly support his interpretation, the provision is ambiguous and the ambiguity should be resolved by reading the provision narrowly to require the checks to have been forged before crossing the state line. For support, the petitioner cites *United States* v. *Bass*, 404 U. S. 336 (1971), where this Court considered a challenge to a conviction under 18 U. S. C. App. § 1202(a), which prohibits a convicted felon from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm." The issue

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terstate transportation of stolen vehicles, using the same "interstate commerce" language as used in § 2314. See n. 2, *supra*. The court rejected the defendant's argument that the Government's failure to show that he had driven the car across a state border required acquittal. "[A]ny driving, whether wholly within the state of origin, state of destination, or from and to, if done as a substantial step in the furtherance of the intended interstate journey is, we think, within the act." 229 F. 2d, at 939. See *United States* v. *Lambert*, 580 F. 2d 740, 743 (CA5 1978).

Cases reviewing other statutes, with slightly different "interstate commerce" provisions, arrive at the same result that we reach today. In *United States* v. *Tobin*, 576 F. 2d 687 (CA5), cert. denied, 439 U. S. 1051 (1978), the defendants were convicted of receiving and conspiring to sell stolen goods "moving as, or which are a part of, or which constitute interstate . . . commerce" in violation of 18 U. S. C. § 2315. The court rejected the defendants' argument that the stolen goods had been taken out of interstate commerce by coming to rest, holding that "[s]o long as its movement within the destination state can be considered a continuation of the movement that began out of state the prerequisite of 18 U. S. C. § 2315 is satisfied." 576 F. 2d, at 692. See *United States* v. *Luman*, 624 F. 2d 152, 155 (CA10 1980) (18 U. S. C. § 2315); *United States* v. *Licavoli*, 604 F. 2d 613, 624–625 (CA9 1979) (18 U. S. C. § 2315), cert. denied, 446 U. S. 935 (1980); *United States* v. *Garber*, 626 F. 2d 1144, 1148 (CA3 1980) (construing similar language in 18 U. S. C. § 659, the court held that "[d]elays enroute do not deprive shipments of continued characterization as interstate or foreign so long as the goods have not yet reached their destination"), cert. denied, 449 U. S. 1079 (1981); *United States* v. *Maddox*, 394 F. 2d 297, 299–300 (CA4 1968) (18 U. S. C. § 659); *United States* v. *Hiscott*, 586 F. 2d 1271, 1274 (CA8 1978) (18 U. S. C. § 2313); *United States* v. *Goble*, 512 F. 2d 458, 469 (CA6 1975) (18 U. S. C. § 2313).

framed by the Court was whether "in commerce or affecting commerce" modified "possesses" as well as "transports," since the respondent, a convicted felon, had been charged with possession of a shotgun, but the Government had made no effort to show that he had possessed the firearm "in commerce or affecting commerce." The Court found both the language of the provision and its legislative history ambiguous on this question, and decided on two grounds to read the statute narrowly, that is, to read "in commerce or affecting commerce" as modifying "possesses" as well as "transports." The Court reasoned that ambiguity concerning the reach of a criminal statute should be resolved by reading the statute narrowly in order to encourage Congress to speak clearly, thus giving the populace "fair warning" of the line between criminal and lawful activity, and in order to have the Legislature, not the courts, define criminal activity. *Id.*, at 347–348. Also, absent a clear statement of purpose from Congress, the Court was unwilling to read a federal criminal statute in a way that would encroach on a traditional area of state criminal jurisdiction.

The present case, however, does not raise significant questions of ambiguity, for the statutory language and legislative history of the Dyer Act indicate that Congress defined the term "interstate commerce" more broadly than the petitioner contends. We hold that Congress intended to use the term "interstate commerce" as this Court had been using it in Commerce Clause cases before 1919. As we observed in *United States* v. *Bramblett*, 348 U. S. 503, 509–510 (1955), although "criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature" (footnote omitted).[22]

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[22] We reject the petitioner's suggestion that our holding today reads § 2314 as if Congress intended to "expand the authority of the Federal Government over the entire field of criminal fraud." Brief for Petitioner 23. Rather, our holding is consistent with the expressed congressional purpose

III

Through § 2314, Congress has sought to aid the States in their detection and punishment of criminals who evade state authorities by using the channels of interstate commerce. Based on this congressional purpose, the trial judge in the present case correctly instructed the jury that they could find the petitioner guilty of violating § 2314 if they found that the forgeries occurred during the course of interstate commerce, which includes a "continuation of a movement that began out of state," even though movement of the forged checks was restricted to one State. Accordingly, we affirm the judgment of the court below.

So ordered.

JUSTICE STEVENS, dissenting.

The words "transportation in interstate or foreign commerce" appear in a host of federal criminal statutes.[1] These statutes prohibit the interstate transportation of stolen motor vehicles, forged checks, prostitutes, explosives, obscene materials, kidnap victims, counterfeit phonograph records, and numerous other items. In all of these statutes the predicate for federal jurisdiction might reasonably be identified in either of two ways: first, as I read the statutory language, it might require that the subject be transported

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to apprehend forgers who use state boundaries to evade detection and punishment by state authorities. Had the petitioner not used interstate channels to pass his forged checks, he would not have been subject to punishment under § 2314.

[1] See, *e. g.*, 18 U. S. C. § 844(d) (explosives); 18 U. S. C. § 924(b) (1976 ed., Supp. IV) (firearms); 18 U. S. C. § 1201(a)(1) (1976 ed., Supp. IV) (kidnaping); 18 U. S. C. § 1231 (strikebreaking); 18 U. S. C. § 1301 (lotteries); 18 U. S. C. § 1465 (obscenity); 18 U. S. C. §§ 2251, 2252 (1976 ed., Supp. IV) (sexual exploitation of children); 18 U. S. C. § 2312 (stolen motor vehicles and aircraft); 18 U. S. C. § 2314 (other stolen property); 18 U. S. C. § 2318 (1976 ed., Supp. IV) (counterfeit phonograph records); 18 U. S. C. § 2421 (prostitution); 18 U. S. C. §§ 2511(1)(b)(iii), 2512(1) (electronic eavesdropping).

across a state line; second, as the Court reads this language, it may merely require that the subject be transported during an interstate journey.

In this case the evidence indicates that petitioner transported stolen checks from Ohio into Pennsylvania. We must assume, because of insufficient contrary evidence, that petitioner did not forge the checks until he was on the Pennsylvania side of his interstate journey. The Court holds that this evidence proves a violation of 18 U. S. C. § 2314, which in pertinent part proscribes the transportation in interstate commerce of forged checks.[2] According to the Court, a forged check is transported in interstate commerce as long as the check was in a forged condition at some point during the defendant's journey from one State to another. Consistent with this rationale, it was not even necessary that the Government proved that the checks crossed state lines.[3] Under the Court's analysis, petitioner would have violated § 2314 if he had left his home in Ohio, picked up a forged check in Pittsburgh, and negotiated it in Beaver Falls.[4]

If the Court's reading of this language is consistently applied to all of the statutes in which the same jurisdictional predicate appears, this is an extremely important case. If the Court's holding is limited to the situation in which a check has been carried across a state line and then forged in the

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[2] Section 2314 also requires proof that the defendant knew that the transported checks were forged. This element is not at issue here.

[3] The instructions of the trial court required proof that the check had moved from Ohio to Pennsylvania, see *ante*, at 645–646, n. 6, but the Court's interpretation of the statute would apply equally to a forged check picked up in the destination State. For the Court the test is whether there was "movement" of the contraband "within the destination State." *Ante*, at 648. The Court of Appeals' position is unclear. See 644 F. 2d 274, 282, n. 1 (CA3 1981) (Garth, J., concurring and dissenting).

[4] Likewise, a transcontinental hitchhiker who stole a car in Pittsburgh and abandoned it in Philadelphia would have violated the Dyer Act.

destination State, the holding is not very significant. Although it would be illogical to limit the holding in that way, a review of the relevant legislative history will demonstrate that the holding should not be extended to its logical conclusion. That review also demonstrates, I believe, that today's holding does not faithfully reflect the intent of Congress.

I

"[T]he issue in the present case is the meaning that Congress ascribed to the phrase 'interstate commerce' in § 2314." *Ante*, at 647, n. 9. More specifically, the question is "whether the statutory phrase 'interstate commerce' comprehends movement of a forged security [wholly] within the destination State," *ante*, at 648, or whether petitioner is correct that Congress intended "to limit the reach of that provision to those persons who transport forged securities across state lines," *ante*, at 647. For the answer to this question, the Court correctly looks to the legislative history of § 3 of the Dyer Act, the precursor of § 2314. The interstate commerce language that was enacted as § 3 of the Dyer Act in 1919 has been retained in § 2314; for our purposes, the subsequent enactments in 1934 and 1939 merely expanded the coverage of § 3 to other types of stolen property and to forged securities, respectively.

Section 3 of the Dyer Act proscribes, in accurate paraphrase, the transportation in interstate commerce of stolen motor vehicles. See 41 Stat. 325. The phrase, standing alone, admittedly is ambiguous. It is clarified by § 2(b) of the same statute, which provides that "[t]he term 'interstate . . . commerce' as used in this Act shall include transportation from one State . . . to another State." *Ibid.* Any lingering ambiguity is dispelled by the legislative history.

The problem that gave rise to the legislation, the House Judiciary Committee reported, was that "[t]hieves steal automobiles and take them from one State to another and oft-

times have associates in this crime who receive and sell the stolen machines." H. R. Rep. No. 312, 66th Cong., 1st Sess., 1 (1919) (hereafter H. R. Rep. No. 312). In a discussion of congressional power under the Commerce Clause, the Committee manifested its intention to proscribe only this problem: "The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not be questioned," *id.*, at 3; "[n]o good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another," *id.*, at 4. In introducing the bill to the House, Representative Dyer opened his remarks by stating that "this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State." 58 Cong. Rec. 5470 (1919). He described §§ 3 and 4 of the Act, the precursors of 18 U. S. C. §§ 2314 and 2315, as follows:

> "It provides, gentlemen, for only two things. Section 3 provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it." 58 Cong. Rec. 5472 (1919).

Representative Igoe stated that "[t]he offense sought to be reached in the act is the transportation, the taking it across the line, taking it from one State to another." *Id.*, at 5473. Senator Cummins, in introducing the House bill to the Senate, described its purpose to be "to punish the transportation of stolen motor vehicles in interstate or foreign commerce." *Id.*, at 6433. He explained:

> "I want Senators to know what the bill is. The favorite place for such thefts is near a State line, where vehicles are carried quickly across the State line, and there is

> very great difficulty in securing the punishment of the offender. The bill is for the purpose of giving the Federal courts jurisdiction for the punishment of such an offender." *Ibid.*[5]

Representative Bee, like Representative Reavis, objected to the bill because it "single[d] out automobiles" for special treatment. *Id.*, at 5473. Representative Reavis stated that he would "be very glad indeed to vote for a bill making it a felony to transport stolen property of any kind from one State to another." *Ibid.*

The Court's expansive interpretation of the interstate commerce phrase in § 3 of the Dyer Act is far broader than any that was expressed by the Committees and the Members of the 66th Congress. The Court offers several reasons for its reading of the statute, but none withstands analysis.

A

The Court first reasons that, by using the phrase "transportation in interstate commerce of stolen motor vehicles" in the statute, Congress must have intended to proscribe more than the "transportation across state lines of stolen motor vehicles" or the "interstate transportation of stolen motor vehicles." The Court's reasoning from the text, however, is flawed in two respects.

First, the House Report and the Members of Congress who described the Dyer Act proscription as the "interstate

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[5] Later, Senator Cummins further described the House bill:

"The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached." 58 Cong. Rec. 6434 (1919).

transportation of stolen motor vehicles," or some such phrase focusing on state lines, used these phrases interchangeably with the phrase "transportation in interstate commerce of stolen motor vehicles," which was the formulation included in the proposed and enacted bill. The point is illustrated by Representative Dyer's descriptions of the interstate commerce element of the bill. For example, the final paragraph of the House Report that he submitted begins with the sentence, "The purpose of the proposed law is to suppress crime in interstate commerce." H. R. Rep. No. 312, at 4. Two sentences later, however, the Report urges that Congress, pursuant to its power to regulate commerce, should "provide that such commerce should not be polluted by the carrying of stolen property from one State to another." *Ibid.* Representative Dyer opened his remarks to the House with the statement that "this bill is for the purpose of providing punishment for those stealing automobiles and automobile trucks and taking them from one State to another State." 58 Cong. Rec. 5470 (1919). It is inconceivable that Representative Dyer or any of the other legislators who used interchangeably the various phrases[6] nevertheless intended the statutory formulation "transportation in interstate commerce of stolen motor vehicles" to mean any more than "interstate transportation of stolen motor vehicles" or "transportation across state lines of stolen motor vehicles" or "transportation of stolen motor vehicles from one State to another."

The second flaw in the Court's textual analysis is its reference to 18 U. S. C. § 10 for the definition of "interstate commerce." See *ante*, at 648–649. Section 10 provides that "[t]he term 'interstate commerce', as used in this title, includes commerce between one State . . . and another State." It merits reiteration, however, that "interstate commerce" is defined much more narrowly in the Dyer Act and the Na-

[6] See, *e. g.*, *id.*, at 5472–5473 (Rep. Reavis); *id.*, at 5473 (Rep. Igoe); *id.*, at 5474–5476 (Rep. Newton); *id.*, at 6433–6434 (Sen. Cummins).

tional Stolen Property Act of 1934. Section 2(b) of the Dyer Act provides that the term "shall include *transportation* from one State . . . to another State." 41 Stat. 325 (emphasis added). Section 2(a) of the 1934 enactment provides that the term "shall *mean* transportation from one State . . . to another State." 48 Stat. 794 (emphasis added). When Congress revised the Federal Criminal Code in 1948, it consolidated several definitions of "interstate commerce" into § 10. The Reviser's Notes state only that, "[i]n addition to slight improvements in style, the word 'commerce' was substituted for 'transportation' in order to avoid the narrower connotation of the word 'transportation' since 'commerce' obviously includes more than 'transportation.'" Notes following 18 U. S. C. § 10. For purposes of divining the intent of Congress in enacting the Dyer Act in 1919, the National Stolen Property Act in 1934, and the amendments thereto in 1939, we must refer to the definition by which those Congresses understood the reach of those criminal statutes.

B

There is a logical explanation—albeit an unarticulated one—for Congress' use of the arguably broader formulation in the statute when its intent was so clearly less ambitious. This explanation is derived from the part of the legislative history in which the constitutionality of the proposed Dyer Act was justified by reference to this Court's expositions of the scope of congressional power under the Commerce Clause. The Court infers from one such part of the legislative history that "Congress intended the statutory phrase to be as broad as this Court had used the phrase in Commerce Clause decisions before 1919." *Ante*, at 653. If the legislative history is examined through 1919 lenses instead of from a distance of six decades, however, the only supportable conclusion is that Congress used the phrase "interstate commerce" merely to indicate the source of its authority to pro-

scribe conduct that had previously been regulated solely by the States.

In the Court's words, the House Report "justif[ied] Congress' authority to enact the Dyer Act by reference to this Court's decisions holding that Congress has plenary power under the Commerce Clause to regulate interstate commerce." *Ante*, at 652. From this discussion in the House Report, the Court draws the conclusion that Congress meant to adopt as the definition of the *statutory* term this Court's construction of the *constitutional* term "interstate commerce." That conclusion does not logically follow from its premise and is without any support in the legislative history.

The part of the House Report cited by the Court begins with this paragraph:

> "The power of the Congress to enact this law and to punish the theft of automobiles in one State and the removing of them into another State can not be questioned, in view of laws of similar nature heretofore enacted by Congress and the decisions of the Supreme Court of the United States touching same." H. R. Rep. No. 312, at 3.

This statement establishes that (1) the objective of the statute was to proscribe the transportation of a stolen automobile from one State to another, and (2) the House Judiciary Committee was confident that this objective could be accomplished under the Commerce Clause, as interpreted by this Court. The Report's discussion of this Court's decisions justifies the Committee's confidence in the constitutionality of the Act. Indeed, the penultimate paragraph of the Report explains just how far Congress can act under the Commerce Clause;[7] in the paragraph's closing sentence, which the

[7] "Congress has enacted various laws for the regulation of interstate commerce which have uniformly been sustained by the courts. Among them are those relating to the use of safety appliances, hours of labor of employees, monthly reports of accidents, arbitration of controversies between railroads and their employees, the exclusion of impure goods and lot-

Court quotes, *ante*, at 650, the Report states that even "[l]arceny of goods from railroad cars being transported in interstate commerce has . . . been declared a crime by act of Congress." H. R. Rep. No. 312, at 4. But the Committee had a much more limited objective in proposing the Dyer Act. In the closing paragraph of the Report, it expressly linked its discussion of this Court's Commerce Clause cases with the statutory objective: "No good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another." *Ibid.*

The Committee's confidence in the constitutionality of the Act was not shared by all Members of Congress. Representative Newton described in detail the practice of automobile thieves of stealing cars and driving them across state lines where they could not be pursued by the police of the first State. See 58 Cong. Rec. 5474–5475 (1919). After summarizing the need for federal legislation,[8] he turned to the question of its constitutionality:

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tery tickets, employers' liability, etc. Specific reference may be made to the interstate commerce act, wherein interstate commerce railroads are forbidden to form combinations or pools for the maintenance of rates, and also the antitrust act of July 2, 1890, wherein every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States was declared a crime, and made punishable as such. Larceny of goods from railroad cars being transported in interstate commerce has also been declared a crime by act of Congress." H. R. Rep. No. 312, at 4.

[8] "That there is a crying need for relief from this rapidly growing evil there can be no question. That the States have been unable to effectively deal with the problem has been fully demonstrated. I have no doubt but that 90 per cent of the cars that are stolen and not recovered cross State lines before they are disposed of. The use which the automobile thief is making of interstate commerce takes him into a sphere which is beyond the reach of State control, and into a field where he can operate with security and where he will continue to do so until Congress asserts its power by the passage of a bill such as the one now under consideration." 58 Cong. Rec. 5475 (1919).

> "But it has been seriously argued by Members of this House that Congress has no power to pass such a law; that such legislation is an invasion of the rights of the States. But if you will study the laws upon kindred subjects heretofore enacted by Congress and will read the decisions of the courts sustaining such laws I do not believe that a doubt will remain in the mind of even the most ardent States-rights advocate as to the powers of Congress upon this subject." *Id.*, at 5475.

Representative Newton discussed a number of court decisions and repeatedly compared the federal laws therein upheld with the bill Congress was considering:

> "In the face of the decisons which I have just read, can there be any question but what an automobile which is stolen in one State and transported across a State line into another State for the purpose of yielding a profit to the person transporting the same constitutes 'interstate commerce'? . . .
>
> . . . . . .
>
> "Thus it will be observed that no particular vehicle of transportation is necessary in order to make the article transported interstate commerce, nor is it necesary that the article should be transported for any specific purpose. All that is necessary for it to become interstate commerce is that it shall be transported from one State to another, even though it be live stock driven on foot.
>
> . . . . . .
>
> "If the driving of diseased cattle from one State to another is interstate commerce, as held in the decision just cited, and as held by the Supreme Court of the United States in the case of Railroad *v.* Hus[e]n (95 U. S., 465), then the driving of a stolen automobile from one State to another certainly falls within the meaning of that term.
>
> . . . . . .

> "If the transportation of a woman from one State to another, by means of an automobile, for prostitution, constitutes interstate commerce, then how can it be argued, with any show of color, that the driving of a stolen automobile from one State to another for profit is not interstate commerce?" *Id.*, at 5475–5476.

Given these statements in the legislative history and the absence of any indication that any legislator intended the Dyer Act to proscribe more than the transportation of stolen automobiles from one State into another, it is manifest that Congress used the term "interstate commerce" and referred to this Court's decisions construing the Commerce Clause simply to articulate the source of its authority to proscribe the interstate transportation of stolen automobiles. The Court's suggestion that Congress incorporated into the statute the constitutional definition of "interstate commerce" is quite implausible.

C

The final leg of the Court's analysis of the legislative history is the following colloquy between Representatives Anderson and Dyer:

> "Mr. ANDERSON. I will ask the gentleman whether the committee meant the same thing in its definition of interstate commerce in section 2 as it meant in section 4?
>
> "Mr. DYER. I think so. If the gentleman will point out wherein it differs, I shall be glad.
>
> "Mr. ANDERSON. In the definition under section 2 interstate commerce means transportation from one State to another, while if you refer to section 4 you find there you have a vehicle or motor car constituting interstate or foreign commerce, and you scarcely have a sensible section.
>
> "Mr. DYER. I will say to the gentleman that if there is any difference there, which I do not see, the matter

would be construed by the Supreme Court, which has passed many times upon what is meant by interstate and foreign commerce. I think it really is not necessary to put the definition in this bill. It was done at the request of some of the members of the committee. The Supreme Court has decided many times what is interstate commerce. I do not think myself that any definition is necessary." *Id.*, at 5472.

Since the Court places so much reliance upon Representative Dyer's answer, see *ante*, at 650–652, a careful parsing is necessary. Section 2(b) of the bill provided that "[t]he term 'interstate . . . commerce,' as used in this Act, shall include transportation from one State . . . to another State." 41 Stat. 325. Section 4 of the bill proscribed the receipt, concealment, storage, bartering, sale, or disposition of any stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate . . . commerce." *Ibid.* Representative Anderson's confusion is understandable: § 2 defined interstate commerce in terms of interstate transportation; § 4, however, seemed to indicate that the automobile itself constituted interstate commerce, apart from the transportation of it.[9] Representative Dyer obviously did not understand the confusion because he perceived no difference between the two sections insofar as the meaning of "interstate commerce" was concerned. He had no doubt that this Court knew what the term meant and that § 4 would be construed correctly; indeed, he saw no need for the statutory definition of "interstate commerce." Even if it could be said that Representative Dyer was willing to defer to this Court for the definition of the interstate commerce element of § 4, that is not what Congress did. The Dyer Act as proposed and as enacted in-

[9] This is the section that Representative Dyer had just previously described as providing for the punishment of "the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it." *Id.*, at 5472.

cluded the definition of "interstate commerce" as transportation from one State to another. Moreover, § 4, which contained the confusing reference to interstate commerce, is the precursor of § 2315, not the section the Court interprets today. The precursor of § 2314 is § 3 of the Dyer Act, which has nothing to do with Representative Anderson's confusion and Representative Dyer's answer.

Interestingly, another colloquy, this one between Representatives Hastings and Saunders, also indicates the confusion about the meaning of § 4 of the bill:

> "Mr. HASTINGS. I want to direct the gentleman's attention to section 4. Suppose an automobile is stolen, say, in the State of Virginia at some one point and is transported to some other point in the State of Virginia and sold to some one there who knows that property to have been stolen, would that be a Federal offense under section 4?
>
> "Mr. SAUNDERS of Virginia. I think not. How would it be? Up to that point what has been done has not reached the dignity of a Federal offense. The Federal offense begins when there is a movement in interstate commerce.
>
> "Mr. HASTINGS. Section 4 provides that anyone receiving stolen property knowing it to have been stolen, and it does not require it to have gone across State lines, as you will perceive if you read section 4 closely.
>
> "Mr. SAUNDERS of Virginia. The gentleman did not read the language in line 10, which says:
>
> > Moving as, or which is a part of, or which constitutes interstate or foreign commerce.
>
> "And that answers the difficulty of the gentleman from Oklahoma." 58 Cong. Rec. 5477 (1919).

Immediately after this colloquy, Representative Dyer asked for a vote, and the House passed the bill. If we were construing § 2315, which is the successor to § 4 of the Dyer Act,

then this colloquy would seem to indicate that § 4 requires the automobile to have crossed state lines, notwithstanding the confusing reference to "interstate commerce" in that section and Representative Dyer's answer to Representative Anderson's observation. In any event, we are not construing § 2315, but § 2314, and the definition of "interstate commerce" included in the Dyer Act, as well as the statute's legislative history, clearly indicates that § 3, the precursor of § 2314, proscribed only the transportation across state lines of stolen automobiles.

II

The National Stolen Property Act, enacted in 1934, merely extended the Dyer Act to the transportation in interstate commerce of other types of stolen property.[10] The Act was passed with little debate, but its legislative history confirms the points made above. As they did in 1919, the Committees and Members of Congress used the phrase "transportation in interstate commerce of stolen property" interchangeably with such phrases as "interstate transportation of stolen property" or "transportation across state lines of stolen property." The Senate Judiciary Committee Report described the Dyer Act as "concerned [with] interstate transportation of stolen motor vehicles." S. Rep. No. 538, 73d Cong., 2d Sess., 2 (1934). The House Judiciary Committee Report stated that "[t]his bill is designed to punish interstate transportation of stolen property, securities, or money." H. R. Rep. No. 1462, 73d Cong, 2d Sess., 2 (1934). It also noted

[10] In the 1934 National Stolen Property Act, Congress adopted a slightly different definition of "interstate commerce" than the one included in the 1919 Dyer Act. Section 2(b) of the Dyer Act provides that the term shall *include* transportation from one State to another State, whereas § 2(a) of the 1934 enactment provides that the terms shall *mean* transportation from one State to another State. There is no reason to believe that one definition was intended to be any broader than the other. But see the Court's curious discussion, *ante*, at 650–652, n. 14.

that "[p]revious Congresses have considered bills providing punishment for interstate shipment of stolen property." *Ibid.* Senator Ashurst told the Senate: "Gangsters who now convey stolen property, except vehicles, across the State line, with that immemorial gesture of derision, thumb their nose at the officers. This bill extends the provisions of the [Dyer Act] to other stolen property described in the bill." 78 Cong. Rec. 6981 (1934). Also like the legislative history of the Dyer Act, the Reports in 1934 substantiated the constitutionality of the enactment, this time by reference to the decisions upholding the Dyer Act. See S. Rep. No. 538, *supra*, at 2; H. R. Rep. No. 1462, *supra*, at 2.

The Reports made an additional point that merits consideration. The Department of Justice, in a memorandum reprinted in the Senate Report, explained the troubles that previous attempts at extending the Dyer Act to other stolen property had faced:

> "The explanation for the opposition to federalizing such crimes was in the concern which had developed at that time over the burdening of the Federal machinery for administering criminal justice. It was for this reason also that the Senate failed to pass a similar bill in 1930. The heavy burden placed on the Federal Government by the Dyer Act, which concerned interstate transportation of stolen motor vehicles, had then become apparent." S. Rep. No. 538, *supra*, at 2.

The Senate bill therefore limited federal jurisdiction to cases involving stolen property worth $1,000 or more. The House increased the limit to $5,000, with this explanation:

> "It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations

> fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General." H. R. Rep. No. 1462, *supra*, at 2.

The Senate acceded to the increase. The point to be made is that Congress recognized that federal law enforcement authorities had limited resources. This recognition makes it all the more likely that Congress did not intend in 1934 to extend its proscription beyond the interstate transportation of stolen property.

III

Quoting from *United States* v. *Sheridan*, 329 U. S. 379, 384, the Court declares that "in [enacting] § 2314 Congress 'contemplated coming to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent.'" *Ante*, at 654. Ironically, this quote actually refutes the Court's position. The Court assumes, as it must, that the state offense committed by petitioner—forging a check—was committed in Pennsylvania rather than in Ohio, from which petitioner commenced his interstate journey. This is not a case, therefore, in which the defendant's offense was complete under state law before he crossed state lines to make his getaway. Rather, this is a case in which the defendant crossed state lines and then committed the underlying state offense.[11] It is even more ironic that, although the issue of the meaning of the interstate commerce phrase of § 2314 was not before the Court in *Sheridan*, the Court thrice referred to that element as the "interstate transportation" of forged securities. See 329 U. S., at 384, 385, 387. Remarkably, the Court today places so much significance upon the statutory formulation of the in-

[11] The evidence does not indicate where petitioner traveled after the forgeries.

terstate commerce element of § 2314 even though in referring to that element the Committees and Members of the 1919 and 1934 Congresses, as well this Court in *Sheridan*, repeatedly used the formulation that the Court rejects today as too narrow.

IV

The petitioner's argument that he was prosecuted and convicted under the wrong statute may generate little sympathy.[12] Our primary concern, however, is not with the fate of this defendant. Rather, our concern is to identify the scope of the Federal Government's responsibility for law enforcement. That scope is a matter for Congress to determine. In this case, it is clear to me that the Court has allowed the prosecutor to encroach into an area of state responsibility and to cross a line that Congress has drawn. I therefore respectfully dissent.

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[12] Petitioner concedes that he violated 18 U. S. C. § 2315, the successor to § 4 of the Dyer Act. See Tr. of Oral Arg. 11. Petitioner might also have violated other paragraphs of § 2314. See 644 F. 2d, at 285 (Higginbotham, J., concurring in part and dissenting in part); Tr. of Oral Arg. 18.

AMERICAN MEDICAL ASSOCIATION ET AL. *v.* FEDERAL TRADE COMMISSION

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

No. 80–1690. Argued January 11, 1982—Decided March 23, 1982

638 F. 2d 443, affirmed by an equally divided Court.

Newton N. Minow argued the cause for petitioners. With him on the briefs were *Jack R. Bierig*, *David W. Carpenter*, *William J. Doyle*, and *Linda L. Randell*.

Howard E. Shapiro argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Deputy Solicitor General Shapiro*, *Elliott Schulder*, *March Coleman*, and *L. Barry Costilo*.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

**Peter M. Sfikas* filed a brief for the American Dental Association as *amicus curiae* urging reversal.

A brief for the State of Ohio et al. as *amici curiae* urging affirmance was filed by *William J. Brown*, Attorney General of Ohio, and *Eugene F. McShane*, *Charles D. Weller*, and *Clifton E. Johnson*, Assistant Attorneys General; *Robert K. Corbin*, Attorney General of Arizona; *J. D. MacFarlane*, Attorney General of Colorado, and *Thomas P. McMahon*, Assistant Attorney General; *Carl R. Ajello*, Attorney General of Connecticut, and *Robert M. Langer* and *John R. Lacey*, Assistant Attorneys General; *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Assistant Attorney General; *Stephen H. Sachs*, Attorney General of Maryland, and *Charles O. Monk II* and *Naomi F. Samet*, Assistant Attorneys General; *Warren Spannaus*, Attorney General of Minnesota, and *Stephen P. Kilgriff*, Special Assistant Attorney General; *Paul L. Douglas*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General; *Jeff Bingaman*, Attorney General of New Mexico, and *James J. Wechsler* and *Richard H. Levin*, Assistant Attorneys General; *Robert Abrams*, Attorney General of New York, and *Lloyd Constantine*, Assistant Attorney

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

General; *Rufus L. Edmisten*, Attorney General of North Carolina, *H. A. Cole, Jr.*, Special Deputy Attorney General, and *Fred R. Gamin*, Assistant Attorney General; *Leroy S. Zimmerman*, Attorney General of Pennsylvania, and *Carl S. Hisiro*, Deputy Attorney General; *Dennis J. Roberts II*, Attorney General of Rhode Island, and *Patrick J. Quinlan*, Special Assistant Attorney General; and *Chauncey H. Browning*, Attorney General of West Virginia, and *Charles G. Brown*, Deputy Attorney General.

UNITED TRANSPORTATION UNION *v.* LONG ISLAND RAIL ROAD CO. ET AL.

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

No. 80–1925. Argued January 20, 1982—Decided March 24, 1982

Respondent Railroad, formerly under private ownership, was acquired by New York State in 1966 and is engaged in interstate commerce. Some 13 years later, petitioner Union, representing the Railroad's employees, and the Railroad failed to reach an agreement after conducting collective-bargaining negotiations pursuant to the Railway Labor Act, and mediation efforts also failed to produce agreement. This triggered a 30-day cooling-off period under that Act, at the expiration of which the Act permits a union to resort to a strike. Anticipating that New York would challenge the Railway Labor Act's applicability to the Railroad, the Union sued in Federal District Court, seeking a declaratory judgment that the labor dispute was covered by that Act and not the Taylor Law, the New York law prohibiting strikes by public employees. The Railroad then filed suit in a New York state court, seeking to enjoin an impending strike by the Union under the Taylor Law. Before the state court acted, the Federal District Court held that the Railroad was subject to the Railway Labor Act and that that Act, rather than the Taylor Law, was applicable. The District Court rejected the Railroad's argument that application of the Railway Labor Act to a state-owned railroad was inconsistent with *National League of Cities* v. *Usery*, 426 U. S. 833, wherein it was held that Congress could not impose the requirements of the Fair Labor Standards Act on state and local governments. The Court of Appeals reversed, holding that the operation of the Railroad was an integral state governmental function, that the Railway Labor Act displaced "essential governmental decisions" involving that function, and that the State's interest in controlling the operation of the Railroad outweighed the federal interest in having the federal Act apply.

Held: Application to a state-owned railroad of Congress' acknowledged authority to regulate labor relations in the railroad industry does not so impair a state's ability to carry out its constitutionally preserved sovereign function as to come in conflict with the Tenth Amendment. Pp. 682–690.

(a) One of the requirements under *National League of Cities*, *supra*, at 852, for a successful claim that congressional commerce power is invalid is that a state's compliance with federal law would directly impair its ability to "structure integral operations in areas of traditional govern-

mental functions." Operation of a railroad engaged in interstate commerce is clearly not an integral part of traditional state activities generally immune from federal regulation. And federal regulation of state-owned railroads, whether freight or passenger, simply does not impair a state's ability to function as a state. Pp. 683–686.

(b) To allow individual states, by acquiring railroads, to circumvent the federal system of railroad collective bargaining, or any of the other elements of federal regulation of railroads, would destroy the longstanding and comprehensive uniform scheme of federal regulation of railroads and their labor relations thought essential by Congress and would endanger the efficient operation of the interstate rail system. Moreover, a state acquiring a railroad does so knowing that the railroad is subject to such scheme of federal regulation. Here, New York knew of and accepted federal regulation, and, in fact had operated under it for 13 years without claiming any impairment of its traditional sovereignty. Pp. 686–690.

634 F. 2d 19, reversed and remanded.

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

Edward D. Friedman argued the cause for petitioner. With him on the briefs were *Robert Hart* and *Harold A. Ross.*

Lewis B. Kaden argued the cause for respondents. With him on the brief were *Mary P. Bass* and *Thomas M. Taranto.*

Joshua I. Schwartz argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Geller, T. Timothy Ryan, Jr., Lois G. Williams, Joseph Woodward,* and *Ronald M. Etters.**

**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 reversal.

Briefs of *amici curiae* urging affirmance were filed by *William T. Coleman, Jr., Donald T. Bliss,* and *Zoë E. Baird* for the American Public Transit Association; by *Henry W. Underhill, Jr., Benjamin L. Brown, John Dekker, James B. Brennan, George Agnost, Roger F. Cutler, Lee E. Holt, George F. Knox, Jr., Walter M. Powell, Allen G. Schwartz, J. Lamar Shelley, John W. Witt, Max P. Zall, Conard B. Mattox, Jr.,* and

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Tenth Amendment prohibits application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce.

I

The Long Island Rail Road (the Railroad), incorporated in 1834, provides both freight and passenger service to Long Island.[1] In 1966, after 132 years of private ownership and a period of steadily growing operating deficits, the Railroad was acquired by New York State through the Metropolitan Transportation Authority.

Thereafter, the Railroad continued to conduct collective bargaining pursuant to the procedures of the Railway Labor Act. 44 Stat. (part 2) 577, as amended, 45 U. S. C. § 151 *et seq.* The United Transportation Union, petitioner in this case, represents the Railroad's conductors, brakemen, switchmen, firemen, motormen, collectors, and related train crew employees. In 1978, the Union notified the Railroad that it desired to commence negotiations and the parties began collective bargaining as provided by the Act. They failed to reach agreement during preliminary negotiations

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Charles S. Rhyne for the National Institute of Municipal Law Officers; and by *Ross D. Davis* for the National League of Cities.

Martin L. Barr, *Jerome Thier*, and *Anthony Cagliostro* filed a brief for the New York State Public Employment Relations Board as *amicus curiae*.

[1] The Railroad's western terminus is Pennsylvania Station in Manhattan; there it connects with lines of railroads which serve other parts of the country. The eastern terminus is at Montauk Point, at the tip of Long Island, but most of its main and branch line traffic originates in the western half of Long Island, in the boroughs of Brooklyn and Queens, and in the suburbs of Nassau and western Suffolk Counties. By far the bulk of the Railroad's business is carrying commuters between Long Island's suburban communities and their places of employment in New York City. However, the Railroad supplies Long Island's only freight service; it does a significant volume of freight business, with 1979 freight revenue of over $12 million.

and, in April 1979, the Railroad and the Union jointly petitioned the National Mediation Board for assistance. Seven months of mediation efforts by the Board failed to produce agreement, however, and the Board released the case from mediation. This triggered a 30-day cooling-off period under the Act; absent Presidential intervention, the Act permits the parties to resort to economic weapons, including strikes, upon the expiration of the cooling-off period.

The Union anticipated the State's challenge to the applicability of the Act to the Railroad; on December 7, 1979, one day before the expiration of the 30-day cooling-off period, it sued in federal court seeking a declaratory judgment that the dispute was covered by the Railway Labor Act and not the Taylor Law, New York's law governing public employee collective bargaining and prohibiting strikes by public employees.[2] The next day, the Union commenced what was to be a brief strike. Pursuant to the Act, the President of the United States intervened on December 14, thus imposing an additional 60-day cooling-off period which was to expire on February 13, 1980.[3] A few days before the expiration of the 60-day period, the State converted the Railroad from a private stock corporation to a public benefit corporation, apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law.

The Railroad then filed suit in state court on February 13, 1980, seeking to enjoin the impending strike under the Taylor Law. Before the state court acted, the United States District Court for the Eastern District of New York heard and decided the Union's suit for declaratory relief, holding that the Railroad was a carrier subject to the Railway Labor Act,

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[2] On January 17, 1980, the Railroad responded to the Union's suit for declaratory judgment by asserting that no justiciable controversy existed because the Railroad did not believe the Taylor Law applied and therefore had no intention to invoke its provisions.

[3] The Presidential intervention also triggered the creation of a Presidential Emergency Board to investigate and report on the matter.

that the Act, rather than the Taylor Law, was applicable, and that declaratory relief was in order. 509 F. Supp. 1300 (1980).

In a footnote the District Court rejected the argument now presented to this Court that application of the Act to a state-owned railroad was inconsistent with *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). 509 F. Supp., at 1306, n. 4. The District Court noted that in *National League of Cities*, the Supreme Court "specifically held that the operation of a railroad in interstate commerce is not an integral part of governmental activity" and affirmed the rulings in *California* v. *Taylor*, 353 U. S. 553 (1957), and *United States* v. *California*, 297 U. S. 175 (1936), which held that the Railway Labor Act and the Safety Appliance Act could be applied to state-owned railroads. 509 F. Supp., at 1306, n. 4.

The Court of Appeals reversed, holding that the operation of the Railroad was an integral state governmental function and that the federal Act displaced "essential governmental decisions" involving that function. 634 F. 2d 19 (CA2 1980). The court applied a balancing approach and held that the State's interest in controlling the operation of its railroad outweighed the federal interest in having the federal Act apply.

We granted certiorari, 452 U. S. 960 (1981), and we reverse.

II

There can be no serious question that, as both the District Court and the Court of Appeals held, the Railroad is subject to the terms of the Railway Labor Act,[4] or that the Com-

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[4] The Railroad acknowledges in its brief that its freight service, which is admittedly engaged in interstate commerce, "eliminat[es] any dispute regarding its coverage by the RLA." Brief for Respondents 23.

In the Court of Appeals, the Railroad maintained that Congress did not intend the Act to apply to state-owned passenger railroads. 634 F. 2d, at 23. Whatever merit that claim may have had, it is no longer tenable. After that court rendered its decision, Congress amended the Act to add § 9a, 95 Stat. 681, 45 U. S. C. § 159a (1976 ed., Supp. V). Section 9a

merce Clause grants Congress the plenary authority to regulate labor relations in the railroad industry in general.[5] This dispute concerns the application of this acknowledged congressional authority to a state-owned railroad; we must decide whether that application so impairs the ability of the State to carry out its constitutionally preserved sovereign function as to come into conflict with the Tenth Amendment.[6]

A

The Railroad claims immunity from the Railway Labor Act, relying on *National League of Cities* v. *Usery*, *supra*, where we held that Congress could not impose the requirements of the Fair Labor Standards Act on state and local governments.[7] The Fair Labor Standards Act generally requires covered employers to pay employees no less than a minimum hourly wage and to pay them at one and one-half times their regular hourly rate for all time worked in any workweek in excess of 40 hours. Prior to 1974, the Act excluded most governmental employers. However in that year Congress amended the law to extend its provisions in somewhat modified form to "public agencies," including state governments and their political subdivisions.[8] We held that the 1974 amendments were invalid "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional governmental functions* . . . ." 426 U. S., at 852. (Emphasis supplied.)

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establishes special procedures to be applied to any dispute "between a publicly funded and publicly operated carrier providing rail commuter service . . . and its employees."

[5] See *Texas & N. O. R. Co.* v. *Railway & Steamship Clerks*, 281 U. S. 548 (1930).

[6] The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[7] The Fair Labor Standards Act is codified at 29 U. S. C. § 201 *et seq.*

[8] 88 Stat. 55. The 1974 amendments modified several of the definitions contained in 29 U. S. C. § 203.

Only recently we had occasion to apply the *National League of Cities* doctrine in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981). In holding that the Surface Mining and Reclamation Act of 1977, 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. IV), did not violate the Tenth Amendment by usurping state authority over land-use regulations, we set out a three-prong test to be applied in evaluating claims under *National League of Cities:*

> "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged regulation regulates the 'States as States.' [426 U. S.], at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' *Id.*, at 852." 452 U. S., at 287–288.[9]

The key prong of the *National League of Cities* test applicable to this case is the third one, which examines whether "the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"

B

The determination of whether a federal law impairs a state's authority with respect to "areas of traditional [state] functions" may at times be a difficult one. In this case, however, we do not write on a clean slate. As the District Court

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[9] However, even if these three requirements are met, the federal statute is not automatically unconstitutional under the Tenth Amendment. The federal interest may still be so great as to "justif[y] state submission." 452 U. S., at 288, n. 29. Cf. *Case* v. *Bowles*, 327 U. S. 92 (1946).

noted, in *National League of Cities* we explicitly reaffirmed our holding in *United States* v. *California*, 297 U. S. 175 (1936), and in two other cases involving federal regulation of railroads:[10]

> "The holding of *United States* v. *California* . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . . .' 297 U. S., at 182." 426 U. S., at 854, n. 18.

It is thus clear that operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*. See also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 422–424 (1978) (concurring opinion).[11] The Long Island is concededly a railroad engaged in interstate commerce.

The Court of Appeals undertook to distinguish the three railroad cases discussed in *National League of Cities*, noting

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[10] *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964); *California* v. *Taylor*, 353 U. S. 553 (1957).

[11] "[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause. . . .

. . . . . .

"The *National League of Cities* opinion focused its delineation of the 'attributes of sovereignty' . . . on a determination as to whether the State's interest involved 'functions essential to separate and independent existence.' [426 U. S., at 845], quoting *Coyle* v. *Oklahoma*, 221 U. S. 559, 580 (1911). It should be evident, I would think, that the running of a business enterprise is not an integral operation in the area of traditional government functions. . . . Indeed, the reaffirmance of the holding in *United States* v. *California*, *supra*, by *National League of Cities*, *supra*, at 854, n. 18, strongly supports this understanding." 435 U. S., at 422–424 (BURGER, C. J., concurring in part and in judgment).

that they dealt with freight carriers rather than primarily passenger railroads such as the Long Island. That distinction does not warrant a different result, however. Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments.[12] It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

III

In concluding that the operation of a passenger railroad is not among those governmental functions generally immune from federal regulation under *National League of Cities*, we are not merely following dicta of that decision or looking only to the past to determine what is "traditional." In essence, *National League of Cities* held that under most circumstances federal power to regulate commerce could not be exercised in such a manner as to undermine the role of the states in our federal system. This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather it was meant to require an inquiry into whether the federal regulation affects basic state preroga-

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[12] At the time of this suit, there were 17 commuter railroads in the United States; only 2 of those railroads were publicly owned and operated, both by the Metropolitan Transportation Authority. American Public Transit Assn., Transit Fact Book 74–75 (1979). Those two public railroads—the Long Island and the Staten Island—were originally private railroads. The Staten Island was founded in 1899 and acquired by the Metropolitan Transportation Authority in 1971. Moody's Transportation Manual 97 (1979).

tives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence." 426 U. S., at 851.

Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. Railroads have been subject to comprehensive federal regulation for nearly a century.[13] The Interstate Commerce Act—the first comprehensive federal regulation of the industry—was passed in 1887.[14] A year earlier we had held that only the Federal Government, not the states, could regulate the interstate rates of railroads. *Wabash, St. L. & P. R.* Co. v. *Illinois*, 118 U. S. 557 (1886). The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888;[15] the provisions of that Act were invoked by President Cleveland in reaction to the Pullman strike of 1894. Federal mediation of railroad labor disputes was first provided by the Erdman Act of 1898[16] and strengthened by the Newlands Act of 1913.[17] In 1916, Congress mandated the 8-hour day in the railroad industry.[18] After federal operation of the railroads during World War I, Congress passed the Transportation Act of 1920,[19] which further enhanced federal involvement in

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[13] The initial exercise of the federal authority over railroads occurred before the completion of the first transcontinental railroad. See the Pacific Railroad Act of 1862. 12 Stat. 489. Of course, federal regulation of interstate transportation goes back many more years than that. See the 1793 Act regulating coastal trade discussed in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824).

[14] 24 Stat. 379.

[15] Ch. 1063, 25 Stat. 501.

[16] 30 Stat. 424.

[17] Ch. 6, 38 Stat. 103.

[18] Adamson Act of 1916, ch. 436, 39 Stat. 721.

[19] 41 Stat. 456.

railroad labor relations. Finally, in 1926, Congress passed the Railway Labor Act, which was jointly drafted by representatives of the railroads and the railroad unions.[20] The Act has been amended a number of times since 1926, but its basic structure has remained intact. The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry.

Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. Congress determined that the most effective means of preventing such disruptions is by way of requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees.

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[20] Railway Labor Act of 1926, 44 Stat. (part 2) 577, as amended, 45 U. S. C. § 151 *et seq.* The purposes of the Railway Labor Act are set out in § 2 of the Act, 45 U. S. C. § 151a:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Rather than absolutely prohibiting strikes, Congress decided to assure equitable settlement of railroad labor disputes, and thus prevent interruption of rail service, by providing mediation and imposing cooling-off periods, thus creating "an almost interminable" collective-bargaining process. *Detroit & T. S. L. R. Co.* v. *Transportation Union*, 396 U. S. 142, 149 (1969). "[T]he procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway & Steamship Clerks* v. *Florida E. C. R. Co.*, 384 U. S. 238, 246 (1966).[21] To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

In addition, a state acquiring a railroad does so knowing that the railroad is subject to this longstanding and comprehensive scheme of federal regulation of its operations and its

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[21] Under the recent amendments to the Act, adding a new § 9a, 95 Stat. 68, 45 U. S. C. § 159a (1976 ed., Supp. V), the process has been made even more "long and drawn out" insofar as it applies to publicly owned commuter rail lines such as the Long Island. The law now provides for a "cooling-off period" of up to 240 days after failure of mediation. Any party to the dispute, or the Governor of any state through which the rail service operates, may request appointment of a Presidential Emergency Board to investigate and report on the dispute. If the dispute is not settled within 60 days after creation of the Emergency Board, the National Mediation Board must hold a public hearing at which each party must appear and explain any refusal to accept the Emergency Board's recommendations. The law then requires appointment of a second Emergency Board at the request of any party or Governor of an affected state. That Emergency Board must examine the final offers submitted by each party and must determine which is the most reasonable. Finally, if a work stoppage occurs, substantial penalties are provided against the party refusing to accept the offer determined by the Emergency Board to be most reasonable.

labor relations. See *California* v. *Taylor*, 353 U. S., at 568. Here the State acquired the Railroad with full awareness that it was subject to federal regulation under the Railway Labor Act. At the time of the acquisition, a spokesman stated:

> "We just have a new owner and a new board of directors. We're under the Railway Labor Act, just as we've always been. The people do not become state employes, they remain railroad employes and retain all the benefits and drawbacks of that."

The parties proceeded along those premises for the next 13 years, with both sides making use of the procedures available under the Railway Labor Act, and with Railroad employees covered by the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employers' Liability Act. Conversely, Railroad employees were not eligible for any of the retirement, insurance, or job security benefits of state employees.

The State knew of and accepted the federal regulation; moreover, it operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty. Indeed, the State's initial response to this suit was to acknowledge that the Railway Labor Act applied. It can thus hardly be maintained that application of the Act to the State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities* v. *Usery*, 426 U. S., at 851.

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

Reversed and remanded.

UNDERWRITERS NATIONAL ASSURANCE CO. *v.* NORTH CAROLINA LIFE & ACCIDENT & HEALTH INSURANCE GUARANTY ASSN. ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 80–1496. Argued November 9, 1981—Decided March 24, 1982

Petitioner, an Indiana stock insurance corporation, as required by law to do business in North Carolina, was a member of respondent North Carolina Life and Accident and Health Insurance Guaranty Association (North Carolina Association), which, under a North Carolina statute, is ultimately responsible for fulfilling the policy obligations of members that become insolvent or otherwise fail to meet their policy obligations. Because of its questionable financial condition, petitioner was required by respondent North Carolina Commissioner of Insurance to post a $100,000 deposit for the benefit of its North Carolina policyholders. Subsequently, rehabilitation proceedings were brought against petitioner in an Indiana state court (Rehabilitation Court), in which the North Carolina Association intervened and in which the court certified a class consisting of all past and present policyholders. The Rehabilitation Court ultimately ruled in 1978 that all pre-rehabilitation claims to the deposit were compromised, settled, and dismissed by the court's 1976 order which adopted a rehabilitation plan and which ruled that the court had jurisdiction over the subject matter and over the parties. In the meantime, when a dispute arose between petitioner and the North Carolina Association as to the rehabilitation plan's effect on use of the North Carolina deposit, the North Carolina Association filed suit in a North Carolina state court, seeking a declaratory judgment that it was entitled to use the deposit to fulfill the pre-rehabilitation contractual obligations to North Carolina policyowners that had been compromised in the rehabilitation proceeding. Holding that the North Carolina statutes governing the North Carolina Association and the $100,000 deposit deprived the Rehabilitation Court of subject-matter jurisdiction to determine rights in the deposit, the North Carolina court refused to honor the Rehabilitation Court's prior ruling as to claims to the deposit. The North Carolina Court of Appeals affirmed.

Held: Under the Full Faith and Credit Clause, a judgment of a court in one State is conclusive upon the merits in another State only if the court in the first State had power to pass on the merits—that is, had jurisdic-

tion over the subject matter and the relevant parties. Cf. *Durfee* v. *Duke*, 375 U. S. 106. In this case, the North Carolina courts violated the Full Faith and Credit Clause by refusing to treat the Rehabilitation Court's prior judgments as res judicata. Pp. 703–716.

(a) Regardless of the validity, under North Carolina law, of the North Carolina courts' holding that the Rehabilitation Court did not have subject-matter jurisdiction to determine the rights in the deposit, it is not an appropriate ground for refusing to accord the Indiana judgments full faith and credit. The principles of res judicata apply to questions of jurisdiction, and "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee* v. *Duke*, *supra*, at 111. The record here establishes that the Rehabilitation Court fully and fairly considered whether it had subject-matter jurisdiction to settle the pre-rehabilitation claims of the parties before it to the North Carolina deposit. As an intervening party, the North Carolina Association was obliged to advance its argument that the court did not have authority to settle pre-rehabilitation claims to the deposit when it was given the opportunity to do so. Pp. 705–710.

(b) The North Carolina courts' refusal to give the Indiana judgments full faith and credit cannot be supported on the asserted ground that the Rehabilitation Court lacked *in personam* jurisdiction over North Carolina policyowners because no policyowner actually appeared in the rehabilitation proceedings and because the class representatives could not adequately represent the policyowners in both deposit and nondeposit States. Respondents have not identified any current interest in the North Carolina deposit that a policyowner might have, independent of the interests asserted by the North Carolina Association. North Carolina law requires the Association to provide North Carolina policyowners with pre-rehabilitation coverage even if it cannot use the deposit to finance this obligation. Therefore, these policyowners have no current interest in whether the Association is allowed to liquidate the deposit. Pp. 711–713.

(c) Nor can refusal to give full faith and credit to the Rehabilitation Court's judgments be supported on the asserted ground that the court lacked *in personam* jurisdiction over North Carolina officials. Although the Rehabilitation Court did not attempt to exercise jurisdiction over the North Carolina trustees of the deposit, it did purport to exercise jurisdiction over the trust corpus; its 1978 order specified that the 1976 rehabilitation plan determined that the deposit was an asset of petitioner, subject to the court's jurisdiction. Regardless of whether this conclu-

sion might have been erroneous as a matter of North Carolina law, the jurisdictional issue was fully and fairly litigated and finally determined by the Rehabilitation Court, and the North Carolina courts were required to honor the Rehabilitation Court's determination. A court of competent jurisdiction can settle the claims of two competing parties to specific property even though a third party may claim an interest in the same res. Pp. 713–715.

(d) There may be merit, as a matter of insurance law, in respondent's arguments that honoring the Rehabilitation Court's determination that the deposit was an asset of petitioner would negate North Carolina's comprehensive statutory scheme to ensure protection of North Carolina policyowners and that a State has a right to segregate assets of a foreign insurance company to be used for the sole benefit of that State's policyowners. However, the only forums in which respondents may challenge the Rehabilitation Court's assertion of jurisdiction on such grounds are in Indiana, not North Carolina. Pp. 715–716.

48 N. C. App. 508, 269 S. E. 2d 688, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which POWELL and STEVENS, JJ., joined, *post*, p. 716.

Theodore R. Boehm argued the cause for petitioner. With him on the briefs was *Charles T. Richardson.*

William S. Patterson argued the cause for respondents. With him on the brief were *Rufus L. Edmisten*, Attorney General of North Carolina, *Richard L. Griffin*, Assistant Attorney General, *Charles D. Case*, and *Eugene Gressman.*

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, the North Carolina Court of Appeals held that an Indiana court was without jurisdiction to adjudicate the rights of various parties in a $100,000 deposit held in trust by certain North Carolina officials. Because it found that the Indiana court did not have jurisdiction, the North Carolina court refused to recognize the Indiana court's prior ruling that all claims to the deposit were compromised, settled, and dismissed by the final order entered by that court during a

rehabilitation proceeding. We granted certiorari to decide whether, by refusing to treat the prior Indiana court judgment as res judicata, the North Carolina court has violated the Full Faith and Credit Clause of the Constitution and its implementing federal statute. 451 U. S. 982 (1981). For the reasons stated below, we reverse the decision of the North Carolina Court of Appeals.

I

Petitioner Underwriters National Assurance Co. (Underwriters) is an Indiana stock insurance corporation specializing in life and disability insurance for certain high-income professional groups. In 1973 Underwriters was licensed to do business in 45 States, including North Carolina, and was administering over 50,000 policies. To qualify to do business in North Carolina, Underwriters was required to join respondent North Carolina Life and Accident and Health Insurance Guaranty Association (North Carolina Association), a state-created association of all foreign and domestic insurance companies operating in North Carolina. See Life and Accident and Health Insurance Guaranty Association Act, N. C. Gen. Stat. § 58–155.65 *et seq.* (1975) (Guaranty Act). Under the terms of the Guaranty Act, the North Carolina Association is ultimately responsible for fulfilling the policy obligations of any member that becomes insolvent or otherwise fails to honor its obligations to North Carolina policyholders. N. C. Gen. Stat. § 58–155.72(4) (Supp. 1981).

In June 1973, after determining that Underwriters' financial condition was questionable, the North Carolina Commissioner of Insurance informed Underwriters that it must post a $100,000 deposit "for the sole benefit of North Carolina policyholders," to continue to do business in that State. Shortly thereafter, Underwriters deposited with the State a $100,000 bond registered to the "Treasurer of the State of North Carolina in trust for the Underwriters National Assur-

ance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58–188.5 of the North Carolina General Statutes." See N. C. Gen. Stat. § 58–182 *et seq.* (1975) (Deposit Act).

The North Carolina Commissioner's fears about Underwriters' financial condition proved to be well founded. Approximately one year after Underwriters posted this bond, the Indiana Department of Insurance commenced rehabilitation proceedings against petitioner on the ground that its reserves were inadequate to meet its future policy obligations. By order dated August 5, 1974, the Superior Court for Marion County (Rehabilitation Court)[1] appointed the Indiana Commissioner of Insurance as Rehabilitator and directed him to "take possession of the business and assets of Underwriters . . . and conduct the business thereof and appoint such personnel as may be necessary to rehabilitate Underwriters." Notice of this action was sent to all state insurance commissioners, including respondent North Carolina Commissioner. The North Carolina Commissioner immediately informed the North Carolina Association that Underwriters was undergoing rehabilitation in Indiana, and that title to all assets of Underwriters had been transferred to the Indiana Rehabilitator.

Shortly after entering the order of rehabilitation, the Rehabilitation Court enjoined the commencement or prosecution of any suit against Underwriters or the Rehabilitator. This injunction stayed several policyholder actions that had been filed against Underwriters, and required that any person who desired to institute or to prosecute any such action

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[1] The Indiana Rehabilitation Court is a court of general jurisdiction. In addition, the Rehabilitation Court is authorized by statute to oversee the actions of the Rehabilitator in formulating a plan of rehabilitation, to enter injunctions to prevent interference with either the Rehabilitator or the rehabilitation proceeding, and to enter the final order of rehabilitation. See Ind. Code § 27–1–4–1 *et seq.* (1976).

join the Indiana rehabilitation proceeding.[2] The plaintiffs in the stayed actions were subsequently given permission to intervene in the rehabilitation proceeding. In October 1975, the Rehabilitation Court certified a class consisting of all past and present policyholders, and appointed intervening plaintiffs from the stayed actions as class representatives.[3]

The Rehabilitation Court sent notice of the rehabilitation proceeding to all policyholders, informing them that the class had been certified, and that all members not requesting exclusion would be bound by the judgment of the Rehabilitation Court. The notice concluded by stating that "[t]he entire court file" was available to any class member.[4]

Over the next two and one-half years, the Rehabilitation Court supervised the efforts of the Rehabilitator and other interested parties to return Underwriters to a sound financial footing. After extensive negotiations between Underwriters, the class representatives, and other interested parties, the Rehabilitator submitted a Proposed Plan to the Rehabilitation Court in April 1976. In order to preserve the financial

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[2] Three class actions and one individual lawsuit were stayed as a result of the Rehabilitation Court's order. *Schultz* v. *Underwriters National Assurance Co.*, Civ. Action No. 74 C 2550 (ND Ill.) (class action on behalf of all Illinois policyowners); *Honeycutt* v. *Underwriters National Assurance Co.*, Civ. Action No. 482–74–A (ED Va.) (class action on behalf of all Virginia policyowners); *Hall* v. *Underwriters National Assurance Co.*, Civ. Action No. 75–L–1589–NE (ND Ala.) (class action on behalf of all policyowners in Madison County, Ala.); *Meyer* v. *Guarantee Reserve Life Ins. Co.*, Cause No. 786–532 (Super. Ct. of King County, Wash.). These lawsuits alleged, *inter alia*, that Underwriters had fraudulently misled policyowners as to the financial condition of the company.

[3] The court certified the class under Indiana Trial Rule 23(B)(3). Indiana Trial Rules are identical to the Federal Rules of Civil Procedure with respect to class actions.

[4] The court file included a document listing Underwriters' assets. The North Carolina Association concedes that this document included the $100,000 deposit as a general asset of Underwriters. Brief for Respondents 11–12.

health of the company and to provide continuing coverage for policyholders, the Rehabilitator proposed that the Rehabilitation Court reform the policies to require increased premiums and reduced benefits.[5] Of particular interest to this litigation, the Proposed Plan stated that Underwriters "[will have] no liability to any guaranty association which itself has obligations to [Underwriters'] policyowners." Proposed Rehabilitation Plan, I(J), Exhibit Binder 79 (E. B.). Part X(C) of the Proposed Plan further provided:

> "The guaranty associations in some states *may have obligations to [Underwriters'] policyowners as a result of the [Underwriters] rehabilitation proceeding*. Moreover, to the extent such guaranty associations do have obligations, there is a possibility that those guaranty associations may seek to recover from [Underwriters] sums paid to [Underwriters'] policyowners. *The Rehabilitation Plan should resolve [Underwriters'] contingent liability to any guaranty association* by determining that [Underwriters] has no further obligation or liability to any guaranty association." *Id.*, at 89 (emphasis added).

By direction of the Rehabilitation Court, the Rehabilitator mailed a copy of this Proposed Plan to all interested parties, including all state guaranty associations and insurance commissioners. The Rehabilitator subsequently sent to the guaranty associations notice of a hearing to consider various rehabilitation plans, including that of the Rehabilitator.

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[5] Underwriters had underwritten a large block of "noncancelable" disability insurance policies. These policies not only were guaranteed to be renewable at the same premium regardless of experience, but also entitled the policyowner to a refund of 80% of the premiums paid if no disability claims were asserted in a 10-year period. The Proposed Plan eliminated the 80% refund, and converted the policies from "noncancelable" to "guaranteed renewable," meaning that the policy was renewable at the policyowner's option, but the company could increase the premium.

This notice explicitly informed the guaranty associations that although eight associations, including the North Carolina Association, "may have obligations to . . . policyowners as a result of the [Underwriters] rehabilitation proceeding," no association had either intervened in the proceeding, or made suggestions for changes in the Plan. The notice directed that if a guaranty association desired to present any information or contentions relevant to the rehabilitation of Underwriters, it must intervene in the proceeding and present its arguments at the June 9, 1976, hearing. Unless the associations either intervened, or stated in writing that they had no obligations to policyowners and that they waived all claims against Underwriters and the Rehabilitator, a summons would issue to bring the associations before the Rehabilitation Court. *Id.*, at 59–61.

On June 8, 1976, these eight guaranty associations, including the North Carolina Association, intervened in the Indiana rehabilitation proceeding. In their motion to intervene, the guaranty associations stated that Part X(C) of the Proposed Plan was "unacceptable," and that through negotiations, the associations and the Rehabilitator had agreed on a modification that would "protect the rights of the Guaranty Associations." In relevant part,[6] the guaranty associations proposed that Part X(C) be changed to read as follows:

> "[Underwriters shall have] no further obligation or liability to any guaranty association other than the obligation to recognize as valid the assignment of the policyowner's rights to the guaranty association and to treat the guaranty association as it would have treated the policyowner; *provided, however*, if any guaranty association makes any payment to or on behalf of any policyowner which is not fully reimbursed pursuant to the foregoing

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[6] The guaranty associations also requested that the court modify the plan in ways not relevant to the instant proceeding.

> provisions, *that association shall receive from [Underwriters] each year until fully reimbursed a portion of [Underwriters'] statutory net gain from operations* after dividends to policyowners, federal income taxes and the payments to be made under Part XI equal to the annual premium in force for basic coverage in the state of that association on August 5, 1974, divided by the total annual premiums in force for basic coverage of [Underwriters] on August 5, 1974." *Id.*, at 105 (emphasis added).

After a full hearing in which the North Carolina Association participated, the Rehabilitation Court tentatively approved the Proposed Plan, including the above modification. The court directed the Rehabilitator to send notice to all interested persons that on October 14, 1976, a final hearing would be held on the Plan and the settlement of all claims against Underwriters. The notice sent by the Rehabilitator to Underwriters, the North Carolina Commissioner of Insurance, and all other interested parties specified that "[t]he Proposed Rehabilitation Plan provides in part XIII that upon [its] final approval . . . , all claims against [Underwriters] by policyowners or others are compromised and dismissed." At the request of the eight guaranty associations, the Rehabilitation Court subsequently approved a special mailing to policyholders in their respective States explaining that the guaranty associations were statutorily obligated under certain circumstances to continue to provide the benefits compromised by the Indiana court under the Rehabilitation Plan.

In November 1976, after holding final hearings in which the North Carolina Association participated, the Rehabilitation Court approved a Plan of Rehabilitation, which was, with respect to issues relevant here, identical to the Proposed Plan. In its order adopting this Plan, the Rehabilitation Court stated that it had "jurisdiction over the subject matter and over the parties, including . . . all [Underwriters]

policyowners [and] state insurance guaranty associations." App. 38. Further, the court specified that "[t]o the extent that any claim, objection or proposal which was or *could have been* presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied." *Id.*, at 40 (emphasis added). The court went on to state that "[t]his Order is final as to all matters occurring prior to the date of this Order." Finally, the Rehabilitation Court retained jurisdiction "to resolve all questions as to interpretation . . . of the Plan," and "to modify . . . the Plan in any respect in the light of future developments." *Id.*, at 42. Notice of the court's order adopting the final plan was sent to all interested parties, including all policyowners, state insurance commissioners, and the eight guaranty associations. No appeal was taken from this order, and Underwriters was released from rehabilitation in February 1977.

On June 8, 1977, Underwriters and the eight guaranty associations, including the North Carolina Association, invoked the Rehabilitation Court's continuing jurisdiction to request that it approve a "Service Contract," under which Underwriters would continue to service policyowners residing in these States at pre-rehabilitation levels in return for a fee paid by the associations. The Rehabilitation Court approved the proposed contract and directed that Underwriters and the associations execute this agreement "in substantially the form" presented to the court.[7] Pursuant to this order, Underwriters and seven of the guaranty associations executed the Service Contract without incident. Before the North Carolina Association executed its Service Contract, however, it made an addition to the document previously presented to the court. Specifically referring to Underwriters' $100,000

[7] At the joint request of Underwriters and the associations, the Rehabilitation Court had approved the concept of a service contract prior to the adoption of the final Plan of Rehabilitation. Brief for Petitioner 11.

deposit in North Carolina for the first time since it had intervened in the rehabilitation proceeding 16 months before, the North Carolina Association added the following paragraph to the Service Contract approved by the court:

> "It is expressly agreed, however, that the Guaranty Association and Underwriters explicitly reserve all their rights and remedies in connection with any deposits made by Underwriters with the Commissioner of Insurance of North Carolina, including deposits understood to total One Hundred Thousand Dollars ($100,000.00), which rights and remedies are governed by North Carolina law." E. B. 34.

Underwriters signed the revised agreement, but it made clear in a cover letter accompanying the signed agreement its understanding that the above paragraph was intended only to preserve any *future* rights that the North Carolina Association may have in the $100,000 deposit. Any other interpretation of this paragraph, the letter concluded, would be unacceptable because the "Plan of Rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits" prior to rehabilitation. *Id.*, at 35.

The North Carolina Association responded to this letter by filing suit against Underwriters, the North Carolina Commissioner of Insurance, and the State Treasurer, in the Superior Court of Wake County, N. C. The complaint prayed for a declaratory judgment that the North Carolina Association was entitled to use the $100,000 deposit to fulfill the pre-rehabilitation contractual obligations to North Carolina policyowners that had been compromised in the rehabilitation proceeding. The North Carolina Commissioner and Treasurer filed a cross-claim against Underwriters, also requesting that the deposit be liquidated for the benefit of the North Carolina Association and North Carolina policyholders. Underwriters answered, asserting that the Indiana judgment

was res judicata as to any pre-rehabilitation claims against the deposit, and therefore was entitled to full faith and credit in the North Carolina courts.

Invoking the Rehabilitation Court's continuing jurisdiction to resolve all questions involving the interpretation of the Plan, Underwriters filed a petition for instructions in July 1978. The Rehabilitation Court granted the petition, and sent notice to the North Carolina Association, the North Carolina Commissioner and Treasurer, and to all other parties to the rehabilitation proceeding. On September 22, 1978, the Rehabilitation Court held a hearing, at which both Underwriters and the North Carolina Association appeared and presented their respective full-faith-and-credit claims. In an opinion dated November 22, 1978, the Rehabilitation Court held that the 1976 Rehabilitation Plan "fully adjudicated and determined that the North Carolina deposit was an asset of . . . Underwriters, and any claim existing as of the date of adoption of the Plan . . . was compromised, settled and dismissed by the final Order and the Plan." App. to Pet. for Cert. 38A. In reaching this conclusion, the Rehabilitation Court specifically noted that the North Carolina Association had never made any claim to the deposit, even though the $100,000 had been included, without objection, in the general assets of Underwriters listed in Part V of the Plan. See n. 4, *supra*. The court went on to state that, although it probably had the power to enjoin the North Carolina Association from proceeding in North Carolina, it declined to do so because it believed that the North Carolina state court would recognize its judgment as binding.[8]

After receiving the Rehabilitation Court's ruling, Underwriters moved for summary judgment in the North Carolina state trial court, as did the respondents, the North Carolina Association and the North Carolina officials. The trial court

[8] The North Carolina Association has appealed this ruling, but the Indiana Court of Appeals stayed consideration of its appeal pending this Court's resolution of this case.

entered summary judgment in favor of the respondents, reasoning that it was the only court with the "requisite subject matter jurisdiction to determine the rights of North Carolina policyholders in the special deposits made by [Underwriters] for their protection." App. to Pet. for Cert. 25A. While noting that the Indiana court did not have *in personam* jurisdiction over the North Carolina officials or over the North Carolina policyholders, the court held that "[a]n appearance in the Indiana insolvency proceeding by any of the parties having an interest in the deposit . . . could not constitute a waiver of the Indiana Court's lack of subject matter jurisdiction with regard to the deposit." *Ibid.* As a result, the North Carolina trial court refused to honor the judgment of the Rehabilitation Court. The trial court directed the Commissioner of Insurance to liquidate the deposit to reimburse the North Carolina Association for satisfying the pre-rehabilitation claims of North Carolina policyholders.

On appeal, the North Carolina Court of Appeals affirmed, substantially for the reasons expressed by the trial court. 48 N. C. App. 508, 269 S. E. 2d 688 (1980). The Court of Appeals emphasized that the North Carolina Association sought to protect "statutory," as opposed to "contractual," rights; that title and rights to the $100,000 were vested by law in the State Commissioner and Treasurer, thus depriving the Rehabilitation Court of subject matter jurisdiction over the deposit; and that the Rehabilitation Court did not have *in personam* jurisdiction over these officials. *Id.*, at 517, 269 S. E. 2d, at 694. The Court of Appeals concluded that the deposit could never be an asset of Underwriters, and that the Rehabilitation Court's decision to the contrary was not entitled to full faith and credit. The North Carolina Supreme Court declined to grant discretionary review. 301 N. C. 527, 273 S. E. 2d 453 (1980).

II

The concept of full faith and credit is central to our system of jurisprudence. Ours is a union of States, each having its

own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. See *Sherrer* v. *Sherrer*, 334 U. S. 343, 355 (1948); *Riley* v. *New York Trust Co.*, 315 U. S. 343, 348–349 (1942). Recognizing that this risk of relitigation inheres in our federal system, the Framers provided that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U. S. Const., Art. IV, § 1. This Court has consistently recognized that, in order to fulfill this constitutional mandate, "the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." *Hampton* v. *McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C. J.); *Riley* v. *New York Trust Co.*, *supra*, at 353.[9]

To be sure, the structure of our Nation as a union of States, each possessing equal sovereign powers, dictates some basic limitations on the full-faith-and-credit principles enumerated above. Chief among these limitations is the caveat, consistently recognized by this Court, that "a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Durfee* v. *Duke*, 375 U. S. 106, 110 (1963).[10]

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[9] This construction is also compelled by 28 U. S. C. § 1738, the statutory codification of this constitutional guarantee. This provision requires that "Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

[10] This limitation flows directly from the principles underlying the Full Faith and Credit Clause. It is axiomatic that a judgment must be supported by a proper showing of jurisdiction over the subject matter and over

Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given. See *Nevada* v. *Hall*, 440 U. S. 410, 421 (1979).

The North Carolina courts relied on this limitation in refusing to give full faith and credit to either the 1976 judgment or the 1978 judgment of the Rehabilitation Court. Respondents argue, and the North Carolina courts held, that the Rehabilitation Court was powerless to determine that the North Carolina deposit was an asset of Underwriters. Specifically, respondents contend that the Rehabilitation Court lacked both jurisdiction over the subject matter and jurisdiction over the relevant parties.

A

The North Carolina courts held that the Guaranty Act and the Deposit Act deprived the Rehabilitation Court of the subject matter jurisdiction to determine rights in the $100,000 deposit. Regardless of the validity of this holding as a matter of North Carolina law,[11] it is not an appropriate ground for

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the relevant parties. One State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction merely gives to that judgment the same "credit, validity, and effect" that it would receive in a court of the rendering State.

[11] Respondents argue that because North Carolina courts have exclusive jurisdiction to determine rights in the deposit, they were not required to recognize the Indiana judgment. Even if we accept the argument that North Carolina courts have exclusive jurisdiction over the subject matter of this litigation, the rule of jurisdictional finality established in *Durfee* v. *Duke*, 375 U. S. 106 (1963), would still apply. See *infra*, at 706. Respondents attempt to analogize this claim of exclusive jurisdiction to the exclusive jurisdiction each State has to control the administration of real property within its borders. See *Fall* v. *Eastin*, 215 U. S. 1 (1909); *Clarke* v. *Clarke*, 178 U. S. 186 (1900). Respondents fail to recognize, however, that the *Durfee* Court explicitly refused to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction. 375 U. S., at 115.

refusing to accord the Indiana judgments full faith and credit under the facts of this case. In relying on this ground, the courts below failed to recognize the limited scope of review one court may conduct to determine whether a foreign court had jurisdiction to render a challenged judgment.[12]

This Court has long recognized that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166 (1932). See also *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (1939); *Davis* v. *Davis*, 305 U. S. 32 (1938). Any doubt about this proposition was definitively laid to rest in *Durfee* v. *Duke*, *supra*, at 111, where this Court held that "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."[13] The North Carolina courts, therefore, should have determined in the first instance whether the Rehabilitation Court fully and fairly considered the question of subject matter jurisdiction over the North Carolina deposit,

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[12] Respondents argue that the North Carolina court's determination of its own jurisdiction, as well as its determination that the Rehabilitation Court was without jurisdiction, is now entitled to this same limited scope of review. See Brief for Respondents 40. Although this argument would have force if Underwriters were collaterally attacking the North Carolina court's decision on jurisdiction, see *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (1939), it has no application to this litigation: Underwriters is seeking direct review of the North Carolina court's judgment. Consequently, Underwriters need only argue that the North Carolina court erred in concluding that the Rehabilitation Court did not fully and fairly determine that it had jurisdiction to adjudicate rights in the deposit.

[13] The need for finality within our federal system, see *supra*, at 703–704, applies with equal force to questions of jurisdiction. As this Court stated in *Stoll* v. *Gottlieb*, 305 U. S. 165, 172 (1938): "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

with respect to pre-rehabilitation claims of the parties before it. If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts.

From our examination of the record, we have little difficulty concluding that the Rehabilitation Court fully and fairly considered whether it had subject matter jurisdiction to settle the pre-rehabilitation claims of the parties before it to the North Carolina deposit. As we noted earlier, in addition to being a state court of general jurisdiction, the Rehabilitation Court also has special duties with respect to the rehabilitation of insurance companies. See n. 1, *supra*. In its November 1976 order approving the Rehabilitation Plan, the Rehabilitation Court made it clear that it was asserting both subject matter jurisdiction over all pre-rehabilitation claims against Underwriters, including those of the guaranty associations, and personal jurisdiction over the North Carolina Association and Underwriters. See App. 39, 53. Furthermore, as our recitation of the events leading up to the Rehabilitation Court's 1976 order indicates, that court was aware of potential claims that the North Carolina Association might assert against Underwriters. In order to ensure that all such claims were definitively resolved during the rehabilitation proceeding, the Rehabilitation Court notified the Association that it *must* either intervene in the rehabilitation proceeding to make objections to, or suggest changes in, the Proposed Plan of Rehabilitation, or specifically waive all such claims. See *supra*, at 698. Finally, the record indicates that, after the North Carolina Association intervened in the rehabilitation proceeding, it negotiated certain changes in Part X(C) of the Proposed Plan of Rehabilitation, concerning Underwriters' liability to the guaranty associations for payments made to Underwriters' policyowners.[14] See *supra*, at 698–699.

[14] The North Carolina Association argues that Part X(C) of the Proposed Plan explicitly recognizes its right to assert pre-rehabilitation claims

The North Carolina Association relies on the failure of the Rehabilitation Court either to specify that it was extinguishing the Association's right to use the $100,000 deposit to satisfy pre-rehabilitation obligations, or to address the argument that only North Carolina courts have subject matter jurisdiction to settle rights to the deposit. This reliance is misplaced. First, any doubts that the North Carolina Association may have had concerning the extent to which the Rehabilitation Court purported to exercise its jurisdiction over the Association's rights to the deposit were definitively settled by that court's 1978 ruling. *Supra*, at 702. After considering the arguments now advanced by the North Carolina Association, the Rehabilitation Court ruled that its 1976 order had "fully adjudicated and determined that the North Carolina deposit was an asset of . . . Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association . . . was compromised, settled and dismissed by the final Order and the Plan."[15] App. to Pet. for Cert. 38A.

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against Underwriters. In its 1978 order, however, the Rehabilitation Court held that the claims asserted by the North Carolina Association in the North Carolina litigation would violate the Plan. App. to Pet. for Cert. 38A. Whether or not this ruling is correct is a matter to be decided by the Indiana courts on direct review, not in the North Carolina courts or in this Court on collateral attack.

[15] Respondents argue that this 1978 order was not a *de novo* reexamination of the jurisdictional question, and therefore is of no independent significance. This argument misperceives the question addressed in the 1978 proceeding. In its 1976 order, the Rehabilitation Court retained jurisdiction over parties to the proceeding to resolve questions of interpretation, implementation, and application of the Plan. App. 42. The question whether the 1976 order included the North Carolina deposit as a general asset, thereby compromising any claim that the North Carolina Association might otherwise have had to the deposit, is clearly a question of interpretation and implementation of the Plan. The 1978 order specifying that the Rehabilitation Plan disposed of the North Carolina Association's pre-rehabilitation rights in the deposit is a binding judgment on the interpreta-

Second, it is undisputed that the Rehabilitation Court had listed the North Carolina deposit as a general asset of Underwriters to be included in the Plan of Rehabilitation.[16] By listing the deposit as a general asset, the Rehabilitation Court announced its intention to assert jurisdiction over pre-rehabilitation claims to the deposit.[17] As an intervening

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tion of the Plan rendered by a court that had retained jurisdiction over the issue. Although the North Carolina Association still may attack the 1978 order on direct appeal, see n. 8, *supra*, that order is entitled to full faith and credit in the North Carolina courts. See 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.416[3] (1980).

[16] Respondents argue that the deposit was incorrectly included as a general asset of Underwriters, rather than as a special asset reserved exclusively for the benefit of North Carolina policyowners. The propriety of including the deposit as a general asset, however, is irrelevant to the question whether the deposit was brought to the attention of the Rehabilitation Court. As we have consistently held, the fact that the rendering court may have made an error of law with respect to a particular question does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue. See *American Express Co.* v. *Mullins*, 212 U. S. 311 (1909). If the North Carolina Association wished to argue that the Rehabilitation Court should not have included the deposit as a general asset, and consequently should have declined to exercise jurisdiction over the deposit, it should have done so in the rehabilitation proceeding. Having failed to do so, its only recourse is to assert these legal arguments on direct review before the Indiana courts; it cannot raise these contentions in a collateral attack on the judgment.

[17] The document listing the North Carolina deposit as a general asset of Underwriters was called to the North Carolina Association's attention by the North Carolina Commissioner of Insurance as early as March 11, 1975. See E. B. 26. The Association argues that it was misled into believing that the deposit was not before the Rehabilitation Court because the deposit had been listed as a general asset of Underwriters, and not as a deposit held in trust for the sole benefit of North Carolina policyowners. However, the very fact that the $100,000 may have been erroneously included as a general asset subject to rehabilitation should have alerted the Association that the Indiana court was purporting to exercise jurisdiction over the deposit, and that, once a final plan of rehabilitation was approved, the Association's claim to use the North Carolina deposit to satisfy pre-

party to the rehabilitation proceeding, the North Carolina Association was obliged to advance its argument that the Rehabilitation Court did not have the authority to settle pre-rehabilitation claims to the deposit when it was given the opportunity to do so. A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding. See *Sherrer* v. *Sherrer*, 334 U. S., at 352. The Indiana Rehabilitation Court gave the North Carolina Association sufficient notice that any pre-rehabilitation claim that it had against the North Carolina deposit, including its argument that the Rehabilitation Court was without jurisdiction to extinguish its claim to the deposit, had to be advanced in the rehabilitation proceeding. No such claim having been made, the Rehabilitation Court finally determined the issue when it approved the Plan, and ruled that all claims inconsistent with the Plan,[18] which could have been presented in the rehabilitation proceeding, were "overruled and relief to that extent denied." App. 40. The issue having been fully and fairly considered by the Indiana court, its final determination was entitled to full faith and credit in North Carolina.[19]

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rehabilitation obligations might be extinguished. Therefore, the North Carolina Association was obliged to object to this listing, which it believed to be erroneous, or to suffer the consequences.

[18] The North Carolina Association's claim to the deposit is "inconsistent with the plan" because the deposit was included as a general asset of Underwriters, and therefore was included in the pool of resources upon which continued coverage to all policyowners was based.

[19] The concurrence argues that the foregoing discussion of the Rehabilitation Court's assertion of jurisdiction over the deposit is unnecessary to the disposition of this case once it has been established that the court had personal jurisdiction over Underwriters and the North Carolina Association. See *post*, at 718. This argument misperceives both the nature of the jurisdiction asserted by the Rehabilitation Court and the North Carolina Association's challenge to that assertion of jurisdiction. Respondents do not dispute that the Rehabilitation Court had jurisdiction to settle

B

Alternatively, respondents argue that the judgment of the Rehabilitation Court was not entitled to full faith and credit because that court lacked *in personam* jurisdiction over the North Carolina policyowners and the state officials. Although under different circumstances these questions might give us pause, it is clear that the Rehabilitation Court had personal jurisdiction over all parties necessary to its determination that the North Carolina Association could not satisfy pre-rehabilitation claims out of the North Carolina deposit.

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all claims of the parties before it to the assets of Underwriters as part of its attempt to rehabilitate the company. They argue that the Rehabilitation Court's final resolution of claims against *Underwriters* does not preclude their action in North Carolina, however, because the North Carolina deposit *is not an asset of Underwriters*. Consequently, cases such as *Riehle* v. *Margolies*, 279 U. S. 218 (1929), and *Morris* v. *Jones*, 329 U. S. 545 (1947), are inapposite to the present situation. In those cases, as the concurrence correctly notes, this Court held that a court need not have jurisdiction over a debtor's property to determine whether a creditor had a legitimate claim against the debtor so long as it had personal jurisdiction over the creditor and the debtor. Those decisions do not hold, however, that a court with personal jurisdiction over the debtor and the creditor can adjudicate the creditor's claim against property *not belonging to the debtor*.

Given the nature of the North Carolina Association's claim, the Rehabilitation Court's 1976 order must be given full faith and credit in the North Carolina courts so as to bar the Association's claims only if the Rehabilitation Court determined, rightly or wrongly, that the $100,000 deposit *was* an asset of Underwriters, and that it therefore had the power to compromise the pre-rehabilitation claims of the parties before it to that asset. As we indicate in text, this was precisely the reasoning used by the Rehabilitation Court in 1978 when it held that the 1976 Plan had compromised the North Carolina Association's claim to the deposit. The only basis asserted by the Rehabilitation Court, which had specifically retained jurisdiction to resolve all questions of interpretation of the Plan, for barring the North Carolina Association from proceeding against the deposit was that the Plan "fully adjudicated and determined that the North Carolina deposit *was an asset of . . . Underwriters*." App. to Pet. for Cert. 38A (emphasis added).

Respondents argue that the Rehabilitation Court did not have jurisdiction over the policyowners because no policyowner actually appeared in the rehabilitation proceeding, and because the class representatives could not adequately represent the interests of policyowners in both deposit and nondeposit States.[20] As a preliminary matter, we note that no North Carolina policyowner has complained about the Rehabilitation Plan, nor did any policyowner directly participate in either the North Carolina litigation or the proceedings before this Court.[21] Furthermore, the North Carolina Association has not identified *any* interest in the North Carolina deposit that a policyowner might have, independent of the interests asserted here by the Association. The class representatives in the rehabilitation proceeding were instructed by the Rehabilitation Court to represent the interests of all past and present policyowners. See n. 20, *supra*. Although the North Carolina Association asserts that these representatives were inadequate, it never explains *why* the policyowners, as compared to the Association, would care whether the deposit was considered a general asset of Underwriters, unavailable for the Association's use in satisfying pre-rehabilitation claims. North Carolina law requires the Association to provide North Carolina policyowners with pre-rehabilitation coverage even if it cannot use the deposit to finance this obligation. See N. C.

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[20] The Rehabilitation Court sent the North Carolina policyowners notice that they were included in the class of policyowners in the rehabilitation proceeding. None of the North Carolina policyowners opted out of this class. In the rehabilitation proceeding, the interests of the policyowners were advocated by the class representatives.

[21] The North Carolina Association argues that the failure of the policyowners to appear in this litigation is not significant, because the Association is the legal representative of the policyowners, empowered to assert any claim that those policyowners might have against either Underwriters or the deposit. We accept this argument for purposes of this decision.

Gen. Stat. § 58–155.72(4) (Supp. 1981). Therefore, these policyowners have no current interest in whether the North Carolina Association is allowed to liquidate the $100,000 deposit. The North Carolina courts' refusal to give the Indiana judgment full faith and credit, accordingly, cannot be supported by the alleged inadequate representation of this unidentified policyowner interest.

The argument that the Rehabilitation Court did not have jurisdiction over the North Carolina officials is more complex.[22] The North Carolina Court of Appeals found that the Rehabilitation Court did not have jurisdiction over the trust property or over the statutory trustees. Citing this Court's decision in *Hanson* v. *Denckla*, 357 U. S. 235 (1958), respondents argue that absent jurisdiction over the trust corpus or the trustee, the Rehabilitation Court was powerless to adjudicate rights in the North Carolina deposit. Therefore, respondents argue, the judgment of the Rehabilitation Court is not entitled to full faith and credit, even as to parties admittedly subject to its jurisdiction.

Respondents' reliance on *Hanson* v. *Denckla*, *supra*, is misplaced. In *Hanson*, this Court considered both a Florida judgment on direct review, and a Delaware judgment refusing to accord full faith and credit to the Florida judgment. Because the Florida judgment was before the Court on direct review, the Court was free to determine whether that court's exercise of jurisdiction over the trust or the trustee was appropriate. This Court determined that the Florida courts were without jurisdiction over either the trust or the trustee

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[22] The North Carolina Association argues that the State of North Carolina has intentionally made these North Carolina officials necessary but unreachable parties in order to ensure that its courts will have exclusive jurisdiction over all claims concerning rights in any North Carolina deposit. Underwriters contends that, if this is true, the North Carolina statutory scheme violates the Commerce Clause. Because of our resolution of this case, we find it unnecessary to reach this issue.

who, under Florida law, was a necessary party to a suit to determine the validity of the trust. As a result, of course the Delaware courts were under no obligation to accord full faith and credit to a judgment rendered in a court without jurisdiction.

In this case, however, the Rehabilitation Court's conclusion that it had jurisdiction to compromise the claims of the parties before it to the North Carolina deposit is not presented to this Court on direct review, and we express no opinion on the propriety of this conclusion. Although the Rehabilitation Court did not attempt to exercise jurisdiction over the North Carolina trustees, that court *did* purport to exercise jurisdiction over the trust corpus.[23] The 1978 order specifies that the 1976 Rehabilitation Plan determined that the North Carolina deposit was an asset of Underwriters, subject to the jurisdiction of the Rehabilitation Court. This conclusion may well have been erroneous as a matter of North Carolina law. See *State ex rel. Ingram* v. *Reserve Insurance Co.*, 303 N. C. 623, 629, 281 S. E. 2d 16, 20 (1981). Erroneous or not, however, this jurisdictional issue was fully and fairly litigated and finally determined by the Rehabilitation Court. Under *Durfee* v. *Duke*, 375 U. S. 106 (1963), and its progeny, once the Rehabilitation Court determined that the North Carolina Association could not liquidate the deposit to settle pre-rehabilitation claims, the North Carolina courts were required to honor that determination, even though the Rehabilitation Court did not assert personal juris-

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[23] Because we find that the Rehabilitation Court did purport to exercise jurisdiction over the trust, we do not have to address respondents' argument that Indiana law, like the Florida law at issue in *Hanson* v. *Denckla*, 357 U. S. 235 (1958), requires jurisdiction over the trust or the trustee before rights in a statutory trust can be compromised. The concurrence, by arguing that personal jurisdiction over Underwriters and the North Carolina Association was sufficient to prevent the Association from litigating its claim to the deposit in North Carolina, seems to imply that *Hanson* is no longer dispositive on this point.

diction over the trustees. See *supra*, at 706–707. It is beyond dispute that a court of competent jurisdiction can settle the claims of two competing parties to specific property even though a third party may claim an interest in the same res. See *Morris* v. *Jones*, 329 U. S. 545 (1947). The Rehabilitation Court held that the Rehabilitation Plan extinguished the claim that the North Carolina Association is now asserting, and the North Carolina courts erred in refusing to give that court's judgment full faith and credit.

C

Respondents argue that requiring North Carolina to give full faith and credit to the Rehabilitation Court's determination that the deposit was an asset of Underwriters, would negate that State's comprehensive statutory scheme to ensure the protection of North Carolina policyowners. Respondents contend that the courts and commentators are virtually unanimous in their support of a State's right to segregate assets of a foreign insurance company to be used for the sole benefit of that State's policyowners. See 2 G. Couch, Insurance Law § 22:96 (2d ed. 1959); 5 J. Joyce, Law of Insurance § 3595 (2d ed. 1918). Cf. *Blake* v. *McClung*, 172 U. S. 239, 257 (1898). It would not be equitable, respondents conclude, to require North Carolina to honor such a clearly erroneous result. While these arguments may have merit as a matter of insurance law, the only forums in which respondents may challenge the Rehabilitation Court's assertion of jurisdiction on these legal and equitable grounds are in Indiana.[24] The North Carolina Association's decision to assert these arguments in a separate proceeding in North Carolina has resulted in two state courts reaching mutually inconsistent judgments on the same issue. This is precisely the situation the Full Faith and Credit Clause was designed to prevent.

[24] Indeed, in the Indiana appellate court's review of the 1978 order, the North Carolina Association may still have an opportunity to challenge the Rehabilitation Court's conclusion that it had jurisdiction over the deposit.

Because we find that North Carolina was obligated to give full faith and credit to the judgment of the Rehabilitation Court, we reverse the decision of the North Carolina Court of Appeals and remand for further proceedings not inconsistent with this opinion.[25]

It is so ordered.

JUSTICE WHITE, with whom JUSTICES POWELL and STEVENS join, concurring in the judgment.

I agree with much of the discussion in the majority opinion on the scope and function of the principles of res judicata. I also agree with the majority that "it is clear that the Rehabilitation Court had personal jurisdiction over all parties necessary to its determination that the North Carolina Association could not satisfy pre-rehabilitation claims out of the North Carolina deposit." *Ante*, at 711.

The only parties over which the Indiana court needed jurisdiction in order to prohibit the Association from moving against the North Carolina deposit were the Association and Underwriters National Assurance Co. (UNAC). It had

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[25] Underwriters urges us also to dismiss the cross-claim filed by the Commissioner of Insurance and the Treasurer of North Carolina because these state officials are mere "stakeholders" with no real interest in the deposit. Respondents reply that, as statutory trustees, these officials have a vital interest in the administration of deposits under their control. We have concluded that the North Carolina Association may not relitigate its claim to use the deposit to satisfy its obligations to North Carolina policyowners by arguing that the absence of the North Carolina officials deprived the Rehabilitation Court of jurisdiction. On the other hand, we recognize that, as a matter of state law, the North Carolina officials may have an interest in the deposit, independent of that asserted by the North Carolina Association, which was not considered by the Rehabilitation Court. In this Court, the respondent officials merely joined the arguments made by the North Carolina Association, and did not identify any independent claim that they might make against the deposit. Because this is purely a question of state law, on remand the North Carolina courts may determine whether, consistent with this opinion, these officials have any independent interest in the North Carolina deposit that was not determined in the Indiana proceeding.

jurisdiction over the latter in a rehabilitation proceeding, because Indiana was the State of incorporation; it had jurisdiction over the Association because, as the majority opinion amply demonstrates in Part I, the Association appeared before the court as a party and participated in the Rehabilitation Plan. With jurisdiction over UNAC and the Association, the Indiana court clearly had the authority to adjudicate the amount and character of the claim that the Association had against UNAC, including its claim against the North Carolina deposit.

This is true regardless of the jurisdiction the Indiana court may or may not have had over any other parties with potential interests in the controversial deposit. There are at least two such parties: the trustees and the North Carolina policyholders. In my view, the Indiana court did not have jurisdiction to determine the interests of either of these parties in the controverted fund. Neither of these parties appeared before the Indiana court, and I am quite unconvinced that the Indiana court had jurisdiction over the North Carolina deposit in the sense that it could adjudicate the validity of or scale down the lien on that fund held by nonappearing North Carolina policyholders and trustees. I agree with the majority, therefore, that it is proper for this Court to reserve at least the issue of whether the trustees "have an interest in the deposit, independent of that asserted by the North Carolina Association, which was not considered by the Rehabilitation Court." *Ante*, at 716, n. 25. As for the policyholders, as I understand the opinion of the North Carolina court, under North Carolina law the Association was subrogated to the rights of the policyholders when it entered the service contract and undertook to make the policyholders whole. The policyholders thus no longer have an independent interest in the deposit.* See 48 N. C. App. 508, 518, 269 S. E. 2d 688, 694 (1980).

*Since the policyholders and the Association appear to be the only possible beneficiaries of the trust, the trustees may have no beneficial interest to protect. This, however remains a matter of state law.

The authority of the Indiana court so to resolve the claims of the Association existed regardless of that court's jurisdiction over any particular asset of UNAC, including the North Carolina deposit. In *Riehle* v. *Margolies*, 279 U. S. 218 (1929), a creditor received a judgment against a corporation in state court. While the creditor's claim was being litigated in state court, a federal court appointed a receiver of the corporation's property. This Court held that the judgment from the state court regarding the creditor's claim had to be recognized as res judicata in the federal court, despite the fact that neither the corporation nor the receiver had undertaken to defend in the state court. The Court adopted a twofold distinction between control over claims and over assets:

> "In so far as [a court order] determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. [This] function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. . . . There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*." *Id.*, at 224.

The reasoning of *Riehle* was specifically applied to judgments between States under the Full Faith and Credit Clause in *Morris* v. *Jones*, 329 U. S. 545, 549 (1947): "[T]he distribution of assets of a debtor among creditors ordinarily has a 'twofold aspect.' It deals 'directly with the property' when it fixes the time and manner of distribution. . . . But proof and allowance of claims are matters distinct from distribution." *Id.*, at 548–549. Thus, in my view, jurisdiction over the deposit is simply not relevant to the question of the res judicata effect of the Indiana court's judgment as to the Association.

The Rehabilitation Plan fully determined the nature of the claim that the Association would have against UNAC and established the manner in which it could collect on those claims. *Ante*, at 698–700. That decision must be given res judicata effect by the North Carolina court vis-à-vis the Association, unless the Indiana court failed to follow the procedural requirements of the Due Process Clause. I believe those requirements were met in this case, and, therefore, I concur in the judgment of the Court reversing the decision below.

UNITED STATES *v.* NEW MEXICO ET AL.

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

No. 80–702. Argued December 8, 1981—Decided March 24, 1982

Sandia Corporation and Zia Company have contracts with the Federal Government to manage certain Government-owned atomic laboratories located in New Mexico. Los Alamos Constructors, Inc., has a Government contract for construction and repair work at one of the laboratories. The contracts use an "advanced funding" procedure to meet contractor costs whereby the contractor is allowed to pay creditors and employees with drafts drawn on a special bank account in which United States Treasury funds are deposited, so that only federal funds are expended when the contractor meets its obligations. New Mexico imposes a gross receipts tax and a compensating use tax on those doing business within the State. The gross receipts tax in effect operates as a tax on the sale of goods and services. The use tax is imposed on property acquired out-of-state in a transaction that would have been subject to the gross receipts tax if it had occurred within the State. The Government brought suit in Federal District Court, seeking a declaratory judgment that advanced funds are not taxable gross receipts to the contractors; that the receipts of vendors selling property to the Government through the contractors cannot be taxed by the State; and that the use of Government-owned property by the contractors is not subject to the use tax. The District Court granted summary judgment for the Government. The Court of Appeals reversed, taking the view that the Government-contractor relationships in question did not so incorporate the contractors into the Government structure as to make them "instrumentalities of the United States" immune from the New Mexico taxes.

Held: The contractors, as independent taxable entities, are not protected by the Constitution's guarantee of federal supremacy, and hence are subject to the state taxes in question. Pp. 730–744.

(a) Federal immunity from state taxation cannot be conferred simply because the tax has an effect on the United States, or because the Federal Government shoulders the entire economic burden of the levy, or because the tax falls on the earnings of a contractor providing services to the Government. And where a use tax is involved, immunity cannot be conferred simply because the State levies the tax on the use of federal property in private hands, or, indeed, simply because the tax is paid with

Government funds. Tax immunity is appropriate only when the state levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. A finding of constitutional tax immunity therefore requires something more than the invocation of traditional agency notions. Pp. 730–738.

(b) With respect to the New Mexico use tax, the contractors cannot be termed "constituent parts" of the Federal Government. The congruence of professional interests between the contractors and the Government is not complete, the contractors' relationship with the Government having been created for limited and carefully defined purposes. Allowing a State to apply use taxes to such entities does not offend the notion of federal supremacy. *United States* v. *Boyd*, 378 U. S. 39. For similar reasons the New Mexico gross receipts tax must be upheld as applied to funds received by the contractors to meet salaries and internal costs. As to the tax on sales to the contractors, the facts that Sandia and Zia make purchases in their own names and presumably are themselves liable to the vendors, that the vendors are not informed that the Government is the only party with an independent interest in the purchase, and that the contractors need not obtain Government approval for each purchase, all demonstrate that the contractors have a substantial independent role in making purchases, and that the identity of interests between the Government and the contractors is far from complete. As a result, sales to Sandia and Zia are in neither a real nor a symbolic sense sales to the "United States itself." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, distinguished. The fact that title passes directly from the vendor to the Government cannot alone make the transaction a purchase by the United States, so long as the purchasing entity, in its role as purchaser, is sufficiently distinct from the Government. Pp. 738–743.

624 F. 2d 111, affirmed.

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

George W. Jones argued the cause, *pro hac vice*, for the United States. On the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Murray*, *Stuart A. Smith*, *Johnathan S. Cohen*, and *R. Bruce Johnson*.

Daniel H. Friedman, Special Assistant Attorney General of New Mexico, argued the cause for respondents. With him on the brief were *Jeff Bingaman*, Attorney General, *Richard*

M. Kopel, Sarah E. Bennett, James A. Burke, Edward R. Barnicle, Jr., Denise D. Fort, and *Gerald B. Richardson,* Assistant Attorneys General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with a recurring problem: to what extent may a State impose taxes on contractors that conduct business with the Federal Government?

I

A

This case concerns the contractual relationships between three private entities and the United States. The three agreements involved are typical in most respects of management contracts devised by the Atomic Energy Commission

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(AEC), now the Department of Energy (DOE).[1] Like many of the Government's contractual undertakings, DOE management contracts generally provide the private contractor with its costs plus a fixed fee. But in several ways DOE agreements are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities. As the parties to this case acknowledge, the complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms. See App. 196–197; Hiestand & Florsheim, The AEC Management Contract Concept, 29 Federal B. J. 67 (1969) (Hiestand & Florsheim). While subject to the general direction of the Government, the contractors are vested with substantial autonomy in their operations and procurement practices.[2]

The first of the contractors, Sandia Corporation, was organized in 1949 as a subsidiary of Western Electric Company, Inc. Sandia manages the Government-owned Sandia Laboratories in Albuquerque, N. M., and engages exclusively in federally sponsored research. It receives no fee under its contract, and owns no property except for $1,000 in United States bonds that constitute its paid-in capital. But Sandia and Western Electric are guaranteed royalty-free, irrevocable licenses for any communications-related discoveries or inventions developed by most Sandia employees during the

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[1] Responsibility for the Nation's nuclear program was transferred from the AEC to the Energy Research and Development Administration in 1975, and to the Department of Energy in 1977. See Energy Reorganization Act of 1974, Pub. L. 93–438, 88 Stat. 1233, 42 U. S. C. § 5801 *et seq.*; Exec. Order No. 11834, 3 CFR 943 (1971–1975 Comp.); Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565, 42 U. S. C. § 7101 *et seq.* (1976 ed., Supp. IV).

[2] AEC management contracts were developed in an attempt to secure Government control over the production of fissionable materials, while making use of private industry's expertise and resources. See *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 234–236 (1952); Tr. of Oral Arg. 4–6.

course of the contract, App. 34–35, and the company receives complete reimbursements for salary outlays and other expenditures. *Id.*, at 40–42.[3]

The Zia Company, another of the contractors, is a subsidiary of Santa Fe Industries, Inc. Since 1946, Zia has performed a variety of management, maintenance, and related functions at the Government's Los Alamos Scientific Laboratory, for which it receives its costs as well as a fixed annual fee. While Zia owns property and performs private work, virtually none of its property is used in the performance of its contract with the Government, and all of its private activities are conducted away from Los Alamos by a separate work force.

The third contractor is Los Alamos Constructors, Inc. (LACI), since 1953 a subsidiary of Zia. LACI's operations are limited to construction and repair work at the Los Alamos facility. The company owns no tangible personal property and makes no purchases; it procures needed property and equipment through its parent, Zia. And like Zia, LACI receives its costs plus a fixed annual fee from the Government.

The management contracts between the Government and the three contractors have a number of significant features in common. As in most DOE atomic facility management agreements, the contracts provide that title to all tangible personal property purchased by the contractors passes directly from the vendor to the Government. App. 231a (Zia); *id.*, at 34 (Sandia).[4] Similarly, the Government bears the

[3] Sandia and its parent receive a variety of additional benefits from the contract. Most obviously, they develop expertise and acquire valuable technical information. See generally Newman, The Atomic Energy Industry: An Experiment in Hybridization, 60 Yale L. J. 1263, 1320–1321 (1951). They receive more tangible benefits as well: through Sandia's contract Western Electric is paid for furnishing a variety of products and services. See 624 F. 2d 111, 120, n. 12 (CA10 1980).

[4] LACI does not purchase goods, and the Government retains title to property it furnishes to the company. App. 29.

risk of loss for property procured by the contractors. Zia and LACI must submit an annual voucher of expenditures for Government approval. *Id.*, at 20 (Zia); *id.*, at 27 (LACI).[5] And the agreements give the Government control over the disposition of all property purchased under the contracts, as well as over each contractor's property management procedures. Disputes under the contracts are to be resolved by a DOE contracting official. *Id.*, at 128–129 (Zia standard terms) and 157–158 (Sandia standard terms).

On the other hand, the contractors place orders with third-party suppliers in their own names, and identify themselves as the buyers. See *id.*, at 36–37 (Sandia contract) and 120 (Zia standard terms). Indeed, the Government acknowledged during discovery that Sandia, Zia, and LACI "may be . . . 'independent contractor[s],' rather than . . . 'servant[s]' for . . . given 'function[s] under' the contract[s] (e. g., directing the details of day-to-day . . . operations and the hiring and direct supervision of employees)," *id.*, at 197, and the Government does not claim that the contractors are federal instrumentalities. *Id.*, at 201; see *Department of Employment* v. *United States*, 385 U. S. 355 (1966). Similarly, the United States disclaims responsibility for torts committed by the contractors' employees, and maintains that such employees have no claim against the United States for labor-related grievances. See 624 F. 2d 111, 116–117, n. 6 (CA10 1980).

Finally, and most importantly, the contracts use a so-called "advanced funding" procedure to meet contractor costs. Advanced funding, an accounting device developed shortly after the conclusion of the Manhattan Project, is designed to provide "up-to-date meaningful records of costs and controls of property," as well as to "speed up reimbursement of contrac-

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[5] Sandia must obtain written approval before advancing suppliers or subcontractors more than $15,000, *id.*, at 31, and must obtain written approval before entering into any "procurement transaction" involving more than $100,000. *Id.*, at 36.

tors." App. 204 (Fifth Semiannual Report of the Atomic Energy Commission (1949)). The procedure allows contractors to pay creditors and employees with drafts drawn on a special bank account in which United States Treasury funds are deposited.[6]

To put the advanced funding mechanism in place, the United States, the contractor, and a bank establish a designated bank account, pursuant to a three-party contract. The Government dispatches a letter of credit to a Federal Reserve Bank in favor of the contractor, making Treasury funds available in the designated account. The contractor pays its expenses by drawing on the account, at which time the bank or the contractor executes a payment voucher in an amount sufficient to cover the draft. The voucher is forwarded to the Federal Reserve Bank. The United States owns the account balance. See *id.*, at 19–20, 84–90a, 109–113. As a result of all this, only federal funds are expended when the contractor makes purchases. If the Government fails to provide funding, the contractor is excused from performance of the contract, and the Government is liable for all properly incurred claims.

Prior to July 1, 1977, the Government's contracts with Sandia, Zia, and LACI did not refer to the contractors as federal "agents." On that date—some two years *after* the commencement of this litigation—the agreements were modified to state that each contractor "acts as an agent [of the Government] . . . for certain purposes," including the disbursement of Government funds and the "purchase, lease, or other acquisition" of property. *Id.*, at 50–51, 55–56, 59–60. This was designed to recognize what was described as the "long-standing agency status and authority" of the contractors. *Id.*, at 50, 55, 59. Thus it was made clear that Sandia and

[6] Advanced funding may be used whenever the program involved requires "advances to finance the recipient organization's activities," 31 CFR § 205.2(a) (1981). Recipients may include "any State and local government." § 205.3(a).

Zia were authorized to "pledge the credit of the United States," *id.*, at 52 and 56, and the Government declared that it "considers all obligations properly incurred" in accordance with the contractual provisions to be Government obligations "from their inception." *Id.*, at 52 (Sandia), 56 (Zia), and 60 (LACI). At the same time, however, the United States denied any intent "formally and directly [to] designat[e] the contractors as agents," *id.*, at 64, and each modification stated that it did not "create rights or obligations not otherwise provided for in the contract." *Id.*, at 52, 57, 61.

B

New Mexico imposes a gross receipts tax and a compensating use tax on those doing business within the State. With limited exceptions, "[f]or the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico." N. M. Stat. Ann. § 72–16A–4 (Supp. 1975).[7] In effect, the gross receipts tax operates as a tax on the sale of goods and services. The State also levies a compensating use tax, equivalent in amount to the gross receipts tax, "[f]or the privilege of using property in New Mexico." § 72–16A–7. This is imposed on property acquired out-of-state in a "transaction that would have been subject to the gross receipts tax had it occurred within [New Mexico]." § 72–16A–7(A)(2).[8] Thus the compensating use tax functions

[7] Since the initiation of this litigation the New Mexico tax statutes have been amended, and are now found at N. M. Stat. Ann. §§ 7–9–1 through 7–9–81 (1978). While the tax rate has been lowered to 3.5%, no other substantive change, pertinent here, has been made. For consistency, and to conform to the pleadings and primary references in the briefs, citations herein are to the old codification.

[8] The statute also has a catchall provision, imposing the compensating use tax on property acquired in any transaction that was not initially subject to tax "but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax." N. M. Stat. Ann. § 72–16A–7(A)(3) (Supp. 1975).

as an enforcement mechanism for the gross receipts tax by imposing a levy on the use of all property that has not already been taxed; the State collects the same percentage regardless of where the property is purchased. Neither tax, however, is imposed on the "receipts of the United States or any agency or instrumentality thereof," or on the "use of property by the United States or any agency or instrumentality thereof." §§ 72–16A–12.1, 72–16A–12.2.

Without objection, Zia and LACI each year paid the New Mexico gross receipts tax on the fixed fees they received from the Federal Government. But the Government argued that the contractors' other expenditures and operations are constitutionally immune from state taxation. In July 1975 the United States therefore initiated this suit in the United States District Court for the District of New Mexico, seeking a declaratory judgment that advanced funds are not taxable gross receipts to the contractors; that the receipts of vendors selling tangible property to the United States through the contractors cannot be taxed by the State; and that the use of Government-owned property by the contractors is not subject to the State's compensating use tax. App. 11–12.[9]

The District Court granted the United States summary judgment. Relying on *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110 (1954), the court determined that the crucial inquiry is whether the contractors are "procurement agents"

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[9] Prior to 1967, the New Mexico Bureau of Revenue did not attempt to tax the contractors. In that year, the State sought to impose gross receipts and compensating use taxes on Zia and LACI for the period January 1, 1966, through June 30, 1967. The United States challenged the assessment, and the New Mexico Court of Appeals held that the State Commissioner of Revenue was estopped from assessing the taxes for the period in question. *United States* v. *Bureau of Revenue*, 87 N. M. 164, 531 P. 2d 212 (1975). One judge, specially concurring, concluded that even if estoppel was unavailable, the taxes could not be imposed. *Id.*, at 166, 531 P. 2d, at 214. The New Mexico court did not address the constitutional validity of the tax.

for the Government. The court answered that question in the affirmative, noting that the Government "maintains control over the contractors' procurement systems, property management and disposal practices, method of payment of operational costs, and other operations under the contracts." 455 F. Supp. 993, 997 (1978). That analysis led the court to identify an agency relationship existing even in the years prior to the 1977 contract modifications. *Ibid.* The court therefore held that the gross receipts tax cannot constitutionally be applied to purchases by the contractors; because the court viewed the compensating use tax as a correlative of the receipts tax, it determined that the use tax also was invalid as applied to Sandia, Zia, and LACI. *Id.*, at 998. Finally, the court ruled that advanced funds do not serve as compensation to the contractors, and therefore cannot be taxed as gross receipts. *Id.*, at 998–999.

The United States Court of Appeals for the Tenth Circuit reversed. 624 F. 2d 111 (1980). In its view, this Court's decisions in the tax immunity area have been "more concerned with preserving the delicate financial balance between our co-existing sovereignties than with rigid adherence to agency law terminology." *Id.*, at 116. Advanced funding, the court declared, "is simply another means of reimbursement devised by accountants to eliminate major weaknesses in the government's bookkeeping practices." *Id.*, at 119. In meeting overhead and salaries with Government funds, the contractors were satisfying their own obligations, and they exercised dominion over the funds by issuing drafts to obligees. And insofar as the claims of third-party vendors are concerned, the court found federal "responsibility for properly incurred claims to be inherent in all cost-type contracts," *id.*, at 119, n. 9; any number of businesses act under letters of credit from banks and other sureties, and the Federal Government itself finances a variety of organizations—incleding States and local governments—in such a manner.

The other contractual provisions relied on by the District Court—federal control over procurement systems, management practices, and the like—failed to impress the Court of Appeals. It concluded that the Government-contractor relationship, viewed as a whole, did not "'so incorporat[e] [the contractors] into the government structure as to [make them] instrumentalities of the United States . . . .'" *Id.*, at 118, quoting *United States* v. *Boyd*, 378 U. S. 39, 48 (1964). And that Sandia received no fee for its services was of little consequence, in the court's view, because "decisions on the amount of fee, if any, to be paid a government contractor are not made primarily with agency consequences in mind." 624 F. 2d, at 120. Since the 1977 contractual amendments by their terms added nothing of substance to the agreements, they did not affect the court's analysis. The District Court was directed to enter summary judgment for New Mexico. *Id.*, at 121.

The United States sought certiorari, and we granted the writ to consider the seemingly intractable problems posed by state taxation of federal contractors. 450 U. S. 909 (1981).

II

A

With the famous declaration that "the power to tax involves the power to destroy," *McCulloch* v. *Maryland*, 4 Wheat. 316, 431 (1819), Chief Justice Marshall announced for the Court the doctrine of federal immunity from state taxation. In so doing he introduced the Court to what has become a "much litigated and often confused field," *United States* v. *City of Detroit*, 355 U. S. 466, 473 (1958), one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.

McCulloch itself relied on generalized notions of federal supremacy to invalidate a state tax on the Second Bank of the

United States. The Court gave broad scope to state power: the opinion declined to "deprive the States of any resources which they originally possessed. It does not extend to . . . a tax imposed on the interest which the citizens of Maryland may hold in [the Bank], in common with other property of the same description throughout the State." 4 Wheat., at 436. Not long afterwards, however, Chief Justice Marshall, speaking for the Court, seemingly disregarded the *McCulloch* dictum in striking down a state tax on interest income from federal bonds, explaining that such levies cannot constitutionally fall on an "operation essential to the important objects for which the government was created." *Weston* v. *City Council of Charleston*, 2 Pet. 449, 467 (1829). During the following century the Court took to heart *Weston*'s expansive analysis of federal tax immunity, invalidating, among many others, state taxes on the income of federal employees, *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842); on income derived from property leased from the Federal Government, *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922); and on sales to the United States, *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218 (1928).[10]

These decisions, it has been said, were increasingly divorced both from the constitutional foundations of the immunity doctrine and from "the actual workings of our federalism," *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 490 (1939) (Frankfurter, J., concurring), and in *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), by a 5–4 vote, the Court marked a major change in course. Over the dissent's

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[10] It is in the case last cited that Justice Holmes in dissent, joined by Justice Brandeis and Justice Stone, countered the great Chief Justice's observation with other well-known words: "The power to tax is not the power to destroy while this Court sits." 277 U. S., at 223. Justice Frankfurter, concurring, in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 490 (1939), observed: "The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen."

justifiable objections that it was "overrul[ing], *sub silentio*, a century of precedents," *id.*, at 161, the Court upheld a state tax on the gross receipts of a contractor providing services to the Federal Government:

> "'[I]t is not necessary to cripple [the State's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.'" *Id.*, at 150, quoting *Willcuts* v. *Bunn*, 282 U. S. 216, 225 (1931).

The Court's more recent cases involving federal contractors generally have hewed to the *James* analysis. *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941), upheld a state tax on sales to a federal contractor, overruling *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, *supra*. Decisions such as *United States* v. *City of Detroit*, *supra*, have validated state use taxes on private entities holding federal property.

Even the Court's post-*James* decisions, however, cannot be set in an entirely unwavering line. *United States* v. *Allegheny County*, 322 U. S. 174 (1944), invalidated a state property tax that included in the assessment the value of federal machinery held by a private party; 14 years later that decision in large part was overruled by *United States* v. *City of Detroit*, *supra*. See *United States* v. *County of Fresno*, 429 U. S. 452, 462–463, n. 10 (1977). In *Livingston* v. *United States*, 364 U. S. 281 (1960), summarily aff'g 179 F. Supp. 9 (EDSC 1959), the Court, without opinion or citation, approved the invalidation of a state use tax as applied to a federal contractor. Yet *United States* v. *Boyd*, *supra*, upheld a virtually identical state tax, seemingly confining *Livingston* to its "extraordinary" facts. 378 U. S., at 45, n. 6.

Similarly, the decisions fail to speak with one voice on the relevance of traditional agency rules in determining the tax-

immunity status of federal contractors. Thus, *Alabama* v. *King & Boozer*, *supra*, declined to find immunity in part because the contractors involved lacked the "status of agents," 314 U. S., at 13, and *United States* v. *Township of Muskegon*, 355 U. S. 484, 486 (1958), upheld a use tax on a federal contractor with the caveat that the "case might well be different if [the contractor] . . . could properly be called a 'servant' of the United States in agency terms." See *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110 (1954). Yet *James* v. *Dravo Contracting Co.*, *supra*, stated flatly that tax immunity is not dependent "'upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents.'" 302 U. S., at 154, quoting *Railroad Co.* v. *Peniston*, 18 Wall. 5, 36 (1873) (plurality opinion). And *United States* v. *Boyd*, *supra*, rejected the Government's argument that its contractors were federal agents and therefore tax immune, stating simply that the private entities were not "instrumentalities of the United States." 378 U. S., at 48.

B

We have concluded that the confusing nature of our precedents counsels a return to the underlying constitutional principle. The one constant here, of course, is simple enough to express: a State may not, consistent with the Supremacy Clause, U. S. Const., Art. VI, cl. 2, lay a tax "directly upon the United States." *Mayo* v. *United States*, 319 U. S. 441, 447 (1943). While "[o]ne could, and perhaps should, read *M'Culloch* . . . simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality," *First Agricultural Bank* v. *State Tax Comm'n*, 392 U. S. 339, 350 (1968) (dissenting opinion), the Court has never questioned the propriety of absolute federal immunity from state taxation. And after 160 years, the doctrine has gathered "a momentum of authority that reflects, if not a detailed exposition of considerations of policy demanded by our federal system, certainly a deep instinct

that there are such considerations . . . ." *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, 503–504 (1958) (opinion of Frankfurter, J.).

But the limits on the immunity doctrine are, for present purposes, as significant as the rule itself. Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy. That is the import of *Alabama* v. *King & Boozer*, where a sales tax was imposed on the gross receipts of a vendor selling to a cost-plus Government contractor. The Court found it constitutionally irrelevant that the United States reimbursed all the contractor's expenditures, including those going to meet the tax: the Government's right to be free from state taxation "does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." 314 U. S., at 9. That the contractor is purchasing property for the Government is similarly irrelevant; in *King & Boozer*, title to goods purchased by the contractor vested in the United States immediately upon shipment by the seller. *Id.*, at 13.

Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. *James* v. *Dravo Contracting Co.*, *supra*. And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, *United States* v. *City of Detroit*, *supra*, even if the private entity is using the Government property to provide the United States with goods, *United States* v. *Township of Muskegon*, *supra*; *City of Detroit* v. *Murray Corp.*, *supra*, or services, *Curry* v. *United States*, 314 U. S. 14 (1941); *United States* v. *Boyd*, *supra*. In such a situation the contractor's use of the property "in connection with commercial activities carried on for

profit," is "a separate and distinct taxable activity." *United States* v. *Boyd*, 378 U. S., at 44. Indeed, immunity cannot be conferred simply because the tax is paid with Government funds; that was apparently the case in *Boyd*, where the contractor made expenditures under an advanced funding arrangement similar to the one involved here. *Id.*, at 41.

What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. This view, we believe, comports with the principal purpose of the immunity doctrine, that of forestalling "clashing sovereignty," *McCulloch* v. *Maryland*, 4 Wheat., at 430, by preventing the States from laying demands directly on the Federal Government. See *City of Detroit* v. *Murray Corp.*, 355 U. S., at 504–505 (opinion of Frankfurter, J.). As the federal structure—along with the workings of the tax immunity doctrine[11]—has evolved, this command has taken on essentially symbolic importance, as the visible "consequence of that [federal] supremacy which the constitution has declared." *McCulloch* v. *Maryland*, 4 Wheat., at 436. At the same time, a narrow approach to governmental tax immunity accords with competing constitutional imperatives,

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[11] With the abandonment of the notion that the economic—as opposed to the legal—incidence of the tax is relevant, it becomes difficult to maintain that federal tax immunity is designed to insulate federal operations from the effects of state taxation. It remains true, of course, that state taxes on contractors are constitutionally invalid if they discriminate against the Federal Government, or substantially interfere with its activities. See *United States* v. *County of Fresno*, 429 U. S. 452, 463, n. 11, 464 (1977); *Moses Lake Homes, Inc.* v. *Grant County*, 365 U. S. 744 (1961); *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, 495 (1958). New Mexico, however, is not discriminating here.

by giving full range to each sovereign's taxing authority. See *Graves* v. *New York ex rel. O'Keefe*, 306 U. S., at 483.

Thus, a finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." *City of Detroit* v. *Murray Corp.*, 355 U. S., at 503 (opinion of Frankfurter, J.). That conclusion is compelled by the Court's principal decisions exploring the nature of the Constitution's immunity guarantee. Chief Justice Hughes' opinion for the Court in *James*, which set the doctrine on its modern course, suggested that a state tax is impermissible when the taxed entity is "so intimately connected with the exercise of a power or the performance of a duty" by the Government that taxation of it would be "'a direct interference with the functions of government itself.'" 302 U. S., at 157, quoting *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524 (1926). And the point is settled by *Boyd*, the Court's most recent decision in the field. There, the Government argued that its contractors were tax-exempt because they were federal agents. Without any discussion of traditional agency rules the Court rejected that suggestion out-of-hand, declaring that "we cannot believe that [the contractors are] 'so assimilated by the Government as to become one of its constituent parts.'" 378 U. S., at 47, quoting *United States* v. *Township of Muskegon*, 355 U. S., at 486. And the Court continued:

> "Should the [Atomic Energy] Commission intend to build or operate the plant with its own servants and employees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. We cannot conclude that [the contractors], both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity." 378 U. S., at 48.

The Court's other cases describing the nature of a federal instrumentality have used similar language: "virtually . . . an

arm of the Government," *Department of Employment* v. *United States*, 385 U. S., at 359–360; "integral parts of [a governmental department]," and "arms of the Government deemed by it essential for the performance of governmental functions," *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 485 (1942).

Granting tax immunity only to entities that have been "incorporated into the government structure" can forestall, at least to a degree, some of the manipulation and wooden formalism that occasionally have marked tax litigation—and that have no proper place in determining the allocation of power between coexisting sovereignties. In this case, for example, the Government and its contractors modified their agreements two years into the litigation in an obvious attempt to strengthen the case for nonliability. Yet the Government resists using its own employees for the tasks at hand—or, indeed, even formally designating Sandia, Zia, and LACI as agents—because it seeks to tap the expertise of industry, without subjecting its contractors to burdensome federal procurement regulations. See Hiestand & Florsheim, at 81; App. 182–184. Instead, the Government earnestly argues that its contractors are entitled to tax immunity because, among other things, they draw checks directly on federal funds, instead of waiting a time for reimbursement. Brief for United States 32–35. We cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows "any government functionary to draw the constitutional line by changing a few words in a contract." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S., at 126 (dissenting opinion).

If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. *James* v. *Dravo Contracting Co.*, 302 U. S., at 161; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 234 (1952). And this allocation of responsibility is wholly

appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. *Massachusetts* v. *United States*, 435 U. S. 444, 456 (1978) (plurality opinion). See *United States* v. *City of Detroit*, 355 U. S., at 474. But absent congressional action, we have emphasized that the States' power to tax can be denied only under "the clearest constitutional mandate." *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 293 (1976).

III

It remains to apply these principles to the Sandia, Zia, and LACI contracts. The Government concedes that the legal incidence of the gross receipts and use taxes falls on the contractors, Brief for United States 25, and we do not disagree. See *United States* v. *New Mexico*, 581 F. 2d 803, 806 (CA10 1978). The issue, then, is whether the contractors can realistically be considered entities independent of the United States. If so, a tax on them cannot be viewed as a tax on the United States itself.

So far as the use tax is concerned, *United States* v. *Boyd*, *supra*, controls this case. The contracts at issue in *Boyd* were standard AEC management contracts, in all relevant respects identical to the ones here. The contractors performed maintenance and construction work at Government facilities, under the general direction of the Government. They procured materials, and paid for the goods with Government funds under an advanced funding arrangement; title passed directly from the vendor to the United States. The contractors owned none of the property involved, and received a fixed annual fee. Indeed, one of the contractor's purchase orders stated that it made purchases "for and on behalf of the Government." 378 U. S., at 42, n. 4. And the Tennessee use tax did not differ in any significant way from the use tax now before us.[12]

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[12] The Government advances only one ground for distinguishing *Boyd;* it contends that the Tennessee use tax was a "privilege-type use tax," while

As noted above, the Government argued that this close contractual relationship made the contractors federal agents, and therefore tax immune. Yet the Court had no difficulty upholding the application of the Tennessee tax, concluding that "'[t]he vital thing' is that [the contractors are] 'using the property in connection with [their] own commercial activities.'" *Id.*, at 45, quoting *United States* v. *Township of Muskegon*, 355 U. S., at 486. That the federal property involved was being used for the Government's benefit—something that by definition will be true in virtually every management contract—was irrelevant, for the contractors remained distinct entities pursuing "private ends," and their actions remained "commercial activities carried on for profit." 378 U. S., at 44. For that reason, the contractors

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New Mexico's is a "compensating use tax." Brief for United States 25, 39, n. 15; Reply Brief for United States 4. As we understand its argument, the Government means to suggest that Tennessee was attempting to tax the privilege of using property, while New Mexico's levy is designed only to enforce its gross receipts tax, and therefore should be analyzed as a sales tax. In our view, this distinction is without substance. The Tennessee tax at issue in *Boyd* imposed a general levy on those "exercising a taxable privilege" by "selling tangible personal property" or "us[ing] or consum[ing] . . . any item or article of tangible personal property," 12 Tenn. Code Ann. § 67–3003 (1963 Cum. Supp.), but the tax was not imposed if the sales or use tax had already been paid. § 67–3003(b). Section 67–3004 specifically applied this tax to the use of property by a contractor "unless such property has been previously subjected to a sales or use tax."

The New Mexico use tax under consideration here operates in precisely the same way. Both taxes in terms reach the *use* of property; both have the effect of serving as enforcement mechanisms for the state sales tax. Both serve to ensure that either the sale or the use of all property in the hands of nonimmune entities will be taxed, no matter where the property is purchased. And both, in terms, tax the privilege of doing business in the State. See N. M. Stat. Ann. § 72–16A–4 (Supp. 1975) (gross receipts tax imposed "[f]or the privilege of engaging in business"); § 72–16A–7 (use tax imposed "[f]or the privilege of using property"). In short, the two taxes have the same "practical operation and effect." *City of Detroit* v. *Murray Corp.*, 355 U. S., at 493.

had not become "instrumentalities" of the United States. *Id.*, at 48.[13]

The same factors are at work here. The tax, the taxed activity, and the contractual relationships do not differ from those involved in *Boyd*. The contractors here are privately owned corporations; "Government officials do not run [their] day-to-day operations nor does the Government have any ownership interest." *First Agricultural Bank* v. *State Tax Comm'n*, 392 U. S., at 354 (dissenting opinion). In contrast to federal employees, then, Sandia and its fellow contractors cannot be termed "constituent parts" of the Federal Government. It is true, of course, that employees are a special type of agent, and like the contractors here employees are paid for their services. But the differences between an employee and one of these contractors are crucial. The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully de-

[13] The Government argues that the tax here is supported by *Livingston* v. *United States*, 364 U. S. 281 (1960), aff'g 179 F. Supp. 9 (EDSC 1959). There, the Court summarily affirmed the District Court's invalidation of a state sales and use tax, as applied to the purchase and use of property by an AEC contractor. The District Court noted the "extraordinary" nature of the contract involved, *id.*, at 16, finding that the contractor had entered into the agreement entirely as a "contribution to the defense effort." *Id.*, at 17. The contractor received a one dollar fee, and otherwise operated "without hope of gain," *id.*, at 17–18. The District Court found that the research conducted and experience gained by the contractor's employees were unlikely to benefit the corporation. *Id.*, at 23. And the court found that the contractor acted "as the *alter ego* of the [Atomic Energy] Commission." *Id.*, at 18. *Boyd* distinguished *Livingston* by confining it to its "extraordinary" facts, finding crucial "the factual determination that [the *Livingston* contractor] received no benefits from the contract." 378 U. S., at 45, n. 6. *Livingston* is inapplicable here for the same reasons. Zia and LACI, of course, receive fixed fees for their services. Sandia does not receive a cash fee, but it obtains obvious benefits from its contractual relationship with the United States. See *supra*, at 723–724, and n. 3. There has been no suggestion—let alone a finding below—that Sandia and Western Electric entered into the contract for only altruistic reasons.

fined purposes. Allowing the States to apply use taxes to such entities does not offend the notion of federal supremacy.[14]

For similar reasons, the New Mexico gross receipts tax must be upheld as applied to funds received by the contractors to meet salaries and internal costs. Once it is conceded that the contractors are independent taxable entities, it cannot be disputed that their gross income is taxable. This conclusion follows directly from *James* v. *Dravo Contracting Co.*, *supra*, where the Court upheld a state tax reaching "gross amounts received from the United States." 302 U. S., at 137. In any event, incurring obligations to achieve contractual ends is not significantly different from using property for the same purposes. And despite the Government's arguments, the use of advanced funding does not change the analysis. That device is, at heart, an efficient method of reimbursing contractors—something the Government has apparently recognized in contexts other than tax litigation. See App. 31 (Sandia contract), 189 (Ninth Semiannual Report of the Atomic Energy Commission (1951)), 191 (same). If receipt of advanced funding is coextensive with status as a federal instrumentality, virtually every federal contractor is, or could easily become, immune from state taxation.

New Mexico's tax on sales to the contractors presents a more complex problem. So far as the use tax discussed above is concerned, the subject of the levy is the taxed entity's beneficial use of the property involved. See *United States* v. *Boyd*, 378 U. S., at 44. Unless the entity as a whole is one of the Government's "constituent parts," then, a

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[14] While a use tax may be valid only to the extent that it reaches the contractor's interest in Government-owned property, cf. *City of Detroit* v. *Murray Corp.*, 355 U. S., at 494; *United States* v. *Colorado*, 627 F. 2d 217 (CA10 1980), summarily aff'd *sub nom. Jefferson County* v. *United States*, 450 U. S. 901 (1981), there has been no suggestion here that the contractors are being taxed beyond the value of their use.

tax on its use of property should not be seen as falling on the United States; in that situation the property is being used in furtherance of the contractor's essentially independent commercial enterprise. In the case of a sales tax, however, it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale—in both a real and a symbolic sense—a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure.

Such was the Court's conclusion in *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, a decision on which the Government heavily relies. The contractor in that case identified itself as a federal procurement agent, and when it made purchases title passed directly to the Government; the purchase orders themselves declared that the purchase was made by the Government and that the United States was liable on the sale. Equally as important, the contractor itself was *not* liable for the purchase price, and it required specific Government approval for each transaction. See 347 U. S., at 120–121. And, as the Court emphasized, the statutory procurement scheme envisioned the use of federal purchasing agents. *Id.*, at 114. The Court concluded that a sale to the contractor was in effect a sale to the United States, and therefore not a proper subject for the Arkansas sales tax.[15] As we have noted elsewhere, *Kern-Limerick* "stands only for the proposition that the State may not impose a tax the legal incidence of which falls on the Federal Government." *United States* v. *County of Fresno*, 429 U. S., at 459–460, n. 7.

We think it evident that the *Kern-Limerick* principle does not invalidate New Mexico's sales tax as applied to purchases made by the contractors here. Even accepting the Government's representation that it is directly liable to vendors for

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[15] Arkansas did not impose a corresponding use tax, and the Court therefore considered only whether the sale itself was a taxable transaction.

the purchase price, see Tr. of Oral Arg. 42–45,[16] Sandia and Zia nevertheless make purchases in their own names—Sandia, in fact, is contractually obligated to do so, App. 37—and presumably they are themselves liable to the vendors. Vendors are not informed that the Government is the only party with an independent interest in the purchase, as was true in *Kern-Limerick*, and the Government disclaims any formal intention to denominate the contractors as purchasing agents. Similarly, Sandia and Zia need not obtain advance Government approval for each purchase.[17] These factors demonstrate that the contractors have a substantial independent role in making purchases, and that the identity of interests between the Government and the contractors is far from complete. As a result, sales to Zia and Sandia are in neither a real nor a symbolic sense sales to the "United States itself." It is true that title passes directly from the vendor to the Federal Government, but that factor alone cannot make the transaction a purchase by the United States, so long as the purchasing entity, in its role as a purchaser, is sufficiently distinct from the Government. *Alabama* v. *King & Boozer*, 314 U. S., at 13.

There is a final irony in this case. In *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232 (1952), the Court considered a state sales and use tax imposed on AEC management contractors. The terms of the contracts were in most relevant respects identical to the ones here, and insofar as they differed they established an even closer relationship between

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[16] It is not entirely clear that the Government's representation is accurate. See, *e. g.*, *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *United States*, 112 Ct. Cl. 563, 81 F. Supp. 596 (1949) (no contract action against the United States in the Court of Claims absent privity of contract). In light of our conclusion about the significance of other aspects of the contracts, there is no need for us to address this issue.

[17] For Zia and LACI the Government contents itself with an annual review of expenditures, App. 20, 27; for Sandia, it requires advance approval of transactions involving $100,000 or more. *Id.*, at 36.

the Government and the contractors. See Brief for United States, O. T. 1951, Nos. 186 and 187, pp. 8–12. The Court held that in the last sentence of § 9(b) of the Atomic Energy Act of 1946, 60 Stat. 765—which barred state or local taxation of AEC "activities"—Congress had statutorily exempted the contractors from state taxation, because the operations of management contractors were Commission activities. 342 U. S., at 234. Congress responded by repealing the last sentence of § 9(b), Pub. L. 262, 67 Stat. 575, in an attempt to "place the Commission and its activities on the same basis, with respect to immunity from State and local taxation, as other Federal agencies." S. Rep. No. 694, 83d Cong., 1st Sess., 3 (1953). In doing so, Congress endorsed the principle that "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States." *Id.*, at 2.

We do not suggest that the repeal of § 9(b) waives the Government's constitutional tax immunity; Congress intended AEC contractors to be shielded by constitutional immunity principles "as interpreted by the courts." S. Rep. No. 694, at 3. But it is worth remarking that DOE is asking us to establish as a constitutional rule something that it was unable to obtain statutorily from Congress. For the reasons set out above, we conclude that the contractors here are not protected by the Constitution's guarantee of federal supremacy. If political or economic considerations suggest that a broader immunity rule is appropriate, "[s]uch complex problems are ones which Congress is best qualified to resolve." *United States* v. *City of Detroit*, 355 U. S., at 474.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

Syllabus

SANTOSKY ET AL. *v.* KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

No. 80–5889. Argued November 10, 1981—Decided March 24, 1982

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." The New York Family Court Act (§ 622) requires that only a "fair preponderance of the evidence" support that finding. Neglect proceedings were brought in Family Court to terminate petitioners' rights as natural parents in their three children. Rejecting petitioners' challenge to the constitutionality of § 622's "fair preponderance of the evidence" standard, the Family Court weighed the evidence under that standard and found permanent neglect. After a subsequent dispositional hearing, the Family Court ruled that the best interests of the children required permanent termination of petitioners' custody. The Appellate Division of the New York Supreme Court affirmed, and the New York Court of Appeals dismissed petitioners' appeal to that court.

Held:

1. Process is constitutionally due a natural parent at a state-initiated parental rights termination proceeding. Pp. 752–757.

(a) The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. Pp. 752–754.

(b) The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. In any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the public and

private interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. The minimum standard is a question of federal law which this Court may resolve. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard. Pp. 754–757.

2. The "fair preponderance of the evidence" standard prescribed by § 622 violates the Due Process Clause of the Fourteenth Amendment. Pp. 758–768.

(a) The balance of private interests affected weighs heavily against use of such a standard in parental rights termination proceedings, since the private interest affected is commanding and the threatened loss is permanent. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. Pp. 758–761.

(b) A preponderance standard does not fairly allocate the risk of an erroneous factfinding between the State and the natural parents. In parental rights termination proceedings, which bear many of the indicia of a criminal trial, numerous factors combine to magnify the risk of erroneous factfinding. Coupled with the preponderance standard, these factors create a significant prospect of erroneous termination of parental rights. A standard of proof that allocates the risk of error nearly equally between an erroneous failure to terminate, which leaves the child in an uneasy status quo, and an erroneous termination, which unnecessarily destroys the natural family, does not reflect properly the relative severity of these two outcomes. Pp. 761–766.

(c) A standard of proof more strict than preponderance of the evidence is consistent with the two state interests at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the child's welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings. Pp. 766–768.

3. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A "clear and convincing evidence" standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts. Pp. 768–770.

75 App. Div. 2d 910, 427 N. Y. S. 2d 319, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a

dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 770.

Martin Guggenheim argued the cause for petitioners. With him on the briefs was *Alan N. Sussman.*

Steven Domenic Scavuzzo argued the cause *pro hac vice* for respondents. With him on the brief was *H. Randall Bixler. Wilfrid E. Marrin* and *Frederick J. Magovern* filed a brief for respondents Balogh et al.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." N.Y. Soc. Serv. Law §§ 384–b.4.(d), 384–b.7.(a) (McKinney Supp. 1981–1982) (Soc. Serv. Law). The New York Family Court Act § 622 (McKinney 1975 and Supp. 1981–1982) (Fam. Ct. Act) requires that only a "fair preponderance of the evidence" support that finding. Thus, in New York, the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action.

Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in

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*Briefs of *amici curiae* urging reversal were filed by *Marcia Robinson Lowry, Steven R. Shapiro,* and *Margaret Hayman* for the American Civil Liberties Union Children's Rights Project et al.; and by *Louise Gruner Gans, Catherine P. Mitchell, Norman Siegel, Gary Connor,* and *Daniel Greenberg* for Community Action for Legal Services, Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams,* Attorney General, *Shirley Adelson Siegel,* Solicitor General, and *Lawrence J. Logan* and *Robert J. Schack,* Assistant Attorneys General, for the State of New York; and by *Dave Frohnmayer,* Attorney General, *William F. Gary,* Solicitor General, and *Jan Peter Londahl,* Assistant Attorney General, for the State of Oregon.

their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.

I

A

New York authorizes its officials to remove a child temporarily from his or her home if the child appears "neglected," within the meaning of Art. 10 of the Family Court Act. See §§ 1012(f), 1021–1029. Once removed, a child under the age of 18 customarily is placed "in the care of an authorized agency," Soc. Serv. Law § 384–b.7.(a), usually a state institution or a foster home. At that point, "the state's first obligation is to help the family with services to . . . reunite it . . . ." § 384–b.1.(a)(iii). But if convinced that "positive, nurturing parent-child relationships no longer exist," § 384–b.1.(b), the State may initiate "permanent neglect" proceedings to free the child for adoption.

The State bifurcates its permanent neglect proceeding into "fact-finding" and "dispositional" hearings. Fam. Ct. Act §§ 622, 623. At the factfinding stage, the State must prove that the child has been "permanently neglected," as defined by Fam. Ct. Act §§ 614.1.(a)–(d) and Soc. Serv. Law § 384–b.7.(a). See Fam. Ct. Act § 622. The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. §§ 623, 631.

At the factfinding hearing, the State must establish, among other things, that for more than a year after the child entered state custody, the agency "made diligent efforts to encourage and strengthen the parental relationship." Fam. Ct. Act §§ 614.1.(c), 611. The State must further prove that during that same period, the child's natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." § 614.1.(d). Should the State support its allegations by "a fair preponderance of the evidence," § 622, the child may be declared permanently ne-

glected. § 611. That declaration empowers the Family Court judge to terminate permanently the natural parents' rights in the child. §§ 631(c), 634. Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.[1]

New York's permanent neglect statute provides natural parents with certain procedural protections.[2] But New York permits its officials to establish "permanent neglect" with less proof than most States require. Thirty-five States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a "fair preponderance of the evidence."[3] The only analogous federal statute of which we are aware

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[1] At oral argument, counsel for petitioners asserted that, in New York, natural parents have no means of restoring terminated parental rights. Tr. of Oral Arg. 9. Counsel for respondents, citing Fam. Ct. Act § 1061, answered that parents may petition the Family Court to vacate or set aside an earlier order on narrow grounds, such as newly discovered evidence or fraud. Tr. of Oral Arg. 26. Counsel for respondents conceded, however, that this statutory provision has never been invoked to set aside a permanent neglect finding. *Id.*, at 27.

[2] Most notably, natural parents have a statutory right to the assistance of counsel and of court-appointed counsel if they are indigent. Fam. Ct. Act § 262.(a)(iii).

[3] Fifteen States, by statute, have required "clear and convincing evidence" or its equivalent. See Alaska Stat. Ann. § 47.10.080(c)(3) (1980); Cal. Civ. Code Ann. § 232(a)(7) (West Supp. 1982); Ga. Code §§ 24A–2201(c), 24A–3201 (1979); Iowa Code § 600A.8 (1981) ("clear and convincing proof"); Me. Rev. Stat. Ann., Tit. 22, § 4055.1.B.(2) (Supp. 1981–1982); Mich. Comp. Laws § 722.25 (Supp. 1981–1982); Mo. Rev. Stat. § 211.447.2(2) (Supp. 1981) ("clear, cogent and convincing evidence"); N. M. Stat. Ann. § 40–7–4.J. (Supp. 1981); N. C. Gen. Stat. § 7A–289.30(e) (1981) ("clear, cogent, and convincing evidence"); Ohio Rev. Code Ann. §§ 2151.35, 2151.414(B) (Page Supp. 1982); R. I. Gen. Laws § 15–7–7(d) (Supp. 1980); Tenn. Code Ann. § 37–246(d) (Supp. 1981); Va. Code § 16.1–283.B (Supp. 1981); W. Va. Code § 49–6–2(c) (1980) ("clear and convincing proof"); Wis. Stat. § 48.31(1) (Supp. 1981–1982).

Fifteen States, the District of Columbia, and the Virgin Islands, by court decision, have required "clear and convincing evidence" or its equivalent. See *Dale County Dept. of Pensions & Security* v. *Robles*, 368 So. 2d 39, 42

permits termination of parental rights solely upon "evidence beyond a reasonable doubt." Indian Child Welfare Act of 1978, Pub. L. 95–608, § 102(f), 92 Stat. 3072, 25 U. S. C. § 1912(f) (1976 ed., Supp. IV). The question here is whether

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(Ala. Civ. App. 1979); *Harper* v. *Caskin*, 265 Ark. 558, 560–561, 580 S. W. 2d 176, 178 (1979); *In re J. S. R.*, 374 A. 2d 860, 864 (D. C. 1977); *Torres* v. *Van Eepoel*, 98 So. 2d 735, 737 (Fla. 1957); *In re Kerns*, 225 Kan. 746, 753, 594 P. 2d 187, 193 (1979); *In re Rosenbloom*, 266 N. W. 2d 888, 889 (Minn. 1978) ("clear and convincing proof"); *In re J. L. B.*, 182 Mont. 100, 116–117, 594 P. 2d 1127, 1136 (1979); *In re Souza*, 204 Neb. 503, 510, 283 N. W. 2d 48, 52 (1979); *J.* v. *M.*, 157 N. J. Super. 478, 489, 385 A. 2d 240, 246 (App. Div. 1978); *In re J. A.*, 283 N. W. 2d 83, 92 (N. D. 1979); *In re Darren Todd H.*, 615 P. 2d 287, 289 (Okla. 1980); *In re William L.*, 477 Pa. 322, 332, 383 A. 2d 1228, 1233, cert. denied *sub nom. Lehman* v. *Lycoming County Children's Services*, 439 U. S. 880 (1978); *In re G. M.*, 596 S. W. 2d 846, 847 (Tex. 1980); *In re Pitts*, 535 P. 2d 1244, 1248 (Utah 1975); *In re Maria*, 15 V. I. 368, 384 (1978); *In re Sego*, 82 Wash. 2d 736, 739, 513 P. 2d 831, 833 (1973) ("clear, cogent, and convincing evidence"); *In re X.*, 607 P. 2d 911, 919 (Wyo. 1980) ("clear and unequivocal").

South Dakota's Supreme Court has required a "clear preponderance" of the evidence in a dependency proceeding. See *In re B. E.*, 287 N. W. 2d 91, 96 (1979). Two States, New Hampshire and Louisiana, have barred parental rights terminations unless the key allegations have been proved beyond a reasonable doubt. See *State* v. *Robert H.*, 118 N. H. 713, 716, 393 A. 2d 1387, 1389 (1978); La. Rev. Stat. Ann. § 13:1603.A (West Supp. 1982). Two States, Illinois and New York, have required clear and convincing evidence, but only in certain types of parental rights termination proceedings. See Ill. Rev. Stat., ch. 37, ¶¶ 705–9(2), (3) (1979), amended by Act of Sept. 11, 1981, 1982 Ill. Laws, P. A. 82–437 (generally requiring a preponderance of the evidence, but requiring clear and convincing evidence to terminate the rights of minor parents and mentally ill or mentally deficient parents); N. Y. Soc. Serv. Law §§ 384–b.3(g), 384–b.4(c), and 384–b.4(e) (Supp. 1981–1982) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse).

So far as we are aware, only two federal courts have addressed the issue. Each has held that allegations supporting parental rights termination must be proved by clear and convincing evidence. *Sims* v. *State Dept. of Public Welfare*, 438 F. Supp. 1179, 1194 (SD Tex. 1977), rev'd on other grounds *sub nom. Moore* v. *Sims*, 442 U. S. 415 (1979); *Alsager* v. *District Court of*

New York's "fair preponderance of the evidence" standard is constitutionally sufficient.

B

Petitioners John Santosky II and Annie Santosky are the natural parents of Tina and John III. In November 1973, after incidents reflecting parental neglect, respondent Kramer, Commissioner of the Ulster County Department of Social Services, initiated a neglect proceeding under Fam. Ct. Act § 1022 and removed Tina from her natural home. About 10 months later, he removed John III and placed him with foster parents. On the day John was taken, Annie Santosky gave birth to a third child, Jed. When Jed was only three days old, respondent transferred him to a foster home on the ground that immediate removal was necessary to avoid imminent danger to his life or health.

In October 1978, respondent petitioned the Ulster County Family Court to terminate petitioners' parental rights in the three children.[4] Petitioners challenged the constitutionality of the "fair preponderance of the evidence" standard specified in Fam. Ct. Act § 622. The Family Court Judge rejected this constitutional challenge, App. 29–30, and weighed the evidence under the statutory standard. While acknowledging that the Santoskys had maintained contact with their children, the judge found those visits "at best superficial and devoid of any real emotional content." *Id.*, at 21. After

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Polk County, 406 F. Supp. 10, 25 (SD Iowa 1975), aff'd on other grounds, 545 F. 2d 1137 (CA8 1976).

[4] Respondent had made an earlier and unsuccessful termination effort in September 1976. After a factfinding hearing, the Family Court Judge dismissed respondent's petition for failure to prove an essential element of Fam. Ct. Act § 614.1.(d). See *In re Santosky*, 89 Misc. 2d 730, 393 N. Y. S. 2d 486 (1977). The New York Supreme Court, Appellate Division, affirmed, finding that "the record as a whole" revealed that petitioners had "substantially planned for the future of the children." *In re John W.*, 63 App. Div. 2d 750, 751, 404 N. Y. S. 2d 717, 719 (1978).

deciding that the agency had made "'diligent efforts' to encourage and strengthen the parental relationship," *id.*, at 30, he concluded that the Santoskys were incapable, even with public assistance, of planning for the future of their children. *Id.*, at 33–37. The judge later held a dispositional hearing and ruled that the best interests of the three children required permanent termination of the Santoskys' custody.[5] *Id.*, at 39.

Petitioners appealed, again contesting the constitutionality of § 622's standard of proof.[6] The New York Supreme Court, Appellate Division, affirmed, holding application of the preponderance-of-the-evidence standard "proper and constitutional." *In re John AA*, 75 App. Div. 2d 910, 427 N. Y. S. 2d 319, 320 (1980). That standard, the court reasoned, "recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . . ." *Ibid.*

The New York Court of Appeals then dismissed petitioners' appeal to that court "upon the ground that no substantial constitutional question is directly involved." App. 55. We granted certiorari to consider petitioners' constitutional claim. 450 U. S. 993 (1981).

II

Last Term, in *Lassiter* v. *Department of Social Services*, 452 U. S. 18 (1981), this Court, by a 5–4 vote, held that the

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[5] Since respondent Kramer took custody of Tina, John III, and Jed, the Santoskys have had two other children, James and Jeremy. The State has taken no action to remove these younger children. At oral argument, counsel for respondents replied affirmatively when asked whether he was asserting that petitioners were "unfit to handle the three older ones but not unfit to handle the two younger ones." Tr. of Oral Arg. 24.

[6] Petitioners initially had sought review in the New York Court of Appeals. That court *sua sponte* transferred the appeal to the Appellate Division, Third Department, stating that a direct appeal did not lie because "questions other than the constitutional validity of a statutory provision are involved." App. 50.

Fourteenth Amendment's Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The case casts light, however, on the two central questions here—whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due.

In *Lassiter*, it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." *Id.*, at 37 (first dissenting opinion); see *id.*, at 24–32 (opinion of the Court); *id.*, at 59–60 (STEVENS, J., dissenting). See also *Little* v. *Streater*, 452 U. S. 1, 13 (1981). The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 845 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to

destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[7]

In *Lassiter*, the Court and three dissenters agreed that the nature of the process due in parental rights termination proceedings turns on a balancing of the "three distinct factors" specified in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. See 452 U. S., at 27–31; *id.*, at 37–48 (first dissenting opinion). But see *id.*, at 59–60 (STEVENS, J., dissenting). While the respective *Lassiter* opinions disputed whether those factors should be weighed against a presumption disfavoring appointed counsel for one not threatened with loss of physical liberty, compare 452 U. S., at 31–32, with *id.*, at 41, and n. 8 (first dissenting opinion), that concern is irrelevant here. Unlike the Court's right-to-counsel rulings, its decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard. To the contrary, the Court has engaged in a straightforward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.

In *Addington* v. *Texas*, 441 U. S. 418 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to

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[7] We therefore reject respondent Kramer's claim that a parental rights termination proceeding does not interfere with a fundamental liberty interest. See Brief for Respondent Kramer 11–18; Tr. of Oral Arg. 38. The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.

'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Id.*, at 423, quoting *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U. S., at 423. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.*, at 427, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." *Id.*, at 424. See also *In re Winship*, 397 U. S., at 372 (Harlan, J., concurring).

The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980). See also *Logan* v. *Zimmerman Brush Co.*, *ante*, at 432. Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has

traditionally been left to the judiciary to resolve." *Woodby* v. *INS*, 385 U. S. 276, 284 (1966).[8] "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Addington* v. *Texas*, 441 U. S., at 425, quoting *Tippett* v. *Maryland*, 436 F. 2d 1153, 1166 (CA4 1971) (opinion concurring in part and dissenting in part), cert. dism'd *sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U. S. 355 (1972).

This Court has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington* v. *Texas*, 441 U. S., at 424. Notwithstanding "the state's 'civil labels and good intentions,'" *id.*, at 427, quoting *In re Winship*, 397 U. S., at 365–366, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U. S., at 425, 426. See, *e. g.*, *Addington* v. *Texas*, *supra* (civil commitment); *Woodby* v. *INS*, 385 U. S., at 285 (deportation); *Chaunt* v. *United States*, 364 U. S. 350, 353 (1960) (denaturalization);

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[8] The dissent charges, *post*, at 772, n. 2, that "this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens." As the dissent properly concedes, however, the Court must examine a State's chosen standard to determine whether it satisfies "the constitutional minimum of 'fundamental fairness.'" *Ibid.* See, *e. g.*, *Addington* v. *Texas*, 441 U. S. 418, 427, 433 (1979) (unanimous decision of participating Justices) (Fourteenth Amendment requires at least clear and convincing evidence in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital); *In re Winship*, 397 U. S. 358, 364 (1970) (Due Process Clause of the Fourteenth Amendment protects the accused in state proceeding against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged).

Schneiderman v. *United States*, 320 U. S. 118, 125, 159 (1943) (denaturalization).

In *Lassiter*, to be sure, the Court held that fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application. 452 U. S., at 31–32 (natural parent's right to court-appointed counsel should be determined by the trial court, subject to appellate review). But this Court never has approved case-by-case determination of the proper *standard of proof* for a given proceeding. Standards of proof, like other "procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U. S., at 344 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.[9]

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[9] For this reason, we reject the suggestions of respondents and the dissent that the constitutionality of New York's statutory procedures must be evaluated as a "package." See Tr. of Oral Arg. 25, 36, 38. Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the "cumulative effect" of state procedures. In the criminal context, for example, the Court has never assumed that "strict substantive standards or special procedures compensate for a lower burden of proof . . . ." *Post*, at 773. See *In re Winship*, 397 U. S., at 368. Nor has the Court treated appellate review as a curative for an inadequate burden of proof. See *Woodby* v. *INS*, 385 U. S. 276, 282 (1966) ("judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment").

As the dissent points out, "the standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erro-

III

In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

A

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg* v. *Kelly*, 397 U. S. 254, 262–263 (1970), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.

Lassiter declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property

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neous decisions.'" *Post*, at 785, quoting *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 13 (1979). Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information *before* the factfinder. But only the standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions" he draws from that information. *In re Winship*, 397 U. S., at 370 (Harlan, J., concurring). The statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts.

right. 452 U. S., at 27, quoting *Stanley* v. *Illinois*, 405 U. S., at 651. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." 452 U. S., at 27.

In government-initiated proceedings to determine juvenile delinquency, *In re Winship*, *supra;* civil commitment, *Addington* v. *Texas*, *supra;* deportation, *Woodby* v. *INS*, *supra;* and denaturalization, *Chaunt* v. *United States*, *supra*, and *Schneiderman* v. *United States*, *supra*, this Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof. Yet juvenile delinquency adjudications, civil commitment, deportation, and denaturalization, at least to a degree, are all *reversible* official actions. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. See n. 1, *supra*. Few forms of state action are both so severe and so irreversible.

Thus, the first *Eldridge* factor—the private interest affected—weighs heavily against use of the preponderance standard at a state-initiated permanent neglect proceeding. We do not deny that the child and his foster parents are also deeply interested in the outcome of that contest. But at the factfinding stage of the New York proceeding, the focus emphatically is not on them.

The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. Fam. Ct. Act § 614.1.(d). The questions disputed and decided are

what the State did—"made diligent efforts," § 614.1.(c)—and what the natural parents did not do—"maintain contact with or plan for the future of the child." § 614.1.(d). The State marshals an array of public resources to prove its case and disprove the parents' case. Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.[10]

At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act § 631 (judge shall make his order "solely on the basis of the best interests of the child," and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.[11] Thus,

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[10] The Family Court Judge in the present case expressly refused to terminate petitioners' parental rights on a "non-statutory, no-fault basis." App. 22–29. Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness. See *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest,'" quoting *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 862–863 (1977) (Stewart, J., concurring in judgment)).

[11] For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado, for example, it has been noted: "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever." *In re K. S.*, 33 Colo. App. 72, 76, 515 P. 2d 130, 133 (1973).

Some losses cannot be measured. In this case, for example, Jed Santosky was removed from his natural parents' custody when he was only

at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

However substantial the foster parents' interests may be, cf. *Smith* v. *Organization of Foster Families*, 431 U. S., at 845–847, they are not implicated directly in the factfinding stage of a state-initiated permanent neglect proceeding against the natural parents. If authorized, the foster parents may pit their interests directly against those of the natural parents by initiating their own permanent neglect proceeding. Fam. Ct. Act § 1055(d); Soc. Serv. Law §§ 384–6.3(b), 392.7.(c). Alternatively, the foster parents can make their case for custody at the dispositional stage of a state-initiated proceeding, where the judge already has decided the issue of permanent neglect and is focusing on the placement that would serve the child's best interests. Fam. Ct. Act §§ 623, 631. For the foster parents, the State's failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child. Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections.

B

Under *Mathews* v. *Eldridge*, we next must consider both the risk of erroneous deprivation of private interests resulting from use of a "fair preponderance" standard and the likelihood that a higher evidentiary standard would reduce that risk. See 424 U. S., at 335. Since the factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties.

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three days old; the judge's finding of permanent neglect effectively foreclosed the possibility that Jed would ever know his natural parents.

In New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial. Cf. *Lassiter* v. *Department of Social Services*, 452 U. S., at 42–44 (first dissenting opinion); *Meltzer* v. *C. Buck LeCraw & Co.*, 402 U. S. 954, 959 (1971) (Black, J., dissenting from denial of certiorari). See also dissenting opinion, *post*, at 777–779 (describing procedures employed at factfinding proceeding). The Commissioner of Social Services charges the parents with permanent neglect. They are served by summons. Fam. Ct. Act §§ 614, 616, 617. The factfinding hearing is conducted pursuant to formal rules of evidence. § 624. The State, the parents, and the child are all represented by counsel. §§ 249, 262. The State seeks to establish a series of historical facts about the intensity of its agency's efforts to reunite the family, the infrequency and insubstantiality of the parents' contacts with their child, and the parents' inability or unwillingness to formulate a plan for the child's future. The attorneys submit documentary evidence, and call witnesses who are subject to cross-examination. Based on all the evidence, the judge then determines whether the State has proved the statutory elements of permanent neglect by a fair preponderance of the evidence. § 622.

At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith* v. *Organization of Foster Families*, 431 U. S., at 835, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent.[12]

[12] For example, a New York court appraising an agency's "diligent efforts" to provide the parents with social services can excuse efforts *not* made on the grounds that they would have been "detrimental to the best interests of the child." Fam. Ct. Act § 614.1.(c). In determining whether

Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, *id.*, at 833–835, such proceedings are often vulnerable to judgments based on cultural or class bias.

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.[13]

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the parent "substantially and continuously or repeatedly" failed to "maintain contact with . . . the child," § 614.1.(d), the judge can discount actual visits or communications on the grounds that they were insubstantial or "overtly demonstrat[ed] a lack of affectionate and concerned parenthood." Soc. Serv. Law § 384–b.7.(b). When determining whether the parent planned for the child's future, the judge can reject as unrealistic plans based on overly optimistic estimates of physical or financial ability. § 384–b.7.(c). See also dissenting opinion, *post*, at 779–780, nn. 8 and 9.

[13] In this case, for example, the parents claim that the State sought court orders denying them the right to visit their children, which would have prevented them from maintaining the contact required by Fam. Ct. Act. § 614.1.(d). See Brief for Petitioners 9. The parents further claim that the State cited their rejection of social services they found offensive or superfluous as proof of the agency's "diligent efforts" and their own "failure to plan" for the children's future. *Id.*, at 10–11.

We need not accept these statements as true to recognize that the State's unusual ability to structure the evidence increases the risk of an erroneous factfinding. Of course, the disparity between the litigants' re-

The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination, as New York did here, see n. 4, *supra*, it always can try once again to cut off the parents' rights after gathering more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

Coupled with a "fair preponderance of the evidence" standard, these factors create a significant prospect of erroneous termination. A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. See *In re Winship*, 397 U. S., at 371, n. 3 (Harlan, J., concurring). Given the weight of the private interests at stake, the social cost of even occasional error is sizable.

Raising the standard of proof would have both practical and symbolic consequences. Cf. *Addington* v. *Texas*, 441 U. S., at 426. The Court has long considered the heightened standard of proof used in criminal prosecutions to be "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U. S., at 363. An elevated standard of proof in a parental rights termination proceeding would alleviate "the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Addington* v. *Texas*, 441 U. S., at 427. "Increasing the burden of proof is one way to impress the factfinder with the im-

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sources will be vastly greater in States where there is no statutory right to court-appointed counsel. See *Lassiter* v. *Department of Social Services*, 452 U. S. 18, 34 (1981) (only 33 States and the District of Columbia provide that right by statute).

portance of the decision and thereby perhaps to reduce the chances that inappropriate" terminations will be ordered. *Ibid.*

The Appellate Division approved New York's preponderance standard on the ground that it properly "balanced rights possessed by the child . . . with those of the natural parents. . . ." 75 App. Div. 2d, at 910, 427 N. Y. S. 2d, at 320. By so saying, the court suggested that a preponderance standard properly allocates the risk of error *between* the parents and the child.[14] That view is fundamentally mistaken.

The court's theory assumes that termination of the natural parents' rights invariably will benefit the child.[15] Yet we have noted above that the parents and the child share an interest in avoiding erroneous termination. Even accepting the court's assumption, we cannot agree with its conclusion that a preponderance standard fairly distributes the risk of error between parent and child. Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights. Cf. *In re Winship*, 397 U. S., at 371 (Harlan, J., concurring). For the child, the likely consequence of an erroneous failure to terminate is preservation of

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[14] The dissent makes a similar claim. See *post*, at 786–791.

[15] This is a hazardous assumption at best. Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. See, *e. g.*, Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985, 993 (1975) ("In fact, under current practice, coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention").

Nor does termination of parental rights necessarily ensure adoption. See Brief for Community Action for Legal Services, Inc., et al. as *Amici Curiae* 22–23. Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and "temporary" foster placements after his ties to his natural parents have been severed. See *Smith* v. *Organization of Foster Families*, 431 U. S., at 833–838 (describing the "limbo" of the New York foster care system).

an uneasy status quo.[16] For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.

C

Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" at the *factfinding* proceeding. *Lassiter* v. *Department of Social Services*, 452 U. S., at 27. As *parens patriae*, the State's goal is to provide the child with a permanent home. See Soc. Serv. Law § 384–b.1.(a)(i) (statement of legislative findings and intent). Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not

[16] When the termination proceeding occurs, the child is not living at his natural home. A child cannot be adjudicated "permanently neglected" until, "for a period of more than one year," he has been in "the care of an authorized agency." Soc. Serv. Law § 384–b.7.(a); Fam. Ct. Act § 614.1.(d). See also dissenting opinion, *post*, at 789–790.

Under New York law, a judge has ample discretion to ensure that, once removed from his natural parents on grounds of neglect, a child will not return to a hostile environment. In this case, when the State's initial termination effort failed for lack of proof, see n. 4, *supra*, the court simply issued orders under Fam. Ct. Act § 1055(b) extending the period of the child's foster home placement. See App. 19–20. See also Fam. Ct. Act § 632(b) (when State's permanent neglect petition is dismissed for insufficient evidence, judge retains jurisdiction to reconsider underlying orders of placement); § 633 (judge may suspend judgment at dispositional hearing for an additional year).

severance, of natural familial bonds.[17] § 384–b.1.(a)(ii). "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley* v. *Illinois*, 405 U. S., at 652.

The State's interest in finding the child an alternative permanent home arises only "when it is *clear* that the natural parent cannot or will not provide a normal family home for the child." Soc. Serv. Law § 384–b.1.(a)(iv) (emphasis added). At the factfinding, that goal is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.

Unlike a constitutional requirement of hearings, see, *e. g.*, *Mathews* v. *Eldridge*, 424 U. S., at 347, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. As we have observed, 35 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their factfinding proceedings. See n. 3, *supra*.

Nor would an elevated standard of proof create any real administrative burdens for the State's factfinders. New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. See Soc. Serv. Law §§ 384–b.3.(g), 384–b.4.(c), and 384–b.4.(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse). New York also demands at least clear and convincing evidence in proceedings of far less moment than parental rights termination proceedings. See, *e. g.*, N. Y. Veh. & Traf. Law § 227.1 (McKinney Supp. 1981) (requiring the State to prove traffic

[17] Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, *after* the parents have been found unfit.

infractions by "clear and convincing evidence") and *In re Rosenthal* v. *Hartnett*, 36 N. Y. 2d 269, 326 N. E. 2d 811 (1975); see also *Ross* v. *Food Specialties, Inc.*, 6 N. Y. 2d 336, 341, 160 N. E. 2d 618, 620 (1959) (requiring "clear, positive and convincing evidence" for contract reformation). We cannot believe that it would burden the State unduly to require that its factfinders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver's license.

IV

The logical conclusion of this balancing process is that the "fair preponderance of the evidence" standard prescribed by Fam. Ct. Act § 622 violates the Due Process Clause of the Fourteenth Amendment.[18] The Court noted in *Addington:* "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 441 U. S., at 427. Thus, at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable. The next question, then, is whether a "beyond a reasonable doubt" or a "clear and convincing" standard is constitutionally mandated.

In *Addington*, the Court concluded that application of a reasonable-doubt standard is inappropriate in civil commitment proceedings for two reasons—because of our hesitation to apply that unique standard "too broadly or casually in noncriminal cases," *id.*, at 428, and because the psychiatric evidence ordinarily adduced at commitment proceedings is

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[18] The dissent's claim that today's decision "will inevitably lead to the federalization of family law," *post*, at 773, is, of course, vastly overstated. As the dissent properly notes, the Court's duty to "refrai[n] from interfering with state answers to domestic relations questions" has never required "that the Court should blink at clear constitutional violations in state statutes." *Post*, at 771.

rarely susceptible to proof beyond a reasonable doubt. *Id.*, at 429–430, 432–433. To be sure, as has been noted above, in the Indian Child Welfare Act of 1978, Pub. L. 95–608, § 102(f), 92 Stat. 3072, 25 U. S. C. § 1912(f) (1976 ed., Supp. IV), Congress requires "evidence beyond a reasonable doubt" for termination of Indian parental rights, reasoning that "the removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty . . . ." H. R. Rep. No. 95–1386, p. 22 (1978). Congress did not consider, however, the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings.

Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress. Cf. *Lassiter* v. *Department of Social Services*, 452 U. S., at 30; *id.*, at 44–46 (first dissenting opinion) (describing issues raised in state termination proceedings). The substantive standards applied vary from State to State. Although Congress found a "beyond a reasonable doubt" standard proper in one type of parental rights termination case, another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.

A majority of the States have concluded that a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. See n. 3, *supra*. We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. We further hold that determination of the precise burden equal to or greater than that standard

is a matter of state law properly left to state legislatures and state courts. Cf. *Addington* v. *Texas*, 441 U. S., at 433.

We, of course, express no view on the merits of petitioners' claims.[19] At a hearing conducted under a constitutionally proper standard, they may or may not prevail. Without deciding the outcome under any of the standards we have approved, we vacate the judgment of the Appellate Division and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body politic. But today's decision certainly moves us in that direction. By parsing the New York scheme and holding one narrow provision unconstitutional, the majority invites further federal-court intrusion into every facet of state family law. If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic,"[1] it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.

Equally as troubling is the majority's due process analysis. The Fourteenth Amendment guarantees that a State will treat individuals with "fundamental fairness" whenever its actions infringe their protected liberty or property interests. By adoption of the procedures relevant to this case, New

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[19] Unlike the dissent, we carefully refrain from accepting as the "facts of this case" findings that are not part of the record and that have been found only to be more likely true than not.

[1] *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921).

York has created an exhaustive program to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights. And yet the majority's myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme "fundamentally fair."

I

State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.

Throughout this experience the Court has scrupulously refrained from interfering with state answers to domestic relations questions. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." *United States* v. *Yazell*, 382 U. S. 341, 352 (1966). This is not to say that the Court should blink at clear constitutional violations in state statutes, but rather that in this area, of all areas, "substantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals." *Mathews* v. *Eldridge*, 424 U. S. 319, 349 (1976).

This case presents a classic occasion for such solicitude. As will be seen more fully in the next part, New York has enacted a comprehensive plan to *aid* marginal parents in regaining the custody of their child. The central purpose of the New York plan is to reunite divided families. Adoption of the preponderance-of-the-evidence standard represents New York's good-faith effort to balance the interest of par-

ents against the legitimate interests of the child and the State. These earnest efforts by state officials should be given weight in the Court's application of due process principles. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267, 270 (1904).[2]

The majority may believe that it is adopting a relatively unobtrusive means of ensuring that termination proceedings provide "due process of law." In fact, however, fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes. By holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any state scheme passes constitutional muster so long as it applies that standard of proof. A state law permitting termination of parental rights upon a showing of neglect by clear and convincing evidence certainly would not be ac-

[2] The majority asserts that "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.' *Woodby* v. *INS*, 385 U. S. 276, 284 (1966)." *Ante*, at 755–756. To the extent that the majority seeks, by this statement, to place upon the federal judiciary the primary responsibility for deciding the appropriate standard of proof in state matters, it arrogates to itself a responsibility wholly at odds with the allocation of authority in our federalist system and wholly unsupported by the prior decisions of this Court. In *Woodby* v. *INS*, 385 U. S. 276 (1966), the Court determined the proper standard of proof to be applied under a *federal* statute, and did so only after concluding that "Congress ha[d] not addressed itself to the question of what degree of proof [was] required in deportation proceedings." *Id.*, at 284. Beyond an examination for the constitutional minimum of "fundamental fairness"—which clearly is satisfied by the New York procedures at issue in this case—this Court simply has no role in establishing the standards of proof that States must follow in the various judicial proceedings they afford to their citizens.

ceptable to the majority if it provided no procedures other than one 30-minute hearing. Similarly, the majority probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. See *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 862–863 (1977) (Stewart, J., concurring in judgment).

After fixing the standard of proof, therefore, the majority will be forced to evaluate other aspects of termination proceedings with reference to that point. Having in this case abandoned evaluation of the overall effect of a scheme, and with it the possibility of finding that strict substantive standards or special procedures compensate for a lower burden of proof, the majority's approach will inevitably lead to the federalization of family law. Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). It should not do so in the absence of a clear constitutional violation. As will be seen in the next part, no clear constitutional violation has occurred in this case.

II

As the majority opinion notes, petitioners are the parents of five children, three of whom were removed from petitioners' care on or before August 22, 1974. During the next four and one-half years, those three children were in the custody of the State and in the care of foster homes or institutions, and the State was diligently engaged in efforts to prepare petitioners for the children's return. Those efforts were un-

successful, however, and on April 10, 1979, the New York Family Court for Ulster County terminated petitioners' parental rights as to the three children removed in 1974 or earlier. This termination was preceded by a judicial finding that petitioners had failed to plan for the return and future of their children, a statutory category of permanent neglect. Petitioners now contend, and the Court today holds, that they were denied due process of law, not because of a general inadequacy of procedural protections, but simply because the finding of permanent neglect was made on the basis of a preponderance of the evidence adduced at the termination hearing.

It is well settled that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U. S. 564, 569 (1972). In determining whether such liberty or property interests are implicated by a particular government action, "we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.*, at 571 (emphasis in original). I do not disagree with the majority's conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. See *Smith* v. *Organization of Foster Families*, *supra*, at 862–863 (Stewart, J., concurring in judgment). "Once it is determined that due process applies, [however,] the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). It is the majority's answer to this question with which I disagree.

A

Due process of law is a flexible constitutional principle. The requirements which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, "not all situations calling for

procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer*, *supra*, at 481. See also *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979); *Mathews* v. *Eldridge*, 424 U. S., at 334; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand.

Given this flexibility, it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards. As we have stated before, courts must consider "the fairness and reliability of the existing . . . procedures" before holding that the Constitution requires more. *Mathews* v. *Eldridge*, *supra*, at 343. Only through such a broad inquiry may courts determine whether a challenged governmental action satisfies the due process requirement of "fundamental fairness."[3] In some instances, the Court has even looked to nonprocedural restraints on official action in determining whether the deprivation of a protected interest was effected without due process of law. *E. g.*, *Ingraham* v.

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[3] Although, as the majority states, we have held that the minimum requirements of procedural due process are a question of federal law, such a holding does not mean that the procedural protections afforded by a State will be inadequate under the Fourteenth Amendment. It means simply that the adequacy of the state-provided process is to be judged by constitutional standards—standards which the majority itself equates to "fundamental fairness." *Ante*, at 754. I differ, therefore, not with the majority's statement that the requirements of due process present a federal question, but with its apparent assumption that the presence of "fundamental fairness" can be ascertained by an examination which completely disregards the plethora of protective procedures accorded parents by New York law.

Wright, 430 U. S. 651 (1977). In this case, it is just such a broad look at the New York scheme which reveals its fundamental fairness.[4]

The termination of parental rights on the basis of permanent neglect can occur under New York law only by order of the Family Court. N. Y. Soc. Serv. Law (SSL) § 384–b.3.(d) (McKinney Supp. 1981–1982). Before a petition for permanent termination can be filed in that court, however, several other events must first occur.

The Family Court has jurisdiction only over those children who are in the care of an authorized agency. N. Y. Family Court Act (FCA) § 614.1.(b) (McKinney 1975 and Supp. 1981–1982). Therefore, the children who are the subject of a termination petition must previously have been removed from their parents' home on a temporary basis. Temporary removal of a child can occur in one of two ways. The parents may consent to the removal, FCA § 1021, or, as occurred in this case, the Family Court can order the removal pursuant to a finding that the child is abused or neglected.[5] FCA §§ 1051, 1052.

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[4] The majority refuses to consider New York's procedure as a whole, stating that "[t]he statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." *Ante*, at 758, n. 9. Implicit in this statement is the conclusion that the risk of error may be reduced to constitutionally tolerable levels only by raising the standard of proof—that other procedures can never eliminate "undue uncertainty" so long as the standard of proof remains too low. Aside from begging the question of whether the risks of error tolerated by the State in this case are "undue," see *infra*, at 785–791, this conclusion denies the flexibility that we have long recognized in the principle of due process; understates the error-reducing power of procedural protections such as the right to counsel, evidentiary hearings, rules of evidence, and appellate review; and establishes the standard of proof as the *sine qua non* of procedural due process.

[5] An abused child is one who has been subjected to intentional physical injury "which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emo-

Court proceedings to order the temporary removal of a child are initiated by a petition alleging abuse or neglect, filed by a state-authorized child protection agency or by a person designated by the court. FCA §§ 1031, 1032. Unless the court finds that exigent circumstances require removal of the child before a petition may be filed and a hearing held, see FCA § 1022, the order of temporary removal results from a "dispositional hearing" conducted to determine the appropriate form of alternative care. FCA § 1045. See also FCA § 1055. This "dispositional hearing" can be held only after the court, at a separate "fact-finding hearing," has found the child to be abused or neglected within the specific statutory definition of those terms. FCA §§ 1012, 1044, 1051.

Parents subjected to temporary removal proceedings are provided extensive procedural protections. A summons and copy of the temporary removal petition must be served upon the parents within two days of issuance by the court, FCA §§ 1035, 1036, and the parents may, at their own request, delay the commencement of the factfinding hearing for three days after service of the summons. FCA § 1048.[6] The fact-finding hearing may not commence without a determination by the court that the parents are present at the hearing and have been served with the petition. FCA § 1041. At the hearing itself, "only competent, material and relevant evidence may be admitted," with some enumerated exceptions

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tional health or protracted loss or impairment of the function of any bodily organ." FCA § 1012(e)(i). Sexual offenses against a child are also covered by this category. A neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education." FCA § 1012(f)(i)(A).

[6] The relatively short time between notice and commencement of hearing provided by § 1048 undoubtedly reflects the State's desire to protect the child. These proceedings are designed to permit prompt action by the court when the child is threatened with imminent and serious physical, mental, or emotional harm.

for particularly probative evidence. FCA § 1046(b)(ii). In addition, indigent parents are provided with an attorney to represent them at both the factfinding and dispositional hearings, as well as at all other proceedings related to temporary removal of their child. FCA § 262(a)(i).

An order of temporary removal must be reviewed every 18 months by the Family Court. SSL § 392.2. Such review is conducted by hearing before the same judge who ordered the temporary removal, and a notice of the hearing, including a statement of the dispositional alternatives, must be given to the parents at least 20 days before the hearing is held. SSL § 392.4. As in the initial removal action, the parents must be parties to the proceedings, *ibid.*, and are entitled to court-appointed counsel if indigent. FCA § 262(a).

One or more years after a child has been removed temporarily from the parents' home, permanent termination proceedings may be commenced by the filing of a petition in the court which ordered the temporary removal. The petition must be filed by a state agency or by a foster parent authorized by the court, SSL § 384–b.3.(b), and must allege that the child has been permanently neglected by the parents. SSL § 384–b.3.(d).[7] Notice of the petition and the dispositional proceedings must be served upon the parents at least 20 days before the commencement of the hearing, SSL § 384–b.3.(e), must inform them of the potential consequences of the hearing, *ibid.*, and must inform them "of their right to the assistance of counsel, including [their] right . . . to have counsel assigned by the court [if] they are financially unable to obtain counsel." *Ibid.* See also FCA § 262.

As in the initial removal proceedings, two hearings are held in consideration of the permanent termination petition.

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[7] Permanent custody also may be awarded by the Family Court if both parents are deceased, the parents abandoned the child at least six months prior to the termination proceedings, or the parents are unable to provide proper and adequate care by reason of mental illness or mental retardation. SSL § 384–b.4.(c).

SSL § 384–b.3.(f). At the factfinding hearing, the court must determine, by a fair preponderance of the evidence, whether the child has been permanently neglected. SSL § 384–b.3.(g). "Only competent, material and relevant evidence may be admitted in a fact-finding hearing." FCA § 624. The court may find permanent neglect if the child is in the care of an authorized agency or foster home and the parents have "failed for a period of more than one year . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so." SSL § 384–b.7.(a).[8] In addition, because the State considers its "first obligation" to be the reuniting of the child with its natural parents, SSL § 384–b.1.(iii), the court must also find that the supervising state agency has, without success, made "*diligent* efforts to encourage and strengthen the parental relationship." SSL § 384–b.7.(a) (emphasis added).[9]

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[8] As to maintaining contact with the child, New York law provides that "evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such a character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." SSL § 384–b.7.(b).

Failure to plan for the future of the child means failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent." SSL § 384–b.7.(c).

[9] "Diligent efforts" are defined under New York law to "mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

"(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

Following the factfinding hearing, a separate, dispositional hearing is held to determine what course of action would be in "the best interests of the child." FCA § 631. A finding of permanent neglect at the factfinding hearing, although necessary to a termination of parental rights, does not control the court's order at the dispositional hearing. The court may dismiss the petition, suspend judgment on the petition and retain jurisdiction for a period of one year in order to provide further opportunity for a reuniting of the family, or terminate the parents' right to the custody and care of the child. FCA §§ 631–634. The court must base its decision solely upon the record of "material and relevant evidence" introduced at the dispositional hearing, FCA § 624; *In re "Female" M.*, 70 App. Div. 2d 812, 417 N. Y. S. 2d 482 (1979), and may not entertain any presumption that the best interests of the child "will be promoted by any particular disposition." FCA § 631.

As petitioners did in this case, parents may appeal any unfavorable decision to the Appellate Division of the New York Supreme Court. Thereafter, review may be sought in the New York Court of Appeals and, ultimately, in this Court if a federal question is properly presented.

As this description of New York's termination procedures demonstrates, the State seeks not only to protect the interests of parents in rearing their own children, but also to assist and encourage parents who have lost custody of their children to reassume their rightful role. Fully understood, the New York system is a comprehensive program to *aid* parents such as petitioners. Only as a last resort, when "diligent efforts" to reunite the family have failed, does New

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"(2) making suitable arrangements for the parents to visit the child;

"(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

"(4) informing the parents at appropriate intervals of the child's progress, development and health." SSL § 384–b.7.(f).

York authorize the termination of parental rights. The procedures for termination of those relationships which cannot be aided and which threaten permanent injury to the child, administered by a judge who has supervised the case from the first temporary removal through the final termination, cannot be viewed as fundamentally unfair. The facts of this case demonstrate the fairness of the system.

The three children to which this case relates were removed from petitioners' custody in 1973 and 1974, before petitioners' other two children were born. The removals were made pursuant to the procedures detailed above and in response to what can only be described as shockingly abusive treatment.[10] At the temporary removal hearing held before the Family Court on September 30, 1974, petitioners were represented by counsel, and allowed the Ulster County Department of Social Services (Department) to take custody of the three children.

Temporary removal of the children was continued at an evidentiary hearing held before the Family Court in December 1975, after which the court issued a written opinion concluding that petitioners were unable to resume their parental responsibilities due to personality disorders. Unsatisfied with the progress petitioners were making, the court also di-

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[10] Tina Apel, the oldest of petitioners' five children, was removed from their custody by court order in November 1973 when she was two years old. Removal proceedings were commenced in response to complaints by neighbors and reports from a local hospital that Tina had suffered injuries in petitioners' home including a fractured left femur, treated with a homemade splint; bruises on the upper arms, forehead, flank, and spine; and abrasions of the upper leg. The following summer John Santosky III, petitioners' second oldest child, was also removed from petitioners' custody. John, who was less than one year old at the time, was admitted to the hospital suffering malnutrition, bruises on the eye and forehead, cuts on the foot, blisters on the hand, and multiple pin pricks on the back. Exhibit to Brief for Respondent Kramer 1–5. Jed Santosky, the third oldest of petitioners' children, was removed from his parents' custody when only three days old as a result of the abusive treatment of the two older children.

rected the Department to reduce to writing the plan which it had designed to solve the problems at petitioners' home and reunite the family.

A plan for providing petitioners with extensive counseling and training services was submitted to the court and approved in February 1976. Under the plan, petitioners received training by a mother's aide, a nutritional aide, and a public health nurse, and counseling at a family planning clinic. In addition, the plan provided psychiatric treatment and vocational training for the father, and counseling at a family service center for the mother. Brief for Respondent Kramer 1–7. Between early 1976 and the final termination decision in April 1979, the State spent more than $15,000 in these efforts to rehabilitate petitioners as parents. App. 34.

Petitioners' response to the State's effort was marginal at best. They wholly disregarded some of the available services and participated only sporadically in the others. As a result, and out of growing concern over the length of the children's stay in foster care, the Department petitioned in September 1976 for permanent termination of petitioners' parental rights so that the children could be adopted by other families. Although the Family Court recognized that petitioners' reaction to the State's efforts was generally "nonresponsive, even hostile," the fact that they were "at least superficially cooperative" led it to conclude that there was yet hope of further improvement and an eventual reuniting of the family. Exhibit to Brief for Respondent Kramer 618. Accordingly, the petition for permanent termination was dismissed.

Whatever progress petitioners were making prior to the 1976 termination hearing, they made little or no progress thereafter. In October 1978, the Department again filed a termination petition alleging that petitioners had completely failed to plan for the children's future despite the considerable efforts rendered in their behalf. This time, the Family Court agreed. The court found that petitioners had "failed in any meaningful way to take advantage of the many social

and rehabilitative services that have not only been made available to them but have been diligently urged upon them." App. 35. In addition, the court found that the "infrequent" visits "between the parents and their children were at best superficial and devoid of any real emotional content." *Id.*, at 21. The court thus found "nothing in the situation which holds out any hope that [petitioners] may ever become financially self sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time, it must be said, 'enough is enough.'" *Id.*, at 36.

In accordance with the statutory requirements set forth above, the court found that petitioners' failure to plan for the future of their children, who were then seven, five, and four years old and had been out of petitioners' custody for at least four years, rose to the level of permanent neglect. At a subsequent dispositional hearing, the court terminated petitioners' parental rights, thereby freeing the three children for adoption.

As this account demonstrates, the State's extraordinary 4-year effort to reunite petitioners' family was not just unsuccessful, it was altogether rebuffed by parents unwilling to improve their circumstances sufficiently to permit a return of their children. At every step of this protracted process petitioners were accorded those procedures and protections which traditionally have been required by due process of law. Moreover, from the beginning to the end of this sad story all judicial determinations were made by one Family Court Judge. After four and one-half years of involvement with petitioners, more than seven complete hearings, and additional periodic supervision of the State's rehabilitative efforts, the judge no doubt was intimately familiar with this case and the prospects for petitioners' rehabilitation.

It is inconceivable to me that these procedures were "fundamentally unfair" to petitioners. Only by its obsessive

focus on the standard of proof and its almost complete disregard of the facts of this case does the majority find otherwise.[11] As the discussion above indicates, however, such a

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[11] The majority finds, without any reference to the facts of this case, that "numerous factors [in New York termination proceedings] combine to magnify the risk of erroneous factfinding." *Ante*, at 762. Among the factors identified by the majority are the "unusual discretion" of the Family Court judge "to underweigh probative facts that might favor the parent"; the often uneducated, minority status of the parents and their consequent "vulnerab[ility] to judgments based on cultural or class bias"; the "State's ability to assemble its case," which "dwarfs the parents' ability to mount a defense" by including an unlimited budget, expert attorneys, and "full access to all public records concerning the family"; and the fact that "natural parents have no 'double jeopardy' defense against repeated state" efforts, "with more or better evidence," to terminate parental rights "even when the parents have attained the level of fitness required by the State." *Ante*, at 762, 763, 764. In short, the majority characterizes the State as a wealthy and powerful bully bent on taking children away from defenseless parents. See *ante*, at 761–764. Such characterization finds no support in the record.

The intent of New York has been stated with eminent clarity: "the [S]tate's *first obligation* is to *help* the family with services to *prevent* its break-up or to *reunite* it if the child has already left home." SSL § 384–b.1.(a)(iii) (emphasis added). There is simply no basis in fact for believing, as the majority does, that the State does not mean what it says; indeed, the facts of this case demonstrate that New York has gone the extra mile in seeking to effectuate its declared purpose. See *supra*, at 781–785. More importantly, there should be no room in the jurisprudence of this Court for decisions based on unsupported, inaccurate assumptions.

A brief examination of the "factors" relied upon by the majority demonstrates its error. The "unusual" discretion of the Family Court judge to consider the " 'affectio[n] and concer[n]' " displayed by parents during visits with their children, *ante*, at 763, n. 12, is nothing more than discretion to consider reality; there is not one shred of evidence in this case suggesting that the determination of the Family Court was "based on cultural or class bias"; if parents lack the "ability to mount a defense," the State provides them with the full services of an attorney, FCA § 262, and they, like the State, have "full access to all *public* records concerning the family" (emphasis added); and the absence of "double jeopardy" protection simply recognizes the fact that family problems are often ongoing and may in the future

focus does not comport with the flexible standard of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

B

In addition to the basic fairness of the process afforded petitioners, the standard of proof chosen by New York clearly reflects a constitutionally permissible balance of the interests at stake in this case. The standard of proof "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J. concurring); *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). In this respect, the standard of proof is a crucial component of legal process, the primary function of which is "to minimize the risk of erroneous decisions."[12] *Greenholtz* v. *Nebraska*

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warrant action that currently is unnecessary. In this case the Family Court dismissed the first termination petition because it desired to give petitioners "the benefit of the doubt," Exhibit to Brief for Respondent Kramer 620, and a second opportunity to raise themselves to "an acceptable minimal level of competency as parents." *Id.*, at 624. It was their complete failure to do so that prompted the second, successful termination petition. See *supra*, at 781–784 and this page.

[12] It is worth noting that the significance of the standard of proof in New York parental termination proceedings differs from the significance of the standard in other forms of litigation. In the usual adjudicatory setting, the factfinder has had little or no prior exposure to the facts of the case. His only knowledge of those facts comes from the evidence adduced at trial, and he renders his findings solely upon the basis of that evidence. Thus, normally, the standard of proof is a crucial factor in the final outcome of the case, for it is the scale upon which the factfinder weighs his knowledge and makes his decision.

Although the standard serves the same function in New York parental termination proceedings, additional assurances of accuracy are present in its application. As was adduced at oral argument, the practice in New York is to assign one judge to supervise a case from the initial temporary removal of the child to the final termination of parental rights. Therefore,

Penal Inmates, 442 U. S., at 13. See also *Addington* v. *Texas*, *supra*, at 425; *Mathews* v. *Eldridge*, 424 U. S., at 344.

In determining the propriety of a particular standard of proof in a given case, however, it is not enough simply to say that we are trying to minimize the risk of error. Because errors in factfinding affect more than one interest, we try to minimize error as to those interests which we consider to be most important. As Justice Harlan explained in his well-known concurrence to *In re Winship:*

> "In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof

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as discussed above, the factfinder is intimately familiar with the case before the termination proceedings ever begin. Indeed, as in this case, he often will have been closely involved in protracted efforts to rehabilitate the parents. Even if a change in judges occurs, the Family Court retains jurisdiction of the case and the newly assigned judge may take judicial notice of all prior proceedings. Given this familiarity with the case, and the necessarily lengthy efforts which must precede a termination action in New York, decisions in termination cases are made by judges steeped in the background of the case and peculiarly able to judge the accuracy of evidence placed before them. This does not mean that the standard of proof in these cases can escape due process scrutiny, only that additional assurances of accuracy attend the application of the standard in New York termination proceedings.

> beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." 397 U. S., at 370–371.

When the standard of proof is understood as reflecting such an assessment, an examination of the interests at stake in a particular case becomes essential to determining the propriety of the specified standard of proof. Because proof by a preponderance of the evidence requires that "[t]he litigants . . . share the risk of error in a roughly equal fashion," *Addington* v. *Texas*, *supra*, at 423, it rationally should be applied only when the interests at stake are of roughly equal societal importance. The interests at stake in this case demonstrate that New York has selected a constitutionally permissible standard of proof.

On one side is the interest of parents in a continuation of the family unit and the raising of their own children. The importance of this interest cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley* v. *Illinois*, 405 U. S. 645, 651." *Lassiter* v. *Department of Social Services*, 452 U. S. 18, 27 (1981). In creating the scheme at issue in this case, the New York Legislature

was expressly aware of this right of parents "to bring up their own children." SSL § 384–b.1.(a)(ii).

On the other side of the termination proceeding are the often countervailing interests of the child.[13] A stable, loving

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[13] The majority dismisses the child's interest in the accuracy of determinations made at the factfinding hearing because "[t]he factfinding does not purport . . . to balance the child's interest in a normal family home against the parents' interest in raising the child," but instead "pits the State directly against the parents." *Ante*, at 759. Only "[a]fter the State has established parental unfitness," the majority reasons, may the court "assume . . . that the interests of the child and the natural parents do diverge." *Ante*, at 760.

This reasoning misses the mark. The child has an interest in the outcome of the factfinding hearing independent of that of the parent. To be sure, "the child and his parents share a vital interest in preventing *erroneous* termination of their natural relationship." *Ibid.* (emphasis added). But the child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error *in the factfinding hearing* that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child. See nn. 14, 15, *infra*.

The preponderance-of-the-evidence standard, which allocates the risk of error more or less evenly, is employed when the social disutility of error *in either direction* is roughly equal—that is, when an incorrect finding of fault would produce consequences as undesirable as the consequences that would be produced by an incorrect finding of *no* fault. Only when the disutility of error in one direction discernibly outweighs the disutility of error in the other direction do we choose, by means of the standard of proof, to reduce the likelihood of the more onerous outcome. See *In re Winship*, 397 U. S. 358, 370–372 (1970) (Harlan, J., concurring).

New York's adoption of the preponderance-of-the-evidence standard reflects its conclusion that the undesirable consequence of an erroneous finding of parental unfitness—the unwarranted termination of the family relationship—is roughly equal to the undesirable consequence of an erroneous finding of parental fitness—the risk of permanent injury to the child either by return of the child to an abusive home or by the child's continued lack of a permanent home. See nn. 14, 15, *infra*. Such a conclusion is well within the province of state legislatures. It cannot be said that the New York procedures are unconstitutional simply because a majority of the Members of this Court disagree with the New York Legislature's weighing of the interests of the parents and the child in an error-free factfinding hearing.

homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline. If the Family Court makes an incorrect factual determination resulting in a failure to terminate a parent-child relationship which rightfully should be ended, the child involved must return either to an abusive home[14] or to the often unstable world of foster care.[15] The reality of these

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[14] The record in this case illustrates the problems that may arise when a child is returned to an abusive home. Eighteen months after Tina, petitioners' oldest child, was first removed from petitioners' home, she was returned to the home on a trial basis. Katherine Weiss, a supervisor in the Child Protective Unit of the Ulster County Child Welfare Department, later testified in Family Court that "[t]he attempt to return Tina to her home just totally blew up." Exhibit to Brief for Respondent Kramer 135. When asked to explain what happened, Mrs. Weiss testified that "there were instances on the record in this court of Mr. Santosky's abuse of his wife, alleged abuse of the children and proven neglect of the children." *Ibid.* Tina again was removed from the home, this time along with John and Jed.

[15] The New York Legislature recognized the potential harm to children of extended, nonpermanent foster care. It found "that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens." SSL § 384–b.1.(b). Subsequent studies have proved this finding correct. One commentator recently wrote of "the lamentable conditions of many foster care placements" under the New York system even today. He noted: "Over fifty percent of the children in foster care have been in this 'temporary' status for more than two years; over thirty percent for more than five years. During this time, many children are placed in a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need." Besharov, State Intervention To Protect

risks is magnified by the fact that the only families faced with termination actions are those which have voluntarily surrendered custody of their child to the State, or, as in this case, those from which the child has been removed by judicial action because of threatened irreparable injury through abuse or neglect. Permanent neglect findings also occur only in families where the child has been in foster care for at least one year.

In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child." *Lassiter* v. *Department of Social Services*, 452 U. S., at 27.[16] Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1944). Thus, "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." *Id.*, at 165. See also *Ginsberg* v. *New York*, 390 U. S. 629, 640–641 (1968).

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a sta-

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Children: New York's Definition of "Child Abuse" and "Child Neglect," 26 N. Y. L. S. L. Rev. 723, 770–771 (1981) (footnotes omitted). In this case, petitioners' three children have been in foster care for more than four years, one child since he was only three days old. Failure to terminate petitioners' parental rights will only mean a continuation of this unsatisfactory situation.

[16] The majority's conclusion that a state interest in the child's well-being arises only after a determination of parental unfitness suffers from the same error as its assertion that the child has no interest, separate from that of its parents, in the accuracy of the factfinding hearing. See n. 13, *supra*.

ble, nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance-of-the-evidence standard of proof. See *Addington* v. *Texas*, 441 U. S., at 423. This is precisely the balance which has been struck by the New York Legislature: "It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption." SSL § 384–b.1.(b).

III

For the reasons heretofore stated, I believe that the Court today errs in concluding that the New York standard of proof in parental-rights termination proceedings violates due process of law. The decision disregards New York's earnest efforts to *aid* parents in regaining the custody of their children and a host of procedural protections placed around parental rights and interests. The Court finds a constitutional violation only by a tunnel-vision application of due process principles that altogether loses sight of the unmistakable fairness of the New York procedure.

Even more worrisome, today's decision cavalierly rejects the considered judgment of the New York Legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems. Accordingly, I dissent.

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 JANUARY 15 THROUGH MARCH 23, 1982

JANUARY 15, 1982

Miscellaneous Order

No. 81–1282. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL. D. C. Idaho; and

No. 81–1283. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL. C. A. 9th Cir. The parties are invited to file on or before Wednesday, January 20, 1982, responses to the suggestion of the Solicitor General that the Court vacate the judgment of the United States District Court for the District of Idaho on grounds of lack of ripeness, without further briefing or oral argument.

JANUARY 18, 1982

Appeals Dismissed

No. 80–1575. CRAIG ET AL. *v.* BICKEL ET AL.; and

No. 80–1624. LARSEN ET AL. *v.* VAN SLOOTEN. Appeals from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 410 Mich. 21, 299 N. W. 2d 704.

No. 81–600. HERNANDEZ *v.* CITY OF LAFAYETTE, LOUISIANA, ET AL. Appeal from Ct. App. La., 3d Cir., dismissed for want of substantial federal question. Reported below: 399 So. 2d 1179.

No. 81–961. VIGILANT INSURANCE CO. *v.* PITONIAK. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 104 Mich. App. 718, 305 N. W. 2d 305.

No. 81–1078. GELLER *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 663 F. 2d 1067.

Certiorari Granted—Vacated and Remanded

No. 80–1498. NATIONAL LABOR RELATIONS BOARD *v.* H & D, INC. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U. S. 404 (1982). Reported below: 665 F. 2d 257.

Miscellaneous Orders

No. A–570. WASHBURN *v.* WASHBURN. Super. Ct. D. C. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–583. MELIA *v.* UNITED STATES ET AL. C. A. 2d Cir. Application for recall and stay of mandate, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–617. UNITED STATES *v.* UNDETERMINED QUANTITIES OF ARTICLES OF DRUGS. Application for stay of the orders of the United States District Court for the Southern District of Florida, Case Nos. 80–6400–Civ–JLK and 80–6407–Civ–JLK, entered November 13, 1981, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending final disposition of the appeal to the United States Court of Appeals for the Eleventh Circuit.

No. D–255. IN RE DISBARMENT OF HOLMAN. It is ordered that James R. Holman, of Tempe, Ariz., 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–256. IN RE DISBARMENT OF DEFRANCIS. It is ordered that Frank D. DeFrancis, of Dayton, 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. 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, 451 U. S. 906.] Motion of Pullman-Standard to reconsider order denying motion for divided argument denied.

No. 80–1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 454 U. S. 812];

No. 80–2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812]; and

No. 80–2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812.] Motions of Council on Administrative Law of the Federal Bar Association, American Bar Association, and Philip Burton et al. for leave to file briefs as *amici curiae* granted.

No. 80–2043. BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, ET AL. *v.* PICO, BY HIS NEXT FRIEND, PICO, ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 891.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 80–2147. CONNECTICUT ET AL. *v.* TEAL ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 813.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 80–2150. FINNEGAN ET AL. *v.* LEU ET AL. C. A. 6th Cir. [Certiorari granted, 454 U. S. 813.] Motions of American Federation of Labor and Congress of Industrial Organizations and National Labor Law Center of the National Lawyers Guild for leave to file briefs as *amici curiae* granted.

No. 81–31. CALIFORNIA ET AL. *v.* GRACE BRETHREN CHURCH ET AL.;

No. 81–228. UNITED STATES ET AL. *v.* GRACE BRETHREN CHURCH ET AL.; and

No. 81–455. GRACE BRETHREN CHURCH ET AL. *v.* UNITED STATES ET AL. D. C. C. D. Cal. [Probable jurisdiction postponed, 454 U. S. 961.] Motion of the Solicitor General for divided argument granted.

No. 81–38. CRAWFORD ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 454 U. S. 892.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and additional time for oral argument is granted to be allotted as follows: Counsel for respondent, 20 minutes; and the Solicitor General, 15 minutes. Petitioners also allotted an additional five minutes for oral argument. Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81–55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 81–202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1030.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. Motion of petitioners for divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 81–244. LORETTO *v.* TELEPROMPTER MANHATTAN CATV CORP. ET AL. Ct. App. N. Y. [Probable jurisdiction noted, 454 U. S. 938.] Motion of the Attorney General of New York for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81–280. GENERAL BUILDING CONTRACTORS ASSN., INC. *v.* PENNSYLVANIA ET AL.;

No. 81–330. UNITED ENGINEERS & CONSTRUCTORS, INC. *v.* PENNSYLVANIA ET AL.;

No. 81–331. CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA ET AL. *v.* PENNSYLVANIA ET AL.;

No. 81–332. GLASGOW, INC. *v.* PENNSYLVANIA ET AL.; and

No. 81–333. BECHTEL POWER CORP. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 454 U. S. 939.] Motion of petitioner in No. 81–280 for divided argument and for additional time for oral argument granted, and an additional 15 minutes allotted for oral argument to be divided as follows: Counsel for petitioners in Nos. 81–280 and 81–331, 20 minutes; and counsel for petitioners in Nos. 81–330, 81–332, and 81–333, 25 minutes. Respondents also allotted an additional 15 minutes for oral argument. Motion of petitioners in Nos. 81–330, 81–331, 81–332, and 81–333 for divided argument and for additional time for oral argument denied.

No. 81–349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied. Motion of Multistate Tax Commission for leave to participate in oral argument as *amicus curiae* denied. Motion of appellees to reconsider order denying motion for additional time for oral argument denied. JUSTICE STEVENS and JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 81–447. CITY OF WICHITA FALLS, TEXAS, ET AL. *v.* STONE, 454 U. S. 1082. Motion of respondent for award of costs, damages, and related expenses denied.

No. 81–5761. IN RE WIDEMON. Petition for writ of mandamus denied.

No. 81–1098 (A–330). CENTRAL INTELLIGENCE AGENCY ET AL. *v.* HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY. C. A. D. C. Cir. Motion of respondent to modify the order entered by THE CHIEF JUSTICE on November 17, 1981, is granted, and the order is vacated insofar as it relates to the "35 congressionally generated documents." In all other respects, the order of THE CHIEF JUSTICE entered November 17, 1981, is continued pending this Court's final disposition of the petition for writ of certiorari.

No. 81–5612. IN RE BEACH;
No. 81–5859. IN RE KING; and
No. 81–5869. IN RE CLAYBORNE. Petitions for writs of habeas corpus denied.

No. 81–5880. IN RE PAUL. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 81–485. HILLSBORO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir.; and
No. 81–930. UNITED STATES *v.* BLISS DAIRY, INC. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 81–485, 641 F. 2d 529; No. 81–930, 645 F. 2d 19.

Certiorari Denied. (See also No. 81–1078, *supra.*)

No. 80–1499. COMMISSIONER OF INTERNAL REVENUE *v.* DELTA METALFORMING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 442.

No. 81–551. ZAMBUTO *v.* UNITED STATES;
No. 81–617. D'ANGELO *v.* UNITED STATES;
No. 81–754. VALLONE *v.* UNITED STATES; and
No. 81–805. TODISCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 667 F. 2d 255.

No. 81–649. COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 652 F. 2d 735.

No. 81–605. CITY OF LAFAYETTE *v.* HERNANDEZ. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 2d 1188.

No. 81–630. CRYAN, DBA DENTURIST-DENTURE LAB *v.* BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF OKLAHOMA. Sup. Ct. Okla. Certiorari denied. Reported below: 638 P. 2d 437.

No. 81–650. KULIK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–685. GRIEG *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 258, 640 F. 2d 1261.

No. 81–701. TAYLOR DIVING & SALVAGE CO., INC., ET AL. *v.* GASPARD. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 372.

No. 81–702. GOLDFIELD DEEP MINES COMPANY OF NEVADA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 1307.

No. 81–721. SCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 1145.

No. 81–722. OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 650 F. 2d 140.

No. 81–726. CHAGRA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 653 F. 2d 26.

No. 81–751. MANDELKORN ET AL. *v.* WARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 45.

No. 81–755. BURLINGTON NORTHERN INC. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 796.

No. 81–772. READER'S DIGEST ASSN., INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 662 F. 2d 955.

No. 81–775. NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND *v.* BUNNELL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 655 F. 2d 451.

No. 81–783. TECLAW *v.* WATT, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 207, 659 F. 2d 253.

No. 81–812. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1343.

No. 81–828. CRUDE CO. ET AL. *v.* UNITED STATES;
No. 81–936. GOSS ET AL. *v.* UNITED STATES;
No. 81–952. CORBITT *v.* UNITED STATES; and
No. 81–962. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 946.

No. 81–830. GIESEY *v.* DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 205, 659 F. 2d 251.

No. 81–849. SPRECHER *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 25.

No. 81–860. YAPALATER *v.* BATES, WESTCHESTER COUNTY COMMISSIONER OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 644 F. 2d 131.

No. 81–873. STRZELECKI ET AL. *v.* SWEATLOCK ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 292 Pa. Super. 565, 433 A. 2d 537.

No. 81–937. DEER PARK MEDICAL GROUP, P.A., MONEY PURCHASE PENSION PLAN *v.* WINCHELL. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1024.

No. 81–938. GRAY, TREASURER OF HARRIS COUNTY, TEXAS (KRIEGEL, SUCCESSOR IN OFFICE) *v.* VAN OOTEGHEM. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 304.

No. 81–941. D. W. BROWNING CONTRACTING CO. ET AL. *v.* NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 401, 655 F. 2d 1218.

No. 81–943. PRIME MOVERS, INC., ET AL. *v.* KENTUCKY BOARD OF ELECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1072.

No. 81–965. GUTTER *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 1194.

No. 81–967. MARGOLES *v.* JOHNS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 291.

No. 81–968. WITCO CHEMICAL CORP. ET AL. *v.* COTTEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 274.

No. 81–975. CHENG *v.* GAF CORP. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 899.

No. 81–977. SCHNEIDER TRANSPORT, INC. *v.* CATTANACH, SECRETARY, WISCONSIN DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 128.

No. 81–1006. VIBRANT SALES, INC. *v.* NEW BODY BOUTIQUE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 299.

No. 81–1083. SARCINELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 672 F. 2d 920.

No. 81–1094. KRETCHMAR ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 663 F. 2d 106.

No. 81–1102. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 655 F. 2d 580.

No. 81–1141. RIBOTSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 2d 23.

No. 81–5532. WHALEN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 434 A. 2d 1346.

No. 81–5540. STEPHENS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5567. LEONARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1074.

No. 81–5594. PIATT *v.* LOVETT ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 81–5605. LEONARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1074.

No. 81–5615. SPARKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 702.

No. 81–5736. LEE *v.* HARRIS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1060.

No. 81–5744. BUSH *v.* MUNCY, SUPERINTENDENT, POWHATAN CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 659 F. 2d 402.

No. 81–5747. POOLE *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 659 F. 2d 730.

No. 81–5750. BOAG *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 939.

No. 81–5751. WEAVER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 91 Ill. App. 3d 1197, 419 N. E. 2d 1274.

No. 81–5752. MCBROOM *v.* MCCARTHY. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 730.

No. 81–5753. MARTINEZ *v.* OHIO BUREAU OF EMPLOYMENT SERVICES. C. A. 5th Cir. Certiorari denied.

No. 81–5754. DUNBAR *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 406 So. 2d 227.

No. 81–5758. GRANT *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5760. PENNSYLVANIA EX REL. ZAPATA *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 494 Pa. 143, 430 A. 2d 1157.

No. 81–5762. GASTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 761, 443 N. Y. S. 2d 491.

No. 81–5763. HAMLIN *v.* WARREN. C. A. 4th Cir. Certiorari denied. Reported below: 664 F. 2d 29.

No. 81–5764. BRANNON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 620 S. W. 2d 321.

No. 81–5765. BRYANT *v.* DEFRANCIS, WARDEN, GEORGIA EARNED RELEASE CENTER, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 702.

No. 81–5768. WEST *v.* MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81–5769. DILLARD *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1039.

No. 81–5770. HILLIARD *v.* SIMPSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5824. BETHEA *v.* HANBERRY, WARDEN, ATLANTA FEDERAL PRISON. C. A. D. C. Cir. Certiorari denied.

No. 81–5854. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81–5860. CRENSHAW *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1328.

No. 81–5862. VANDETTI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81–5866. MORRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–5875. WINTER, AKA GOODHEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 749.

No. 81–5878. QUARRY *v.* GENERAL ACCOUNTING OFFICE. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 32, 661 F. 2d 253.

No. 81–5879. WARE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 408.

No. 81–5889. RYNDAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–604. CAMPAGNO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 402 So. 2d 1380.

No. 81–5890. SIMKO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 662 F. 2d 656.

No. 81–940. BURTON ET AL. *v.* CITY OF JACKSON, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 650 F. 2d 91.

No. 81–974. THEATRES WEST, INC., DBA WESTWORLD CINEMA, THEATRE DEAUVILLE, AND CINEMA WEST, ET AL. *v.* HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 648 F. 2d 1020.

No. 81–934. ARRINGTON, MAYOR OF BIRMINGHAM, ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA BRANCH, INC., ET AL. Sup. Ct. Ala. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 403 So. 2d 893.

Rehearing Denied

No. 81–5585. LUNZ *v.* JIMENEZ ET AL., 454 U. S. 1101; and

No. 81–5627. WILLIAMS *v.* UNITED STATES, 454 U. S. 1090. Petitions for rehearing denied.

No. 80–2074. WORRELL, DBA CHEROKEE HOMES APARTMENTS *v.* UNITED STATES, 454 U. S. 881. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81–500. WORRELL *v.* B. F. GOODRICH CO., 454 U. S. 969. Motion for leave to file petition for rehearing denied.

JANUARY 25, 1982

Affirmed on Appeal

No. 81–1031. TREEN ET AL. *v.* KAREN B. ET AL. Affirmed on appeal from C. A. 5th Cir. Reported below: 653 F. 2d 897.

Appeals Dismissed

No. 81–476. COHEN, CONSUMER ADVOCATE OF PENNSYLVANIA, ET AL. *v.* DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE STEVENS would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 494 Pa. 129, 430 A. 2d 1151.

No. 81–639. REGIRA ET AL. *v.* FALSETTA ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 405 So. 2d 825.

No. 81–840. PETERS *v.* SJOHOLM ET AL. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 95 Wash. 2d 871, 631 P. 2d 937.

No. 81–1002. CLEVELAND ELECTRIC ILLUMINATING CO. *v.* OFFICE OF CONSUMERS' COUNSEL ET AL. Sup. Ct. Ohio. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of a properly presented federal question. Reported below: 67 Ohio St. 2d 153, 423 N. E. 2d 820.

Certiorari Granted—Vacated and Remanded

No. 80–6725. LEGARE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Eddings* v. *Oklahoma*, *ante*, p. 104.

Miscellaneous Orders

No. ——. LOCAL 806, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL–CIO *v.* CATERPILLAR TRACTOR CO. ET AL. Motion of petitioner to direct the Clerk to file the petition for writ of certiorari denied.

No. A–574. AMIS *v.* UNITED STATES ET AL. D. C. M. D. Fla. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 80–1924. WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* ROSSI ET AL. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 813.] Motion of William V. Chappell, Jr., et al. for leave to file a brief as *amici curiae* granted.

No. A–610. LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSN., ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. D. C. S. D. N. Y. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.; 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.] Motion of petitioner in No. 80–951 for leave to file a supplemental brief after argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

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. [Certiorari granted, 451 U. S. 982.] Motion of Lowell P. Weicker, Jr., et al. to reconsider denial of leave to file a brief as *amici curiae* out of time denied.

No. A–593. CHING YEE *v.* SHINTAKU, JUDGE, ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 81–55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motions of Covenant House and Charles H. Keating, Jr., et al. for leave to file briefs as *amici curiae* granted.

No. 81–150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81–546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL. D. C. Minn. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of Commercial Law League of America for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81–225. BLUE SHIELD OF VIRGINIA ET AL. *v.* MCCREADY. C. A. 4th Cir. [Certiorari granted, 454 U. S. 962.] Motion of American Psychological Association for leave to file a brief as *amicus curiae* granted.

No. 81–341. GREENE ET AL. *v.* LINDSEY ET AL. C. A. 6th Cir. [Probable jurisdiction noted, 454 U. S. 938.] Motion of National Housing Law Project for leave to file a brief as *amicus curiae* granted.

No. 81–451. HATHORN ET AL. *v.* LOVORN ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1122.] Motion of the parties to dispense with printing the joint appendix denied.

No. 81–1112. MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. *v.* JOHNSON ET AL. C. A. 4th Cir. Motion of petitioners to expedite consideration of the petition for certiorari denied.

No. 81–349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 81–411. JACKSON TRANSIT AUTHORITY ET AL. *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL–CIO–CLC. C. A. 6th Cir. [Certiorari granted, 454 U. S. 1079.] Motions of Public Service Research Council, National Institute of Municipal Law Officers, and American Public Transit Association for leave to file briefs as *amici curiae* granted.

No. 81–420. MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* LONBERGER. C. A. 6th Cir. [Certiorari granted, 454 U. S. 1141.] Motion for appointment of counsel granted, and it is ordered that John Czarnecki, Esquire, of Toledo, Ohio, be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Noted or Postponed

No. 81–708. CITY OF PORT ARTHUR, TEXAS *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Motion of appellees Jenkins and Douglas for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

No. 81–750. FIDELITY FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* DE LA CUESTA ET AL. Appeal from Ct. App. Cal., 4th App. Dist. Probable jurisdiction noted. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 121 Cal. App. 3d 328, 175 Cal. Rptr. 467.

No. 81–1282. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL.; and

No. 81–1312. CARMEN, ADMINISTRATOR OF GENERAL SERVICES *v.* IDAHO ET AL. Appeals from D. C. Idaho. Motion of appellants in No. 81–1282 to expedite consideration of the jurisdictional statement granted. The motion, in all other respects including the request to expedite plenary consideration, is denied. Motion of Democratic National Committee for leave to file a brief as *amicus curiae* in No. 81–1282 granted. Motions for leave to file briefs as *amici curiae* in Nos. 81–1282 and 81–1283 by the following are granted: American Federation of Labor and Congress of Industrial Organizations et al.; Thomas P. O'Neill, Jr., et al.; Jake Garn et al.; Joseph E. Brennan, Governor of Maine, et al.; American Bar Association; and ERAmerica et al. Motion of Charles Robb, Governor of Virginia, et al. for leave to join the motion of Joseph E. Brennan, Governor of Maine, et al. in Nos. 81–1282 and 81–1283 is granted. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. The cases are consolidated with Nos. 81–1283 and 81–1313, *infra*. The judgment of the United States District Court for the District of Idaho is stayed pending the sending down of the judgment of this Court. Reported below: 529 F. Supp. 1107.

Certiorari Granted

No. 81–1283. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* IDAHO ET AL.; and

No. 81–1313. CARMEN, ADMINISTRATOR OF GENERAL SERVICES *v.* IDAHO ET AL. C. A. 9th Cir. Motion of petitioners in No. 81–1283 to expedite consideration of the petition for writ of certiorari before judgment granted. The motion, in all other respects including the request to expedite plenary consideration, is denied. Certiorari before judgment granted, and cases consolidated with Nos. 81–1282 and 81–1312, *supra*. The judgment of the United States District Court for the District of Idaho is stayed pending the sending down of the judgment of this Court.

No. 81–1003. WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: 384 Mass. 466, 425 N. E. 2d 346.

Certiorari Denied. (See also Nos. 81–476 and 81–840, *supra.*)

No. 81–423. ALANDER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 402 So. 2d 620.

No. 81–644. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 328.

No. 81–718. SUMNER ET UX. *v.* SHEPPARD. Sup. Ct. Kan. Certiorari denied. Reported below: 230 Kan. 146, 630 P. 2d 1121.

No. 81–762. ESTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 181.

No. 81–779. HOLLAND *v.* SEA-LAND SERVICE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 655 F. 2d 556.

No. 81–781. SEA-LAND SERVICE, INC., ET AL. *v.* ALASKA RAILROAD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 197, 659 F. 2d 243.

No. 81–796. ANDREWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–814. CADY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 290.

No. 81–856. SCHRIEVER *v.* UNITED STATES; and
No. 81–870. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 652 F. 2d 1000.

No. 81–877. ZWEGO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 657 F. 2d 248.

No. 81–886. SAILORS' UNION OF THE PACIFIC, AFL–CIO *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–910. MURPHY, SHERIFF OF OSCEOLA COUNTY, ET AL. *v.* ADAMS. C. A. 11th Cir. Certiorari denied. Reported below: 653 F. 2d 224.

No. 81–921. KESSINGER ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 81–923. TANT, T/A SUPER DUPER FOOD STORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 656 F. 2d 961.

No. 81–945. SCOLES, DBA COLLEGE EXXON SERVICE STATION *v.* DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 16.

No. 81–954. FIRST PENTECOSTAL CHURCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1070.

No. 81–971. WYNN OIL CO. *v.* SOUTHERN UNION EXPLORATION CO. Ct. App. N. M. Certiorari denied. Reported below: 95 N. M. 594, 624 P. 2d 536.

No. 81–976. LOWE *v.* OHIO STATE BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 2d 335, 423 N. E. 2d 867.

No. 81–978. GLITSCH, INC. *v.* JONES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 698.

No. 81–988. COMMODORE BUSINESS MACHINES, INC., ET AL. *v.* MCDONNELL DOUGLAS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 1309.

No. 81–997. CHARLTON *v.* CORTEZ DEVELOPMENT CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–1007. LEKTRO-VEND CORP. ET AL. *v.* VENDO CO. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 255.

No. 81–1009. AUBURN NEWS CO., INC., ET AL. *v.* PROVIDENCE JOURNAL CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 659 F. 2d 273.

No. 81–1013. JOHNSON *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (BANK OF AMERICA ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–1018. VORBECK ET AL. *v.* SCHICKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 660 F. 2d 1260.

No. 81–1025. WATTS ET AL. *v.* COOK ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 402 So. 2d 324.

No. 81–1053. COUF ET AL. *v.* DEBLAKER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 652 F. 2d 585.

No. 81–1057. BARNES, SHERIFF OF WASHINGTON COUNTY, OREGON *v.* CARDEN. Sup. Ct. Ore. Certiorari denied. Reported below: 291 Ore. 515, 635 P. 2d 341.

No. 81–1072. HARPER *v.* BARNES GROUP, INC. C. A. 11th Cir. Certiorari denied. Reported below: 653 F. 2d 175.

No. 81–1117. RUFENACHT ET AL. *v.* IOWA BEEF PROCESSORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 198.

No. 81–1125. SEDIGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 1010.

No. 81–1147. LERMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 786.

No. 81–1165. LEADER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1332.

No. 81–1169. DEARMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81–1199. HUGHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 2d 317.

No. 81–5519. AYERS *v.* COLLINS, WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 1022.

No. 81–5576. PALMER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 401 So. 2d 266.

No. 81–5604. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 632 P. 2d 79.

No. 81–5624. ARNOLD *v.* MARSHALL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 83.

No. 81–5629. MURTISHAW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 29 Cal. 3d 733, 631 P. 2d 446.

No. 81–5648. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 81–5670. GOMEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81–5694. CRICK *v.* SMITH, WARDEN, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 650 F. 2d 860.

No. 81–5708. MAZYAK ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 650 F. 2d 788.

No. 81–5713. CORTEZ, AKA CORTEZ-ESPINOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1253.

No. 81–5721. MCCLENDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–5746. YAZZIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 422.

No. 81–5771. WINTERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 288, 422 N. E. 2d 972.

No. 81–5774. VASQUEZ-GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 628.

No. 81–5775. JILES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 194.

No. 81–5776. ANTONELLI *v.* OLD REPUBLIC INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1077.

No. 81–5778. KELLY *v.* OKLAHOMA PARDON AND PAROLE BOARD ET AL. Ct. Crim. App. Okla. Certiorari denied. Reported below: 637 P. 2d 858.

No. 81–5781. BENNETT *v.* FORD MOTOR CO. C. A. 6th Cir. Certiorari denied.

No. 81–5782. CHICCO *v.* PECK ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5785. MCINTYRE *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 81–5791. AMIR *v.* SACRED HEART HOSPITAL. C. A. 3d Cir. Certiorari denied.

No. 81–5796. BROMWELL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 445 A. 2d 334.

No. 81–5797. EVANS *v.* REED ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 498.

No. 81–5798. JOHNSON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5800. MOORE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 295.

No. 81–5803. PHILLIPS ET AL. *v.* PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 554.

No. 81–5804. RENEER *v.* SMITH, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1073.

No. 81–5805. CHICCO *v.* CITY OF NEW BEDFORD ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–5806. PLEASANT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 972, 430 N. E. 2d 905.

No. 81–5808. TINKLE *v.* UNITED STATES; and
No. 81–5913. GARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 617.

No. 81–5809. SCOTT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 404 So. 2d 1255.

No. 81–5811. CUNNINGHAM *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 655 F. 2d 98.

No. 81–5814. GOETZ *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 312 N. W. 2d 1.

No. 81–5816. MOYE *v.* BARNES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 500.

No. 81–5818. SHABAZZ *v.* MAYNARD, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 81–5819. PENOYER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION. C. A. 11th Cir. Certiorari denied.

No. 81–5821. ALFORD *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 497.

No. 81–5825. HAWKINS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 280 S. E. 2d 222.

No. 81–5829. SPRADLIN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 160 Ga. App. 132, 286 S. E. 2d 310.

No. 81–5835. KRUPP *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 88 N. J. 476, 443 A. 2d 695.

No. 81–5842. MOSS *v.* POLLAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 698.

No. 81–5843. MYERS *v.* JOHNSTON ET AL. C. A. 2d Cir. Certiorari denied.

No. 81–5850. WATSON *v.* BUSBEE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81–5851. WATSON *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1077.

No. 81–5856. REDDISH *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81–5881. FODDRELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 493.

No. 81–5891. BEST *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 881, 442 N. Y. S. 2d 109.

No. 81–5909. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 914.

No. 81–5911. TODD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 212.

No. 81–5915. POOL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81–5916. TORRES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1012.

No. 81–5918. HOLLINGSHEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81–5923. GREATHOUSE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 655 F. 2d 1032.

No. 81–5932. MYRICK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 1328.

No. 81–5933. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81–5945. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 612.

No. 81–5948. RAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81–5950. GAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 498.

No. 80–6843. HIGH *v.* GEORGIA. Sup. Ct. Ga.;

No. 81–5628. ROACH *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C.;

No. 81–5687. COPPOLA *v.* WARDEN, VIRGINIA STATE PENITENTIARY. Sup. Ct. Va.;

No. 81–5749. MORGAN *v.* MONTGOMERY, WARDEN, GEORGIA STATE PRISON. Sup. Ct. Ga.; and

No. 81–5801. WALLACE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 80–6843, 247 Ga. 289, 276 S. E. 2d 5; No. 81–5687, 222 Va. 369, 282 S. E. 2d 10; No. 81–5801, 248 Ga. 255, 282 S. E. 2d 325.

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.

No. 81–347. MICHIGAN *v.* DUGAN. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 102 Mich. App. 497, 302 N. W. 2d 209.

No. 81–1067. SMITH'S MOVING & TRUCKING CO. ET AL. *v.* SVENDSEN. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 54 N. Y. 2d 865, 429 N. E. 2d 411.

No. 81–1131. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* SELLERS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 651 F. 2d 1074.

No. 81–811. AMERICAN BRIDGE DIVISION, UNITED STATES STEEL CORP. *v.* ALFORD ET AL. C. A. 5th Cir. Motion of Kaiser Aluminum & Chemical Sales, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 642 F. 2d 807 and 655 F. 2d 86.

No. 81–711. MESA PETROLEUM CO. *v.* KANSAS POWER & LIGHT CO., INC., ET AL. Sup. Ct. Kan. Motions of Kansas Independent Oil & Gas Association et al. and Legal Foundation of America for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 229 Kan. 631, 629 P. 2d 190, and 230 Kan. 166, 630 P. 2d 1129.

No. 81–973. UNITED STATES *v.* DAHLSTRUM. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR would grant certiorari and summarily reverse the judgment. Reported below: 655 F. 2d 971.

No. 81–1043. FEDERAL PRESCRIPTION SERVICE, INC., ET AL. *v.* AMERICAN PHARMACEUTICAL ASSN. C. A. D. C. Cir. Motion of National Association of Mail Service Pharmacies for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 214 U. S. App. D. C. 76, 663 F. 2d 253.

No. 81–5899. GATES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 80–848. PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL., 454 U. S. 235; and

No. 80–883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL., 454 U. S. 235. Petition for rehearing denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81–5186. SALAMA *v.* VIRGINIA ET AL., 454 U. S. 874. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 80–2049. RALSTON, WARDEN *v.* ROBINSON, 454 U. S. 201;

No. 80–6692. BUSBEE *v.* TEXAS, 454 U. S. 1074;

No. 81–16. CALDWELL ET AL. *v.* MISSOURI ET AL., 454 U. S. 1081;

No. 81–204. ROBERTS *v.* UNITED STATES, 454 U. S. 1031;

No. 81–217. MORGAN *v.* UNITED STATES, 454 U. S. 1031;

No. 81–274. ZAVALA-PIZANO *v.* UNITED STATES, 454 U. S. 1031;

No. 81–427. DAVIS *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 454 U. S. 942;

No. 81–589. MCCLUNEY *v.* JOS. SCHLITZ BREWING CO., 454 U. S. 1071;

No. 81–780. ACKERMAN ET AL. *v.* NATIONAL BUREAU OF STANDARDS ET AL., 454 U. S. 1086;

No. 81–5441. BROWN *v.* NEW YORK, 454 U. S. 1126;

No. 81–5478. HARDY *v.* GEORGIA, 454 U. S. 1114;

No. 81–5504. GALIS *v.* WAINWRIGHT, SECRETARY OF THE DEPARTMENT OF OFFENDER REHABILITATION, ET AL., 454 U. S. 1088; and

No. 81–5545. WEBB *v.* ALBERTO-CULVER CO., INC., 454 U. S. 1089. Petitions for rehearing denied.

No. 80–812. MESCALERO APACHE TRIBE *v.* O'CHESKEY, COMMISSIONER OF REVENUE OF NEW MEXICO, ET AL., 450 U. S. 959. Motion for leave to file petition for rehearing denied.

JANUARY 29, 1982

Dismissal Under Rule 53

No. 81–864. L/P/G BENGHAZI ET AL. *v.* VELIBOR ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 653 F. 2d 812.

FEBRUARY 9, 1982

Dismissal Under Rule 53

No. 81–625. MISSOURI *v.* MCGEE [and other cases under this Court's Rule 19.4]. Sup. Ct. Mo. Certiorari dismissed as to Bobby Joe McGee under this Court's Rule 53. Reported below: 619 S. W. 2d 70.

FEBRUARY 18, 1982

Dismissal Under Rule 53

No. 81–924. J. P. STEVENS EMPLOYEES EDUCATION COMMITTEE ET AL. *v.* DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 669 F. 2d 171.

FEBRUARY 19, 1982

Appeal Dismissed

No. ———. HALDEMAN, TRUSTEE OF LEHIGH VALLEY RAILROAD CO. *v.* UNITED STATES RAILWAY ASSN. ET AL. Appeal from Sp. Ct. R. R. R. A. dismissed without prejudice, it appearing that the appeal would not be in the interest of an expeditious conclusion to the proceedings.

FEBRUARY 22, 1982

Appeals Dismissed

No. 81–1028. WILLIAMS *v.* WILLIAMS. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question. Reported below: 121 N. H. 728, 433 A. 2d 1316.

No. 81–1048. RAZATOS *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 636 P. 2d 666.

No. 81–1104. S. H. GOSS, INC., ET AL. *v.* PENNSYLVANIA DEPARTMENT OF AGRICULTURE. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. Reported below: 58 Pa. Commw. 516, 428 A. 2d 731.

No. 81–1164. HEIN *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., San Diego County, dismissed for want of substantial federal question.

No. 81–5943. BIXBY *v.* ROSS. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of substantial federal question.

No. 81–6012. CEPULONIS *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 384 Mass. 495, 427 N. E. 2d 17.

No. 81–1041. STAN MUSIAL & BIGGIES, INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of jurisdiction. Reported below: 402 So. 2d 1330.

No. 81–1183. SOUTHERN STATE COLLEGE ET AL. *v.* ARKANSAS GAZETTE 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: 273 Ark. 248, 620 S. W. 2d 258.

No. 81–5967. ROBINSON, BY HIS MOTHER AND NEXT FRIEND, ROBINSON *v.* ARMAND ET AL. Appeal from D. C. N. D. Ill. 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. 81–723. HYBUD EQUIPMENT CORP. ET AL. *v.* CITY OF AKRON, OHIO, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Community Communications Co.* v. *Boulder*, *ante*, p. 40. Reported below: 654 F. 2d 1187.

No. 81–843. NORTHWEST EXCAVATING, INC. *v.* WAGGONER ET AL., TRUSTEES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kaiser Steel Corp.* v. *Mullins*, *ante*, p. 72. Reported below: 642 F. 2d 333.

Miscellaneous Orders

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. Report of the Special Master on the Equitable Apportionment of the Vermejo River is 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.*, 449 U. S. 1007.]

No. 85, Orig. TEXAS *v.* OKLAHOMA. Report of the Special Master on motion for entry of judgment is received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 30 days. Reply briefs, if any, to such Exceptions may be filed within 15 days. [For earlier order herein, see, *e. g.*, 452 U. S. 957.]

No. 78–1545. ZIPES ET AL. *v.* TRANS WORLD AIRLINES, INC.; 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.] Motion of respondent Trans World Airlines, Inc., for leave to file a supplemental brief after argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 80–644. G. D. SEARLE & CO. *v.* COHN ET AL. C. A. 3d Cir. [Certiorari granted, 451 U. S. 905.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 80–1002. BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, ET AL. *v.* ROWLEY, BY HER PARENTS, ROWLEY ET UX. C. A. 2d Cir. [Certiorari granted, 454 U. S. 961.] Motion of respondents to permit interpretation of oral argument granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–1012. RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL.;

No. 80–1030. BOHEMIAN DISTRIBUTING CO. *v.* NORMAN WILLIAMS CO. ET AL.; and

No. 80–1052. WINE & SPIRITS WHOLESALERS OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL. Ct. App. Cal., 3d App. Dist. [Certiorari granted, 454 U. S. 1080.] Motion of petitioners Bohemian Distributing Co. and Wine & Spirits Wholesalers of California for divided argument granted. Motion of petitioner Baxter Rice for divided argument granted.

No. 80–1305. ALFRED L. SNAPP & SON, INC., ET AL. *v.* PUERTO RICO EX REL. QUIROS, SECRETARY OF LABOR AND HUMAN RESOURCES. C. A. 4th Cir. [Certiorari granted, 454 U. S. 1079.] Motion of the Attorney General of New York for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 80–1952. BLUM, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* YARETSKY ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 815.] Motion of National Citizens' Coalition for Nursing Home Reform for leave to file a brief as *amicus curiae* granted.

No. 80–2070. SUMITOMO SHOJI AMERICA, INC. *v.* AVAGLIANO ET AL.; and

No. 81–24. AVAGLIANO ET AL. *v.* SUMITOMO SHOJI AMERICA, INC. C. A. 2d Cir. [Certiorari granted, 454 U. S. 962.] Motion of Ministry of International Trade and Industry of the Government of Japan for leave to file a brief as *amicus curiae* granted.

No. 80–2116. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 454 U. S. 1030 and 1096.] Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument *pro hac vice* granted.

No. 80–2162. RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. *v.* BUREAU OF REVENUE OF NEW MEXICO. Ct. App. N. M. [Probable jurisdiction noted, 454 U. S. 1079.] Motions of Navajo Tribe of Indians, Association on American Indian Affairs, Inc., and Pueblo of Santa Ana for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–9. WASHINGTON ET AL. *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL. C. A. 9th Cir. [Probable jurisdiction noted, 454 U. S. 890.] Motion of NAACP Legal Defense and Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 81–55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motion of Covenant House for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81–150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81–546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL. D. C. Minn. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of the Solicitor General for divided argument granted. Request for additional time for oral argument denied.

No. 81–202. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1030.] Motion of petitioners to reconsider order denying motion for divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 81–298. COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA *v.* GOTTFRIED ET AL.; and

No. 81–799. FEDERAL COMMUNICATIONS COMMISSION *v.* GOTTFRIED ET AL. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 1141.] Motion of the Solicitor General to consolidate these cases for briefing and oral argument granted.

No. 81–389. UNION LABOR LIFE INSURANCE CO. *v.* PIRENO; and

No. 81–390. NEW YORK STATE CHIROPRACTIC ASSN. *v.* PIRENO. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1052.] Motion of petitioners for divided argument denied.

No. 81–406. MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN. C. A. 5th Cir. [Certiorari granted, 454 U. S. 962.] Motion of National Women's Law Center et al. for leave to file a brief as *amici curiae* granted.

No. 81–431. GUARDIANS ASSN. ET AL. *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1140.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–554. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* WYOMING ET AL. D. C. Wyo. [Probable jurisdiction noted, 454 U. S. 1140.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–451. HATHORN ET AL. *v.* LOVORN ET AL. Sup. Ct. Miss. [Certiorari granted, 454 U. S. 1122.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–613. SPORHASE ET AL. *v.* NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL. Sup. Ct. Neb. [Probable jurisdiction noted, 454 U. S. 1079.] Motion of appellants and City of El Paso for divided argument to permit City of El Paso to present oral argument as *amicus curiae* denied.

No. 81–460. MIDDLESEX COUNTY ETHICS COMMITTEE *v.* GARDEN STATE BAR ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, 454 U. S. 962.] Motions of American Civil Liberties Union, NAACP Legal Defense and Educational Fund, Inc., et al., and National Alliance Against Racist and Political Repression for leave to file briefs as *amici curiae* granted. Motion of respondents to dismiss the writ of certiorari as improvidently granted denied.

No. 81–535. UNITED STATES DEPARTMENT OF STATE ET AL. *v.* WASHINGTON POST CO. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 1030.] Motion of respondent to dismiss the writ of certiorari as improvidently granted denied.

No. 81–837. CITY OF INDIANOLA, MISSISSIPPI, ET AL. *v.* DOTSON ET AL. D. C. N. D. Miss.;

No. 81–839. SKLAR ET AL. *v.* SHORES, EXECUTOR. C. A. 5th Cir.;

No. 81–982. FIRST NATIONAL BANK OF BOSTON (INTERNATIONAL) *v.* BANCO NACIONAL DE CUBA. C. A. 2d Cir.;

No. 81–984. FIRST NATIONAL CITY BANK *v.* BANCO PARA EL COMERCIO EXTERIOR DE CUBA. C. A. 2d Cir.; and

No. 81–1097. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 81–920. VERLINDEN B. V. *v.* CENTRAL BANK OF NIGERIA. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1140.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 81–969. WASHINGTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of Multistate Tax Commission for leave to file a brief as *amicus curiae* granted.

No. 81–5976. IN RE BALLA. Petition for writ of habeas corpus denied.

No. 81–5321. ENMUND *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, 454 U. S. 939.] Motion of George R. Georgieff to permit Lawrence A. Kaden, Esquire, to present oral argument *pro hac vice* granted. Motion of William C. McLain to permit James S. Liebman, Esquire, to present oral argument *pro hac vice* granted.

No. 81–5900. IN RE TALLEY. Petition for writ of mandamus denied.

No. 81–1105. IN RE HOEHN. Petition for writ of mandamus and/or other relief denied.

No. 81–1119. IN RE ELLIS ET AL. Petition for writ of prohibition and/or other relief denied.

Certiorari Granted

No. 81–897. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* PERINI NORTH RIVER ASSOCIATES ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 652 F. 2d 255.

No. 81–1055. POYTHRESS, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* DUNCAN ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 657 F. 2d 691.

No. 81–1064. CITY OF LOS ANGELES *v.* LYONS. C. A. 9th Cir. Certiorari granted. Reported below: 656 F. 2d 417.

No. 81–1203. MOSES H. CONE MEMORIAL HOSPITAL *v.* MERCURY CONSTRUCTION CORP. C. A. 4th Cir. Certiorari granted. Reported below: 656 F. 2d 933 and 664 F. 2d 936.

No. 81–927. CONNECTICUT *v.* JOHNSON. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 185 Conn. 163, 440 A. 2d 858.

Certiorari Denied. (See also Nos. 81–1183 and 81–5967, *supra.*)

No. 80–2079. RENO, STATE ATTORNEY OF DADE COUNTY, FLORIDA, ET AL. *v.* CONCERNED DEMOCRATS OF FLORIDA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 629.

No. 81–286. COEN ET AL. *v.* HARRISON COUNTY SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 24.

No. 81–291. ILLINOIS *v.* BOCHNIAK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 575, 417 N. E. 2d 722.

No. 81–433. COOPERS & LYBRAND *v.* SHARP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 175.

No. 81–586. DIAMOND M CO. *v.* RAINES ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 396 So. 2d 306.

No. 81–664. STODDARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–729. LADMER *v.* UNITED STATES; and
No. 81–730. DILAPI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 651 F. 2d 140.

No. 81–742. SUGGS *v.* ALABAMA; and
No. 81–761. SUGGS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: No. 81–742, 403 So. 2d 309; No. 81–761, 403 So. 2d 303.

No. 81–748. THOREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1332.

No. 81–763. KATZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 1184.

No. 81–756. BANK OF MIAMI ET AL. *v.* MEASON ET AL.; and BANK OF MIAMI, FORMERLY KNOWN AS NORTHSIDE BANK, ET AL. *v.* MEASON. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 542 (first case); 654 F. 2d 722 (second case).

No. 81–788. GERARD ET AL. *v.* LOUISIANA. 24th Jud. Dist. Ct. La., Jefferson Parish. Certiorari denied.

No. 81–815. SHAMY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 656 F. 2d 951.

No. 81–841. E. L. WIEGAND DIVISION, EMERSON ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 650 F. 2d 463.

No. 81–846. TAVELMAN *v.* UNITED STATES; and
No. 81–944. JOB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1133.

No. 81–859. RUCINSKI ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 658 F. 2d 741.

No. 81–863. J. R. SIMPLOT CO. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U. S. DEPARTMENT OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 1134.

No. 81–867. YOUNG, MAYOR OF DETROIT, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 617.

No. 81–881. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY CO. *v.* LEER. Sup. Ct. Minn. Certiorari denied. Reported below: 308 N. W. 2d 305.

No. 81–890. RAPIDES PARISH SCHOOL BOARD ET AL. *v.* VALLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 925 and 653 F. 2d 941.

No. 81–892. GOINS ET AL. *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 62.

No. 81–895. SEREGOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 655 F. 2d 33.

No. 81–901. WEIGAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 948.

No. 81–902. 400 E. BALTIMORE STREET, INC., ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 147, 431 A. 2d 682.

No. 81–911. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 777.

No. 81–915. PERMANENT LABEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 512.

No. 81–925. MAINE CATERERS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 654 F. 2d 131.

No. 81–932. OSTRER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 910.

No. 81–939. RAMSEY ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 171.

No. 81–949. BLACKIE'S HOUSE OF BEEF, INC. *v.* CASTILLO, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 327, 659 F. 2d 1211.

No. 81–963. FRIENDLY RETIREMENT CENTER, INC. *v.* COLLING, SUCCESSOR TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 1249.

No. 81–979. TABCOR SALES CLEARING, INC., ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81–981. DEMA ET AL. *v.* INTERNAL REVENUE SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81–985. MORRONE *v.* UNITED STATES; and TURCHI *v.* UNITED STATES; and
No. 81–5874. KESTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–999. HAWG-N-ACTION, INC. *v.* TRUSTEES OF THE TEAMSTERS CONSTRUCTION WORKERS LOCAL NO. 13 HEALTH & WELFARE TRUST FUND FOR COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 651 F. 2d 1384.

No. 81–1016. AKERS *v.* UNITED STATES; and
No. 81–1017. KENDALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 199.

No. 81–1021. ZINSER ET AL. *v.* PALMBY ET AL.; and
No. 81–1036. CLEVELAND *v.* PALMBY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 754.

No. 81–1023. LOCAL 359, UNITED SEAFOOD WORKERS, SMOKED FISH & CANNERY UNION *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81–1026. RUPPERT *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 81–1037. ISRAEL & RALEY *v.* FUTURONICS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 655 F. 2d 463.

No. 81–1040. JACOB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 657 F. 2d 49.

No. 81–1042. CLEMENTS ET AL. *v.* LOGAN. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 1007.

No. 81–1045. FENNER ET UX. *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 647.

No. 81–1051. WEAVER *v.* BOWERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 1356.

No. 81–1054. BP OIL, INC., ET AL. *v.* BANKERS TRUST CO. ET AL.;

No. 81–1065. VILLANEUVA COMPANIA NAVIERA, S.A. *v.* BANKERS TRUST CO. ET AL.; and

No. 81–1082. BANKERS TRUST CO. ET AL. *v.* VILLANEUVA COMPANIA NAVIERA, S.A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 651 F. 2d 160.

No. 81–1058. MORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81–1059. WEINSTEIN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 2d 1369.

No. 81–1061. GANLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 733.

No. 81–1070. WOOD, DBA NATIONAL PHOTO SERVICES *v.* MCEWEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 644 F. 2d 797.

No. 81–1073. MOYER *v.* ELDER-BEERMAN STORES CORP. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1072.

No. 81–1074. MIDWEST GROWERS COOPERATIVE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1141.

No. 81–1075. SHERROD *v.* MEYERS ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 81–1079. NORTHEASTERN TELEPHONE CO. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 651 F. 2d 76.

No. 81–1080. BLOCH *v.* VETERAN CORPS OF ARTILLERY, STATE OF NEW YORK, CONSTITUTING THE MILITARY SOCIETY OF THE WAR OF 1812. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 829, 427 N. E. 2d 1193.

No. 81–1085. SANGIACOMO ET AL. *v.* ZIGAS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 120 Cal. App. 3d 827, 174 Cal. Rptr. 806.

No. 81–1088. EMI LTD. *v.* BENNETT ET AL.; and
No. 81–1177. CAPITOL INDUSTRIES-EMI, INC. *v.* BENNETT ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 81–1092. WILLIAMS ET AL. *v.* GENERAL MOTORS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 656 F. 2d 120.

No. 81–1093. GOMEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 632 P. 2d 586.

No. 81–1096. EUBANK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81–1100. MERSKI *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 121 N. H. 901, 437 A. 2d 710.

No. 81–1107. HERZOG ET UX. *v.* ENDECO, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 661 F. 2d 1184.

No. 81–1111. JOHNS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 2d 325, 423 N. E. 2d 863.

No. 81–1112. MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari before judgment denied.

No. 81–1121. ST. MARTIN *v.* HEGEWALD ET UX. Ct. App. Wash. Certiorari denied. Reported below: 28 Wash. App. 783, 626 P. 2d 535.

No. 81–1122. FARMER *v.* STRICKLAND, SHERIFF OF PIERCE COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 652 F. 2d 427.

No. 81–1124. GREAT AMERICAN SCREEN, AKA BE-DOWN HOME DESIGNS, ET AL. *v.* MUSIDOR, B.V., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 60.

No. 81–1128. J. RAY MCDERMOTT & CO., INC. *v.* SIGNAL OIL & GAS CO. ET AL.; and

No. 81–1150. SUN OIL CO. ET AL. *v.* SIGNAL OIL & GAS CO. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 1164.

No. 81–1129. MITCHELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 95 Ill. App. 3d 779, 420 N. E. 2d 415.

No. 81–1130. COMAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1204, 420 N. E. 2d 1210.

No. 81–1136. MESSENGER ET UX. *v.* BUCYRUS-ERIE CO. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 903.

No. 81–1137. ALIOTO'S FISH CO., LTD., ET AL. *v.* HUMAN RIGHTS COMMISSION OF SAN FRANCISCO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 120 Cal. App. 3d 594, 174 Cal. Rptr. 763.

No. 81–1138. CONNECTICUT *v.* SMITH. Super. Ct. Conn., New Haven County. Certiorari denied.

No. 81–1140. EAST COAST TENDER SERVICE, INC. *v.* DUTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 2d 933.

No. 81–1145. COOPER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 222, 422 N. E. 2d 885.

No. 81–1146. RICHARDSON, ADMINISTRATOR *v.* CITY OF INDIANAPOLIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 494.

No. 81–1148. BUTLER ET AL. *v.* UNITED STATES; and
No. 81–1237. ANGELILLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 2d 23.

No. 81–1149. SLIGER ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 316, 282 S. E. 2d 291.

No. 81–1151. STEWART *v.* KUTNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1107.

No. 81–1153. TOOKES *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 159 Ga. App. 423, 283 S. E. 2d 642.

No. 81–1155. BADGETT *v.* ERSPAN. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 2d 550 and 659 F. 2d 26.

No. 81–1156. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 256, 659 F. 2d 1140.

No. 81–1159. BASZNER *v.* UNITED STATES; and
No. 81–1353. CAGGIANO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 660 F. 2d 184.

No. 81–1158. McDANIEL ET AL. *v.* HELMS. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 800.

No. 81–1160. STROUP *v.* TUCKER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1077.

No. 81–1162. CROWN PAINT CO. *v.* BANKSTON. Sup. Ct. Okla. Certiorari denied. Reported below: 640 P. 2d 948.

No. 81–1163. McCUTCHEON *v.* CHICAGO BOARD OF EDUCATION ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–1166. JACQUES SYL KNITWEAR, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 904.

No. 81–1167. ENSERCH EXPLORATION, INC., ET AL. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 614 S. W. 2d 215.

No. 81–1171. NELLIE-JEANNE CORP. *v.* CITY OF COLUMBUS, DIVISION OF RECREATION AND PARKS, ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 81–1173. CERTAIN-TEED PIPING MATERIALS, INC. *v.* HYDROAIRE, INC. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 1085.

No. 81–1174. ORTIZ FUNERAL HOME CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 651 F. 2d 136.

No. 81–1176. HOAGLAND ET AL. *v.* LUMBERMENS MUTUAL CASUALTY CO. C. A. 10th Cir. Certiorari denied.

No. 81–1178. YUNKER *v.* KENTUCKY. Cir. Ct. Daviess, Ky. Certiorari denied.

No. 81–1179. DENMAN *v.* BULGER, PRESIDENT OF THE MASSACHUSETTS SENATE, ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–1182. PETERSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 656 F. 2d 703.

No. 81–1187. MIDDLEBURY ASSOCIATES *v.* PIKE INDUSTRIES, INC., ET AL. Sup. Ct. Vt. Certiorari denied. Reported below: 140 Vt. 67, 436 A. 2d 725.

No. 81–1188. MONROE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 35, 429 N. E. 2d 97.

No. 81–1189. BLACKWELL *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 664 F. 2d 1049.

No. 81–1190. ZAN-CAR ENTERPRISES, INC., ET AL. *v.* HOME STATE SAVINGS ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 935.

No. 81–1193. SPEIGHT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 159 Ga. App. 5, 282 S. E. 2d 651.

No. 81–1194. KAGARISE ET AL. *v.* CUMBERLAND, MARYLAND, AREA TEAMSTERS PENSION FUND. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 19.

No. 81–1201. DAVIDSON *v.* ROADWAY EXPRESS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 650 F. 2d 902.

No. 81–1202. WATERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 494.

No. 81–1204. MATTHEWS BROS., INC. *v.* PIERCE, GUARDIAN AD LITEM, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–1206. CHILDERS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 94 Ill. App. 3d 104, 418 N. E. 2d 959.

No. 81–1211. PURRAZZO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 95 Ill. App. 3d 886, 420 N. E. 2d 461.

No. 81–1212. SESSUMS ET AL. *v.* LOUISIANA POWER & LIGHT CO. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 579.

No. 81–1215. SCHNAPPER ET AL. *v.* FOLEY, DIRECTOR, ADMINISTRATIVE OFFICE OF THE U. S. COURTS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 215 U. S. App. D. C. 59, 667 F. 2d 102.

No. 81–1217. NORTH RIVER INSURANCE CO. ET AL. *v.* FED SEA/FED PAC LINE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 985.

No. 81–1218. CUCCHIARA *v.* SECRETARY OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 28.

No. 81–1221. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 968.

No. 81–1224. BOLLOW *v.* FEDERAL RESERVE BANK OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1093.

No. 81–1226. HEPKE *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 100.

No. 81–1230. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 736.

No. 81–1234. LANGFORD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 622 S. W. 2d 916.

No. 81–1235. MCINTOSH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 80.

No. 81–1243. FIRST NATIONAL BANK OF ALABAMA-HUNTSVILLE, FORMERLY HENDERSON NATIONAL BANK *v.* HAILE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 816.

No. 81–1245. MARCHESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–1246. BENSLIMANE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–1261. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–1265. EDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1376.

No. 81–1269. AVEDISIAN *v.* HUBBARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 906.

No. 81–1285. FARACE *v.* NEW YORK; and
No. 81–1292. GRANATO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 643, 440 N. Y. S. 2d 557.

No. 81–1289. SUTHERLAND *v.* UNITED STATES; and
No. 81–1337. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1181.

No. 81–1293. GOLDSTEIN, SECRETARY, NEW MEXICO HEALTH AND ENVIRONMENT DEPARTMENT *v.* NUNEZ ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–1305. MAGUIRE *v.* UNITED STATES; and
No. 81–6092. HALEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–1322. PALAMONE *v.* UNITED STATES; and GERRY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1301 (first case); 673 F. 2d 1299 (second case).

No. 81–1334. HENRIQUE *v.* UNITED STATES MARSHAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 653 F. 2d 1317.

No. 81–1366. DOWNING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–1368. MCNEELY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 496.

No. 81–1378. MINTON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 277.

No. 81–1395. OUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1306.

No. 81–1396. SCULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 27.

No. 81–5079. MCMICHAEL *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1060.

No. 81–5573. GAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1042.

No. 81–5633. BARRETT *v.* BUREAU OF CUSTOMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 1087.

No. 81–5638. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 435 A. 2d 1066.

No. 81–5655. WARREN *v.* UNITED STATES PAROLE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 137, 659 F. 2d 183.

No. 81–5679. JIMENEZ *v.* MONTEZ ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5703. FLEMING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–5704. HALL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 635 P. 2d 618.

No. 81–5718. STINSON *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 911.

No. 81–5733. WASHINGTON *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 650 F. 2d 447.

No. 81–5738. ARCHIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 656 F. 2d 1253.

No. 81–5740. KRALL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 81–5757. DONALDSON *v.* DALSHEIM, SUPERINTENDENT, OSSINING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 899.

No. 81–5767. BONNETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 663 F. 2d 495.

No. 81–5810. WILSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 755.

No. 81–5812. ANDERSON *v.* BAIRD. C. A. 6th Cir. Certiorari denied.

No. 81–5830. CORDLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81–5831. LEUSCHNER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 291 Md. 778.

No. 81–5838. CLARK *v.* MUNICIPAL EMPLOYEES CREDIT UNION OF BALTIMORE, INC. Ct. App. Md. Certiorari denied.

No. 81–5845. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1055, 423 N. E. 2d 1206.

No. 81–5847. JONES ET AL. *v.* CONSOLIDATED EDISON COMPANY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 603, 426 N. E. 2d 755.

No. 81–5861. JONES *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 177 N. J. Super. 560, 427 A. 2d 123.

No. 81–5863. ROSA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1010, 418 N. E. 2d 124.

No. 81–5864. STANLEY *v.* CITY OF PORTLAND. Ct. App. Ore. Certiorari denied. Reported below: 53 Ore. App. 254, 631 P. 2d 826.

No. 81–5868. KINNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81–5870. SERE *v.* WELSH. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 2d 501.

No. 81–5877. JOHNSON *v.* JOHNSON. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1040.

No. 81–5883. HERNANDEZ *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5884. CARTER *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 656 F. 2d 68.

No. 81–5885. GONZALEZ *v.* HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–5886. FRAZIER *v.* S/S DELTA MAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1073.

No. 81–5888. MADISON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 81–5892. HALE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 96 Ill. App. 3d 187, 420 N. E. 2d 1100.

No. 81–5893. EHL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 166.

No. 81–5895. GARCIA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 81–5896. COOPER *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 650 F. 2d 281.

No. 81–5898. VARGAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 2d 1050.

No. 81–5901. OWENS *v.* ZIMMERMAN. C. A. 3d Cir. Certiorari denied.

No. 81–5902. VASQUEZ *v.* NEW YORK. Sup. Ct. N. Y., Bronx County. Certiorari denied.

No. 81–5903. REESE *v.* BYRNE ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–5904. MITCHELL *v.* BOLTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 655 F. 2d 234.

No. 81–5905. LOWE *v.* NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 81–5906. TOUGHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 733.

No. 81–5910. EICHER *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 81–5914. GETCH *v.* HAMMOCK, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 900.

No. 81–5917. TALAMANTEZ *v.* CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 122 Cal. App. 3d 629, 176 Cal. Rptr. 800.

No. 81–5920. SIMMONS *v.* WINSBERG ET AL. Sup. Ct. La. Certiorari denied. Reported below: 407 So. 2d 726.

No. 81–5921. RUSSELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5922. SPANN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 670, 422 N. E. 2d 1051.

No. 81–5924. ALEXANDER *v.* TEXAS. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied.

No. 81–5925. MACK *v.* ENGLE. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1027.

No. 81–5926. BORNES *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 409 So. 2d 649.

No. 81–5927. CLAY *v.* TEXAS ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 81–5928. BLECHMAN *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 899.

No. 81–5929. FLENNER *v.* PONTIFEX ET AL. Sup. Ct. Va. Certiorari denied.

No. 81–5930. WHITELAW *v.* MWP LIMITED PARTNERSHIP. Ct. App. D. C. Certiorari denied.

No. 81–5931. BOSCH *v.* SPALDING. C. A. 9th Cir. Certiorari denied.

No. 81–5934. UNITED STATES EX REL. TOLBERT *v.* FRANZEN. C. A. 7th Cir. Certiorari denied.

No. 81–5936. LEE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 894, 417 N. E. 2d 1090.

No. 81–5938. VITE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 103 Wis. 2d 699, 316 N. W. 2d 832.

No. 81–5939. ALDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81–5941. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5942. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 1087.

No. 81–5946. BRUCE *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 776.

No. 81–5951. JOHNSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–5953. ANTONELLI *v.* DRUG ENFORCEMENT ADMINISTRATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 672 F. 2d 920.

No. 81–5954. ANTWINE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81–5955. DIXON *v.* MACDOUGALL. Sup. Ct. Ariz. Certiorari denied.

No. 81–5956. WILLOUGHBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81–5958. ENGLEMAN *v.* ENGLEMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 2d 799.

No. 81–5959. JACKSON *v.* ALABAMA DEPARTMENT OF PUBLIC SAFETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 657 F. 2d 689.

No. 81–5963. RUMPH *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 1130.

No. 81–5964. RUCKER *v.* BAKEWELL ET AL. C. A. 8th Cir. Certiorari denied.

No. 81–5965. REED *v.* PARRATT, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81–5966. MCMILLION *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 50 Md. App. 755.

No. 81–5969. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81–5972. HOPKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 874.

No. 81–5973. COLLINS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–5974. HOUSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 724.

No. 81–5975. KLEINSCHMIDT *v.* SUN BANK OF MIAMI, PERSONAL REPRESENTATIVE OF THE ESTATE OF KLEINSCHMIDT. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 403 So. 2d 493.

No. 81–5977. MACARTHUR *v.* PHILIPPINE AIR LINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1079.

No. 81–5978. CREASY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81–5981. WOLFF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5982. FONTANA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81–5983. MCDONALD *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY. Sup. Ct. Tenn. Certiorari denied.

No. 81–5985. PARDUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1073.

No. 81–5987. SUTTERER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81–5991. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81–5992. DIAZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 967, 430 N. E. 2d 914.

No. 81–5993. GREEN *v.* DIRECTOR OF INSTITUTIONS, NORTH DAKOTA STATE PRISONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 2d 55.

No. 81–5994. COOPER *v.* SOWDERS, WARDEN, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 916.

No. 81–5995. BALLET *v.* PENCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81–5997. KOPS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 104 Wis. 2d 749, 318 N. W. 2d 401.

No. 81–5998. SMITH *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5999. CARLSEN *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 638 P. 2d 512.

No. 81–6000. RHODES *v.* UNITED STATES NAVY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 1073.

No. 81–6001. OWENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81–6003. SIMMONS *v.* HILTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6004. MCQUADE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 938.

No. 81–6005. RELIFORD *v.* CITY OF KANSAS CITY, MISSOURI, PARKS AND RECREATION DEPARTMENT. C. A. 8th Cir. Certiorari denied.

No. 81–6007. PISCANIO *v.* BEANS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6008. THAYER *v.* PUERTO RICO. C. A. 1st Cir. Certiorari denied.

No. 81–6009. WALKER *v.* WAINWRIGHT. C. A. 11th Cir. Certiorari denied.

No. 81–6010. SIMONS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 741.

No. 81–6011. SANDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81–6022. TURNER *v.* GILLESPIE ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6023. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1300.

No. 81–6024. HERRERA *v.* WHITE, WOODBURY COUNTY SHERIFF. Sup. Ct. Iowa. Certiorari denied.

No. 81–6026. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1080.

No. 81–6029. UPSHER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 495 Pa. 620, 435 A. 2d 178.

No. 81–6033. OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 547.

No. 81–6034. WINLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 560.

No. 81–6035. PISANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81–6049. ZIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1304.

No. 81–6050. FLEMING *v.* UNITED STATES; and
No. 81–6109. RAGINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 440.

No. 81–6051. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81–6059. POSEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 37.

No. 81–6064. CASTRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81–6076. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1054.

No. 81–6084. ODOM *v.* UNITED STATES; and
No. 81–6116. WOLF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: No. 81–6084, 667 F. 2d 1032; No. 81–6116, 667 F. 2d 1033.

No. 81–6085. PERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 286.

No. 81–6086. ELLIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 874.

No. 81–6098. MURPHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81–6104. HAMLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81–6113. GIBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81–6115. HORTON, AKA BYNUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81–6121. BOWLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1052.

No. 81–6128. SHORT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 363, 672 F. 2d 897.

No. 81–6129. HANER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 80–2112. LONG ET AL. *v.* BONNES ET AL.; and

No. 80–2153. KENLEY, COMMISSIONER, DEPARTMENT OF HEALTH OF VIRGINIA, ET AL. *v.* YOUNG. C. A. 4th Cir. Certiorari denied. Reported below: No. 80–2112, 651 F. 2d 214; No. 80–2153, 641 F. 2d 192.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

By enacting the Civil Rights Attorney's Fees Awards Act of 1976 (Act), Congress created a statutory basis for courts, in the exercise of their sound discretion, to award attorney's fees to private litigants who prevail in litigation under various civil rights laws. The Courts of Appeals responsible for interpreting the Act have differed as to the correct construction of more than one of its provisions. Because the two cases from the Court of Appeals for the Fourth Circuit which the Court today declines to review present examples of this difference on the important issue of how to determine when a party "prevails" within the meaning of the Act, I dissent from the denial of certiorari.

The Act, codified as the last sentence of 42 U. S. C. § 1988, provides for the discretionary award of attorney's fees to the "prevailing party" in a lawsuit brought under one or more of eight specified statutes.[1] The Senate Report accompanying the Act, S. Rep. No. 94–1011 (1976), provides that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights

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[1] The relevant portion of 42 U. S. C. § 1988 provides:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U. S. C. § 1681 *et seq.*], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U. S. C. § 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Act."[2] *Id.*, at 4. Two principal cases from this Court deal with the question of when a party shall recover attorney's fees under the Civil Rights Act of 1964. *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U. S. 400 (1968), held that "one who succeeds in obtaining an injunction under . . . Title [II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.*, at 402. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), held that a defendant who successfully defended a charge of employment discrimination under Title VII could recover attorney's fees where the District Court found that the plaintiff's action "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.*, at 421.

In each of these cases, this Court found it unnecessary to decide any question respecting the definition of "prevailing party," because in each case the suit had gone to judgment in favor of the party seeking attorney's fees. Nor has this Court had occasion to define "prevailing party" as used in the Act. As more and more litigation has ensued in which claims for attorney's fees are made under the Act, however, more troublesome questions as to when a party has "prevailed" have confronted the Courts of Appeals.

The Court of Appeals for the Fourth Circuit, in one of the judgments which the Court today declines to review, has established a test for determining when a party "prevails" within the meaning of § 1988. That test requires the trial court to determine

> "'the precise legal/factual condition that the fee claimant has sought to change or affect so as to gain a benefit or

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[2] Section 706(k) of Title II of the Civil Rights Act of 1964 provides in full: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." 42 U. S. C. § 2000e–5(k).

> be relieved of a burden. With this condition taken as a benchmark, inquiry may turn to whether as a quite practical matter the outcome . . . is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.'" 651 F. 2d 214, 217 (1981), quoting *Bonnes* v. *Long*, 599 F. 2d 1316, 1319 (CA4 1979).

This test, which focuses only on the factual question of whether the lawsuit *caused* a change favorable to the plaintiff, apparently is well established in the Fourth Circuit, for it was followed by the Court of Appeals in another case denied review today, *Young* v. *Kenley*, 641 F. 2d 192 (1981). The effect of the *Bonnes* test is best demonstrated by the facts of *Young*.

Willie E. Young, a black woman, was hired in 1973 as a public health nurse by the Virginia State Department of Health. Because Young had graduated from a school that was not accredited by the National League of Nursing, she was assigned a category "A" position, the lowest salary level for public health nurses in Virginia. Although she was promoted to level "B" after complaining to the State's Equal Opportunity Coordinator, she was denied further promotion for lack of an accredited degree.

In February 1977, the Health Department eliminated the regulation which barred Young from further promotion, and on June 23, 1978, the Deputy State Health Commissioner invited Young to apply for advancement. Two days later, the change in policy notwithstanding, Young filed a complaint in federal court alleging that the State's promotion policy violated 42 U. S. C. § 1981 and § 1983. Although the complaint was dismissed for failure to obtain a right-to-sue letter from the Equal Employment Opportunity Commission (to which she had complained about the State's policy in 1976), and although she qualified for promotion in September 1978 by taking and passing the State's merit examination, Young filed an

amended complaint in October 1978. A hearing was held on November 2, 1978, and the parties reached a settlement two weeks later. The settlement granted Young a promotion to public health nurse level "C" retroactive to March 1977 with $992 in backpay, and upgraded her current position from level "B" to level "C" so that she would not have to relocate within the State.

The United States District Court for the Eastern District of Virginia twice denied Young's request for § 1988 attorney's fees, once after the settlement and once after a remand from the Court of Appeals. The District Court found that her "suit was wholly ineffective to remove [the regulatory] bar to promotion since the bar had been removed by a voluntary, unrelated act of the defendant well before [Young's] suit was instituted." *Young* v. *Kenley*, 485 F. Supp. 365, 368 (1980). The District Court also found that the objectives of the Act would not be furthered by the award of attorney's fees in this case: "While actions by 'private attorneys general' are to be rewarded under the attorney's fees provision, it could not be intended that a party be encouraged to file a suit where litigation would be superfluous. A benefit which can be obtained by an informal request need not be the subject of a formal demand." *Id.*, at 370.

Applying the standard set forth in *Bonnes*, the Court of Appeals for the Fourth Circuit reversed the denial of attorney's fees. In a brief *per curiam* opinion the court stated:

> "The district court properly noted that a plaintiff whose case ends in settlement may be considered a 'prevailing party' under the civil rights attorney's fees provisions. In making its determination whether the plaintiff was in fact the 'prevailing party,' the court applied the test set forth in *Nadeau* v. *Helgemoe*, 581 F. 2d 275 (1st Cir., 1978). After the district court rendered its opinion, this court issued its decision in *Bonnes* [v. *Long*, 599 F. 2d 1316 (1979)]. *Bonnes* establishes the test to be applied in this circuit for the consideration whether a

> party to a case which ends in settlement is a 'prevailing party' within the meaning of 42 U. S. C. §§ 1988 and 2000e–5(k).
>
> "Accordingly, the order of the district court is vacated and the case remanded for further proceedings consistent with this opinion." *Young* v. *Kenley*, 614 F. 2d 373, 374 (1979).

It would thus seem that the Court of Appeals for the Fourth Circuit implicitly recognized that its so-called *Bonnes* test conflicted with that followed by the Court of Appeals for the First Circuit in *Nadeau* v. *Helgemoe*, 581 F. 2d 275 (1978). The District Court on remand certainly treated the Court of Appeals' brief *per curiam* opinion as having this effect: "[I]t is apparent from the language of the . . . per curiam memorandum vacating and remanding this case, that a *Nadeau* analysis is inappropriate in this Circuit. A *Bonnes* analysis is required." 485 F. Supp., at 366.

The District Court, attempting to follow the "*Bonnes* analysis," again declined to award attorney's fees. Upon a second appeal, the Fourth Circuit reversed outright the denial of attorney's fees. It found that Young had obtained discernible benefits which she did not have before the suit was initiated: backpay and reclassification of her position to level "C." 641 F. 2d, at 195. That the receipt of these benefits was "caused" by the suit was evident to the Court of Appeals from the fact of settlement: "[S]ettlement in the midst of trial demonstrates [that] the lawsuit and the benefits obtained are causally related." *Ibid.* Thus, by filing a lawsuit to change a regulation which had already been changed, to obtain a promotion for which she had already qualified at the invitation of the State, and to receive other benefits which the District Court found were available upon informal request, Young became entitled to attorney's fees as a prevailing party under the standard adopted by the Court of Appeals for the Fourth Circuit.

A different approach to § 1988, and one which demonstrates the divergence of views among the Courts of Appeals, is that set forth by the Court of Appeals for the First Circuit in *Nadeau* v. *Helgemoe*, *supra*. Like the *Bonnes* test, the *Nadeau* test requires that the lawsuit result in some discernible benefit to the plaintiff. Unlike the *Bonnes* test, the *Nadeau* test also requires that the benefit have some basis in law:

> "Even if plaintiffs can establish that their suit was causally related to the defendants' actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." 581 F. 2d, at 281.

Under this second requirement of the *Nadeau* test, it is doubtful that Young would have prevailed in her request for attorney's fees. Because the law already entitled her to every benefit she was seeking by litigation, it cannot be said that the benefits received in settlement were legally caused by her lawsuit.[3]

In my view, the standard adopted by the Court of Appeals for the First Circuit in *Nadeau* more closely approaches the

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[3] The *Nadeau* test does not require a finding that the plaintiff would have prevailed on the merits, nor does it require the trial court to hold the very trial which the settlement was intended to avoid. As the Court of Appeals explained, at the time of settlement the trial court in most cases will have had "sufficient exposure to the facts and law . . . to determine, whether if the plaintiffs had continued to press their claims . . . , their action could be considered 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' If the court reaches that conclusion, we think it should deny plaintiffs' attorney's fees on those issues regardless of the impact of their suit on defendants' willingness to improve the conditions of . . . the plaintiff class." 581 F. 2d, at 281 (citation omitted), quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422 (1978).

intent of Congress in amending § 1988 than does the *Bonnes* standard of the Court of Appeals for the Fourth Circuit. When it passed the Act, Congress was aware that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens," H. R. Rep. No. 94–1558, p. 1 (1976), and that "a vast majority of the victims of civil rights violations cannot afford legal counsel [and] are unable to present their cases to the courts." *Ibid.* Accordingly, the Act was passed to encourage the "vigorous enforcement of modern civil rights legislation," S. Rep. No. 94–1011, p. 4 (1976), by "'private attorney[s] general' advancing the rights of the public at large, and not merely some narrow parochial interest." 122 Cong. Rec. 35122 (1976) (remarks of Rep. Drinan, sponsor).

It is clear beyond peradventure that unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have "enforced" the civil rights laws or to have promoted their policies for the benefit of the public at large. The *Bonnes* standard, at least as applied in No. 80–2153, seems largely to disregard this central purpose of § 1988, awarding attorney's fees even if the discernible benefit was conferred gratuitously by the defendant or was undertaken simply to avoid further litigation expenses. I would grant certiorari in one or both of these cases to resolve the conflict among the Circuits and to establish a standard consistent with the purposes of the Act.

No. 81–189. ISRAEL ET AL. *v.* MCMORRIS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 643 F. 2d 458.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

Before September 1, 1981, polygraph evidence was admissible in a criminal trial in Wisconsin if the prosecutor and the defendant stipulated in writing both to the administration of

the test itself and to the subsequent admission into evidence of the test results. Notwithstanding the stipulation, the trial court, in its discretion, could refuse to admit the test results into evidence if it determined that the examiner was not qualified or if the test was not conducted under proper conditions. The opposing party was provided with the opportunity to cross-examine the examiner. Finally, the trial judge was required to instruct the jury that the test tends only to indicate whether at the time of the test the defendant was telling the truth and that the test results may not be used to prove or disprove any element of the crime. See *State* v. *Stanislawski*, 62 Wis. 2d 730, 742–743, 216 N.W. 2d 8, 14 (1976).[1]

Because the Wisconsin procedure permitted the prosecutor to refuse, "without articulating his reasons," a defendant's offer to stipulate to the admission of polygraph evidence, the Court of Appeals for the Seventh Circuit held that respondent's due process rights may have been violated. It directed that a writ of habeas corpus issue unless the "prosecutor had valid reasons for refusing to enter into the stipulation offered by the defendant." 643 F. 2d 458, 466 (1981). According to the Court of Appeals, "the prosecutor's refusal to enter into a stipulation must be for justifiable reasons. Justifiable reasons in this context are reasons which go to the reliability of the test or to the integrity of the trial process, not reasons which consider merely the relative tactical advantages from the use of the evidence to the prosecution and the defense." *Id.*, at 464. In order for a court to review the prosecutor's refusal to stipulate to the admission of otherwise inadmissible evidence, the Court of Appeals reasoned that the prosecutor must articulate his reasons.[2]

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[1] The Wisconsin Supreme Court has recently overruled *Stanislawski*, holding it error to admit polygraph evidence in a criminal proceeding unless the stipulation was executed prior to September 1, 1981. *State* v. *Dean*, 103 Wis. 2d 228, 279, 307 N.W. 2d 628, 653 (1981).

[2] The Court of Appeals apparently based its conclusion on *Washington* v. *Texas*, 388 U. S. 14 (1967), and *Chambers* v. *Mississippi*, 410 U. S. 284 (1973).

In my view, this Court should grant the petition for certiorari in this case. Although the case involves a state rule of evidence, the Court of Appeals' decision did not rest on the trial court's exclusion of evidence necessary for the defendant to mount a defense, but on the *prosecutor's* refusal to stipulate to the admission of otherwise inadmissible evidence. In this case, the Court of Appeals has found federal constitutional issues lurking, not in a state court's refusal to admit exculpatory evidence proffered by the defendant, but in the prosecutor's reasons for refusing to stipulate to the admission of otherwise inadmissible evidence. In a given case, this Court's decisions may require that exculpatory evidence be admitted into evidence despite state evidentiary rules to the contrary, but these cases do not suggest any limitation upon the reasons that may permissibly motivate the prosecutor's objection to the admission of inadmissible evidence.

Because the Wisconsin polygraph rule was based on principles of consent and waiver,[3] I do not see how the Court of Appeals' reasoning would not apply to *any* objection by a prosecutor to the introduction of otherwise inadmissible evidence. Though the Court of Appeals attempted to limit its decision to cases involving the polygraph, it seems to me that its reasoning necessarily sweeps a good deal beyond just that type of evidence. In our adversarial system of criminal procedure, testimony from witnesses and documentary exhibits are generally admitted into evidence unless the opposing party objects. In a sense, any such objection by the prosecution is a "refusal" to consent or to stipulate to the admissibility of the evidence. Such an objection, in the words of the Court of Appeals, enables the prosecutor "to veto" the admission of inadmissible evidence. But, according to the Court of Appeals, the defendant's right to a fair trial may be denied because the prosecutor has merely objected on the grounds

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[3] The Wisconsin Supreme Court has expressly stated that its stipulation rule was based on principles of consent and waiver. *State* v. *Dean*, *supra*, at 257, 307 N.W. 2d, at 642.

that the State's evidentiary rules require that the evidence be excluded. The Court of Appeals expressed concern at the inability of courts to review this exercise of prosecutorial authority; but I have thought the common premise of the constitutional limitations on a State's administration of criminal justice was that either party to a criminal trial could "veto" the admission of otherwise inadmissible evidence through the simple expedient of objecting to its admission.

True, we have held that a defendant's rights under the Sixth and Fourteenth Amendments may be implicated when a trial *court* mechanically applies state evidentiary rules to preclude a defendant from introducing exculpatory evidence necessary to his defense. See, *e. g.*, *Green* v. *Georgia*, 442 U. S. 95 (1979) (capital case); *Chambers* v. *Mississippi*, 410 U. S. 284 (1973); *Washington* v. *Texas*, 388 U. S. 14 (1967). But here the Court of Appeals did not find that the exclusion of the polygraph testimony by the trial court was in itself error of constitutional magnitude; it was at pains to point out that Wisconsin was free to wholly exclude polygraph evidence if it chose to follow that policy. The fault the Court of Appeals found with respondent's state-court trial was not the ultimate exclusion of the polygraph evidence, but the fact that the prosecutor failed to articulate any reason for refusing to consent to its admission. I think that this is a dubious constitutional holding with considerable implications beyond the facts of the case—indeed, beyond polygraph tests—which warrants plenary consideration by this Court.

Although Wisconsin has recently abandoned its stipulation rule in favor of a rule that forbids the admission of polygraph evidence under any circumstances, this is hardly a reason to deny review in this case. In light of the Court of Appeals' decision, habeas corpus relief is apparently available to all Wisconsin prisoners who were precluded by the stipulation rule from introducing polygraph test results into evidence. Because as many as 23 States will admit polygraph evidence

upon stipulation,[4] the Court of Appeals' decision calls into question the constitutionality of almost half the States' evidentiary rules regarding the admissibility of polygraph test results. The Court of Appeals for the Eighth Circuit has held that polygraph evidence may be admitted upon stipulation into evidence in a criminal trial. *United States* v. *Oliver*, 525 F. 2d 731, 736–737 (1975), cert. denied, 424 U. S. 973 (1976). Finally, two Courts of Appeals have held that a defendant's constitutional right to a fair trial is not infringed when the prosecutor refuses to stipulate to the admissibility of polygraph test results. *Milano* v. *Garrison*, 677 F. 2d 374, 375 (CA4 1981); *Jackson* v. *Garrison*, 677 F. 2d 371, 373 (CA4 1981); *Conner* v. *Auger*, 595 F. 2d 407, 411 (CA8), cert. denied, 444 U. S. 851 (1979); *United States* v. *Bohr*, 581 F. 2d 1294, 1303 (CA8), cert. denied, 439 U. S. 958 (1978).

Because of this apparent conflict among the Courts of Appeals on this issue, and because of doubt as to the correctness of the Court of Appeals' decision in this case, I would grant the writ of certiorari.

No. 81–353. SPRADLING *v.* TEXAS; and DUNN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

On September 4, 1980, two women, Vicki Rash Norvell and Bobby Folks Rash, while walking together, were killed by the driver of a hit-and-run automobile. Petitioner Spradling later identified himself as the driver and two indictments were presented against him on October 1, 1980. The first charged Spradling with failing to stop and render aid to Vicki Rash Norvell, a felony under Texas law. The second indictment, in identical language, charged Spradling with failing to stop and render aid to Bobby Folks Rash. Spradling was

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[4] Pet. for Cert. 25.

convicted by a jury under the first indictment. The jury assessed as punishment a 5-year prison sentence and a fine of $5,000, and recommended that, in light of the fact that petitioner had never before been convicted of a felony, his prison sentence be suspended. Now the State seeks to prosecute Spradling under the second indictment.

Petitioner moved to dismiss this second indictment claiming former jeopardy. The trial court denied the motion and the Texas Court of Criminal Appeals denied leave to file an application for a writ of prohibition.

Petitioner presents two questions for review. First, he argues that the failure of the State of Texas to afford him review of the trial court's denial of his motion to dismiss for reason of former jeopardy violates the due process and equal protection guarantees of the Fourteenth Amendment. Second, petitioner argues the "merits" of his double jeopardy claim were improperly rejected by the trial court. In my view both questions are substantial and merit review by this Court.

I

Texas procedure provides no mechanism for interlocutory review in criminal cases;[1] petitioner was therefore unable to appeal the denial of his motion to dismiss on the ground of double jeopardy. It is clear that in most applications the Texas procedural rule barring interlocutory review raises no federal constitutional issue. But as applied to claims of former jeopardy, this procedural rule, in combination with a denial by the Texas Court of Criminal Appeals of leave to file an application for a writ of prohibition, denies criminal defendants the opportunity to protect, through the state appellate system, their constitutional rights. I believe this raises an issue worthy of our consideration.

We held in *Abney* v. *United States*, 431 U. S. 651 (1977), that a double jeopardy claim is by its very nature collateral

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[1] See, *e. g.*, *Williams* v. *State*, 464 S. W. 2d 842, 844 (Tex. Crim. App. 1971).

to, and separable from, the guilt of the accused, and that when a trial court rejects a motion to dismiss on the grounds of former jeopardy this order is final and appealable under 28 U. S. C. § 1291. The rationale for our decision in *Abney* was, in part, that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660. This is because the Clause stands, in part, as "a guarantee against being twice put to *trial* for the same offense." *Id.*, at 661 (footnote omitted).

Respondent argues that in *Abney* the Court merely exercised its supervisory powers over federal criminal prosecutions, and that there is no constitutional right to pretrial review of a claim that a second trial will violate the Double Jeopardy Clause. It is true that the Court had no need to reach the constitutional question presented in the instant case when it decided *Abney*, but the Court's recognition in *Abney* that double jeopardy claims not considered prior to trial are rendered, in significant part, moot surely has significant constitutional overtones. We have never held that the Federal Constitution requires that a State provide appellate review. But once such review is provided, it may not be denied arbitrarily without violating the Equal Protection Clause. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353 (1963). See also *Monger* v. *Florida*, 405 U. S. 958, 959–960 (1972) (Douglas, J., dissenting). Fundamental precepts of due process require a right to be heard "at a meaningful time" before suffering a grievous loss. *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). Accord, *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976). Thus, there is surely a good deal of force to petitioner's argument that, if the State provides for appeals to protect other constitutional rights, it runs afoul of the Federal Constitution when it fails to give the same meaningful consideration to a defendant asserting his right not to be subjected to a second trial for the same offense. See Alexander, Interlocutory Appellate Review of

Double Jeopardy Claims: A Method for Testing Evidentiary Sufficiency After a Non-Final Criminal Proceeding, 44 Tex. Bar J. 11, 15 (1981).[2]

II

Even if the Court declined to review the constitutionality of the Texas Court of Criminal Appeals' failure to provide review, it is clear to me that the trial court's order denying petitioner's motion to dismiss on the ground of former jeopardy is reviewable by this Court under 28 U. S. C. § 1257(3).[3] Under this Court's precedents, the refusal to dismiss a criminal indictment prior to trial when the indictment is challenged on the grounds of former jeopardy is a final judgment under 28 U. S. C. § 1257. "Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U. S. § 1257." *Harris* v. *Washington*, 404 U. S. 55, 56 (1971). Cf. *Abney*, *supra*. Where, as here, the trial court's judgment is not reviewable by any state appellate court the judgment has been rendered by "the highest state court in which a decision may be had" within the meaning of § 1257. *Grovey* v. *Townsend*, 295 U. S. 45, 47

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[2] Of course, the Texas Court of Criminal Appeals' rejection of petitioner's double jeopardy claim does not rest on an adequate state ground if, as petitioner contends, the Texas procedure is incompatible with the Federal Constitution.

[3] The fact that petitioner seeks a writ of certiorari to the Texas Court of Criminal Appeals is, of course, no bar to our treating the papers as a petition for a writ of certiorari to the Texas trial court. See, *e. g.*, *Callender* v. *Florida*, 383 U. S. 270 (1966) (*per curiam*). The petition was not filed within 60 days of the entry of the trial court's order but in view of the fact that petitioner understandably attempted to obtain review, prior to seeking review in this Court, in the state courts through the only route available—an extraordinary writ—I would waive the nonjurisdictional time limits for filing petitions in criminal cases set by Supreme Court Rule 20.

(1935). See, *e. g.*, *Thompson* v. *Louisville*, 362 U. S. 199, 202–203 (1960).[4]

In my view, the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires that, except in extremely limited circumstances, not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in a single proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454, and n. 7 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein. Spradling's striking and failing to render aid to the two women was but a single act—the accident and its aftermath a single occurrence. I would therefore reverse the judgment of the Texas trial court.

Accordingly, I respectfully dissent from the denial of the petition for certiorari and would set the case for oral argument.[5]

No. 81–749. CALIFORNIA *v.* WINSON. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 29 Cal. 3d 711, 631 P. 2d 55.

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[4] If we treat the papers as a petition for a writ to the trial court, there would be no need to even consider whether the state appellate court's refusal to consider the merits of petitioner's federal claim because of a rule of state procedure is a bar to review by this Court. Cf. *Henry* v. *Mississippi*, 379 U. S. 443 (1965). Cf. also n. 2, *supra*.

[5] The petition for certiorari was filed jointly on behalf of Spradling and a second petitioner, Dunn, who was tried on drug charges in an unrelated trial. Following his acquittal, Dunn was tried on a different charge arising from the "same transaction." Dunn also unsuccessfully sought leave to file an application for a writ of prohibition in the Texas Court of Criminal Appeals to obtain review of his double jeopardy claim prior to a second trial. But the record in this case indicates that Dunn was convicted on the second charge on November 16, 1981, after this petition was filed. Record 42. Thus, it appears that the Texas appellate courts would now review Dunn's double jeopardy claim and should do so in the first instance.

No. 81–1195. MICHIGAN *v.* HURD. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 81–795. J. S. ALBERICI CONSTRUCTION CO., INC. *v.* SISCO; and

No. 81–1005. SISCO *v.* J. S. ALBERICI CONSTRUCTION CO., INC. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 655 F. 2d 146.

No. 81–850. ST. LOUIS COUNTY, MISSOURI, ET AL. *v.* SIMON. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 656 F. 2d 316.

No. 81–851. COX *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for certiorari and reverse the conviction. Reported below: 619 S. W. 2d 794.

No. 81–933. GREEN *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied. JUSTICE BRENNAN would set the case for oral argument.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

Because there is no jurisdictional bar to considering this case, and because the decision below fails to give due regard to our cases, I dissent from the denial of certiorari.

I

Petitioner, an attorney, was indicted in 1978 on two counts of grand theft. The first count charged him with obtaining or exerting control over a bank account by deception in that he led the executrix of an estate to believe that the account was a probate asset of the estate rather than a survivorship account. The second count of the indictment charged petitioner with obtaining or exerting control over the account be-

yond the scope of the owner's consent by writing $9,000 in checks payable to himself on the account. The trial court sustained petitioner's pretrial motion to dismiss the first count of the indictment on the ground that it failed to state an offense under the Ohio statute. He was acquitted following a bench trial on the second count, the trial judge finding that the State had "failed to establish all of [the] elements" of the crime charged in the second count. App. to Pet. for Cert. 13a. The State appealed the pretrial dismissal of the first count and on January 30, 1980, the Court of Appeals for the First Appellate District of Ohio reversed the dismissal of the first count and remanded to the trial court for further proceedings. Petitioner then filed a motion to dismiss on the ground that a trial on the first count would violate the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. Citing *Ashe* v. *Swenson*, 397 U. S. 436 (1970), petitioner argued that the principle of collateral estoppel is part of the Fifth Amendment guarantee against double jeopardy and that his acquittal on the second count prevented the State from again attempting to prove one or more of the elements of the crime charged in the first count. The trial court denied the motion and petitioner appealed.

The Court of Appeals for the Twelfth Appellate District of Ohio affirmed the denial of the motion. Relying principally on *Blockburger* v. *United States*, 284 U. S. 299 (1932), the court said that the test for determining whether the trial on the second count bars a subsequent trial on the first count is whether each count requires proof of an additional fact which the other does not. The court observed that in order to obtain a conviction on the second count, the State was required to prove that petitioner knowingly obtained or exerted control over the property of another, with purpose to deprive the owner of that property, and that he acted beyond the scope of the owner's express or implied consent. To success-

fully prosecute on the first count, the State must prove that petitioner obtained or exerted control over property of another by deception with the purpose of depriving the owner of the property. The court held that the evidence necessary to sustain the conviction on the first count was not sufficient to sustain a conviction on the second count and therefore acquittal of the charges contained in the second count is not a bar to prosecution of the charges contained in the first count. The court went on to state that even if petitioner were correct that the two counts set forth allied offenses with a common animus, he could not avoid a trial on the first count because he filed a motion to dismiss the first count. Therefore, as in *Jeffers* v. *United States*, 432 U. S. 137, 154 (1977), where the defendant had been granted separate trials on separate counts of the indictment at his own request, petitioner's own actions "deprived him of any right he might have had against consecutive trials." The Supreme Court of Ohio denied petitioner's motion for leave to appeal, and he sought a writ of certiorari from this Court.

II

Petitioner has not yet been tried on the first count of the indictment, and therefore this case lacks the finality ordinarily necessary for our consideration of cases arising from state courts. See 28 U. S. C. § 1257. However, in *Abney* v. *United States*, 431 U. S. 651 (1977), in a case coming to us from a federal court, the Court held that double jeopardy claims are immediately appealable. "[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660. It was emphasized that the Double Jeopardy Clause protects against more than being twice convicted and punished for the same crime: "It is a guarantee against being twice put to *trial* for the same offense." *Id.*, at 661 (footnote omitted). See also *United States* v. *Jorn*, 400

U. S. 470, 479 (1971); *Price* v. *Georgia*, 398 U. S. 323, 326 (1970); *Green* v. *United States*, 355 U. S. 184, 187–188 (1957); *United States* v. *Ball*, 163 U. S. 662, 669 (1896); *Ex Parte Lange*, 18 Wall. 163, 169 (1874). *Abney* was not, by its terms, limited to federal cases, and we have recognized a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . . ." *Mathews* v. *Eldridge*, 424 U. S. 319, 331, n. 11 (1976). If the finality requirement of § 1257, which serves to avoid piecemeal review of state-court decisions and to minimize federal intrusion into state affairs, *North Dakota Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156, 159 (1973), barred our review of this case, petitioner would, in my view, be "forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney* v. *United States*, *supra*, at 662 (footnote omitted). The interests served by the finality requirement, though important, do not outweigh petitioner's interest in receiving the full protection afforded by the Double Jeopardy Clause and avoiding the irreparable injury of a second trial.

Nor did petitioner waive his Fifth Amendment right to double jeopardy protection by moving to dismiss the first count of the indictment. In *Green* v. *United States*, *supra*, it was held that a defendant does not forfeit a double jeopardy defense by appealing a conviction, and under the logic of that case, petitioner did not forfeit a constitutional protection by invoking his right to seek dismissal of a count of the indictment. See also *Burks* v. *United States*, 437 U. S. 1 (1978). *Jeffers* v. *United States*, *supra*, relied upon by the lower court, is inapplicable. There the defendant was charged under two separate indictments. The first indictment charged a crime which was a lesser-included offense to the crime charged in the second indictment. The defendant was granted separate trials and *convicted* on the lesser-included offense. We held that petitioner's opposition to consolidat-

ing the indictments for trial deprived him of his right against successive trials. *Id.*, at 152. There is no doubt that had the defendant in *Jeffers* been acquitted at the first trial, the collateral-estoppel provisions embodied in the Double Jeopardy Clause would have barred a second trial on the greater offense.

III

The Court of Appeals apparently thought that since *Blockburger* would not bar successive convictions on counts one and two, a trial on count one after acquittal on count two is permissible. It did not respond to, or make any mention of, petitioner's argument that collateral estoppel precludes a second trial. However, our cases plainly establish that a second trial may sometimes be allowed under *Blockburger* but barred by the application of collateral estoppel, which constitutes an independent safeguard protecting one "who has been acquitted from having to 'run the gauntlet' a second time." *Ashe* v. *Swenson*, 397 U. S., at 446. The doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.*, at 443. *Ashe* held that the doctrine of collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.*, at 445. Thus, as we observed in *Brown* v. *Ohio*, 432 U. S. 161, 166–167, n. 6 (1977):

> "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."

The Court of Appeals thus erred in assuming that its *Blockburger* analysis sufficiently addressed the collateral-estoppel issues petitioner submitted. Two of the three elements in each of the counts were identical. If the acquittal on the second count was based on the failure of the State to prove either of the two identical elements, it is clear that collateral estoppel would bar a trial on the first count. Yet neither the trial court nor the appellate court indicated which elements of the crime charged in count two the State had failed to prove, and surely the trial court entering the acquittal would have been well aware of that fact. It may be that the State's proof fell short on each of the three elements required to prove the charge in count two. Petitioner also argues that if his acquittal on the second count was based on the failure of proof that petitioner acted beyond the scope of the owner's consent, then he cannot be found to have acted by deception as required for conviction on the first count.

In any event, the collateral-estoppel submission was not adequately disposed of by the *Blockburger* analysis, and I would grant certiorari, vacate the judgment, and remand the case for further consideration. The case does not warrant plenary consideration, however.

No. 81–1241. GOLDSTEIN *v.* CITY OF NORFOLK. Cir. Ct., City of Norfolk, Va. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for certiorari and reverse the conviction.

No. 81–964. MARSHALL & ILSLEY CORP. ET AL. *v.* CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 652 F. 2d 685.

No. 81–1135. HESTER *v.* MARTINDALE-HUBBELL, INC., ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 433.

No. 81–1022. PRESS-ENTERPRISE CO. ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR would grant certiorari.

No. 81–1033. ST. JOE PAPER CO. *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (ESPRIT DE CORP., REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 120 Cal. App. 3d 991, 175 Cal. Rptr. 94.

No. 81–1052. WILLIAMS *v.* SHIPPING CORPORATION OF INDIA. C. A. 4th Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 653 F. 2d 875.

No. 81–1213. MOBIL CORP. ET AL. *v.* MARATHON OIL CO. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 669 F. 2d 378.

No. 81–5834. SOULE *v.* RAINES. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 661 F. 2d 942.

No. 81–1229. PAXTON NATIONAL INSURANCE CO. *v.* TRANSPORT INDEMNITY CO. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari to resolve the conflict between the decision of the Court of Appeals in this case and the decisions of the Court of Appeals for the Tenth Circuit in *Argonaut Insurance Co.* v. *National Indemnity Co.*, 435 F. 2d 718 (1971), and *Hagans* v. *Glens Falls Insurance Co.*, 465 F. 2d 1249 (1972). Reported below: 657 F. 2d 657.

No. 81–5786. STROUTH *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 81–5840. DAVIS *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81–5844. BOWEN *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County;

No. 81–5872. JUSTUS *v.* VIRGINIA. Sup. Ct. Va.;

No. 81–5919. SCHAD *v.* ARIZONA. Sup. Ct. Ariz.;

No. 81–5935. GREEN *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81–5937. COLEMAN *v.* MONTANA. Sup. Ct. Mont.; and

No. 81–5970. TAFERO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–5786, 620 S. W. 2d 467; No. 81–5872, 222 Va. 667, 283 S. E. 2d 905; No. 81–5919, 129 Ariz. 557, 633 P. 2d 366; No. 81–5937, —— Mont. ——, 633 P. 2d 624; No. 81–5970, 403 So. 2d 355.

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. 80–1396. BRANDON ET AL. *v.* BOARD OF EDUCATION OF GUILDERLAND SCHOOL DISTRICT ET AL., 454 U. S. 1123;

No. 81–222. VALERO ENERGY CORP. *v.* SOHYDE DRILLING & WORKOVER, INC., ET AL., 454 U. S. 1081;

No. 81–256. MOORE *v.* SCURR, WARDEN, ET AL., 454 U. S. 1098; and

No. 81–747. PATTERSON ET AL. *v.* YOUNGSTOWN SHEET & TUBE CO. ET AL., 454 U. S. 1100. Petitions for rehearing denied.

No. 81–5060. JOHNSON *v.* LOUISIANA, 454 U. S. 1100;

No. 81–5454. ANTHON *v.* UNITED STATES, 454 U. S. 1164;

No. 81–5586. DAVIS *v.* COMMISSIONER OF PATENTS AND TRADEMARKS, 454 U. S. 1090;

No. 81–5611. FOWLER *v.* GARRAHY, GOVERNOR OF RHODE ISLAND, ET AL., 454 U. S. 1102;

No. 81–5666. HEGWOOD *v.* BLACKBURN, WARDEN, 454 U. S. 1153;

No. 81–5712. HOLLOWAY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 454 U. S. 1154;

No. 81–5818. SHABAZZ *v.* MAYNARD, WARDEN, ET AL., *ante*, p. 925; and

No. 81–5819. PENOYER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, *ante*, p. 925. Petitions for rehearing denied.

No. 81–700. LOESCH ET AL. *v.* UNITED STATES, 454 U. S. 1099. Motion of petitioners to defer consideration of petition for rehearing denied. Petition for rehearing denied.

FEBRUARY 23, 1982

Dismissal Under Rule 53

No. 81–822. LEVISON *v.* LEVISON, 454 U. S. 1147. Petition for rehearing dismissed under this Court's Rule 53.

FEBRUARY 24, 1982

Certiorari Dismissed. (See No. 78–1549, *ante*, at 392, n. 5.)

MARCH 1, 1982

Affirmed on Appeal

No. 81–1161. HIGHTOWER ET AL. *v.* SEARCY ET AL. Affirmed on appeal from C. A. 11th Cir. Reported below: 656 F. 2d 1003.

Appeals Dismissed

No. 81–960. LOCKE ET AL. *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of substantial federal question. Reported below: 402 So. 2d 618.

No. 81–1035. LAIRD, AKA HORNE, ET AL. *v.* SOUTH CAROLINA. Appeal from Sup. Ct. S. C. 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. 80–629. MAREN ENGINEERING CORP. *v.* VELMOHOS. Appeal from Sup. Ct. N. J. Judgment vacated and case remanded for further consideration in light of *G. D. Searle & Co.* v. *Cohn*, *ante*, p. 404. JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR would dismiss the appeal for want of jurisdiction. Reported below: 83 N. J. 282, 416 A. 2d 372.

Certiorari Granted—Vacated and Remanded

No. 80–663. KELSEY-HAYES, INC. *v.* HOPKINS. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *G. D. Searle & Co.* v. *Cohn*, *ante*, p. 404. Reported below: 628 F. 2d 801.

Miscellaneous Orders

No. A–672. ERNEST *v.* COHEN, UNITED STATES ATTORNEY FOR THE DISTRICT OF MAINE, ET AL. Application for injunction, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 80–1121. UNITED STATES *v.* CLARK ET AL., 454 U. S. 555. Motion of respondents not to tax costs denied.

No. 80–2100. ROGERS ET AL. *v.* LODGE ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 454 U. S. 811.] Motion of appellants for leave to file a delayed reply brief granted.

No. 80–1305. ALFRED L. SNAPP & SON, INC., ET AL. *v.* PUERTO RICO EX REL. QUIROS, SECRETARY OF LABOR AND HUMAN RESOURCES. C. A. 4th Cir. [Certiorari granted, 454 U. S. 1079.] Motion of Migrant Legal Action Program, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 80–2146. FLORIDA *v.* ROYER. Dist. Ct. App. Fla., 3d Dist. [Certiorari granted, 454 U. S. 1079.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument granted, and five additional minutes allotted for that purpose. Respondent also allotted an additional five minutes for oral argument.

No. 81–184. UNITED STATES *v.* SECURITY INDUSTRIAL BANK ET AL. C. A. 10th Cir. [Probable jurisdiction noted, 454 U. S. 1122.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 81–334. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–411. JACKSON TRANSIT AUTHORITY ET AL. *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL–CIO–CLC. C. A. 6th Cir. [Certiorari granted, 454 U. S. 1079.] Motion of Railway Labor Executives' Association for leave to file a brief as *amicus curiae* granted.

No. 81–430. ILLINOIS *v.* GATES ET UX. Sup. Ct. Ill. [Certiorari granted, 454 U. S. 1140.] Motion of petitioner for leave to amend or enlarge question presented for review denied.

No. 81–485. HILLSBORO NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. [Certiorari granted, *ante*, p. 906.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 81–525. BOWEN *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 4th Cir. [Certiorari granted, 454 U. S. 1097.] Motion of the Solicitor General for divided argument granted. Request for additional time for oral argument denied.

No. 81–876. ST. LUKE'S FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER; BETH ISRAEL FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* BETH ISRAEL HOSPITAL AND GERIATRIC CENTER; and ST. ANTHONY FEDERATION OF NURSES & HEALTH PROFESSIONALS *v.* ST. ANTHONY HOSPITAL SYSTEMS. C. A. 10th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari granted.

No. 81–912. CLICK ET AL. *v.* IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. Sup. Ct. Idaho;

No. 81–1020. EXXON CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA, ET AL. Sup. Ct. Ala.; and

No. 81–1268. EXCHANGE OIL & GAS CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA. Sup. Ct. Ala. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 81–930. UNITED STATES *v.* BLISS DAIRY, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 906.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 81–6020. IN RE MA. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 81–773. NORTH DAKOTA *v.* UNITED STATES. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 650 F. 2d 911.

No. 81–802. CITY OF LOCKHART *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 559 F. Supp. 581.

Certiorari Granted

No. 81–1008. BURLINGTON NORTHERN INC. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 211 U. S. App. D. C. 111, 655 F. 2d 1341.

No. 81–1222. UNITED STATES *v.* GENERIX DRUG CORP. ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 654 F. 2d 1114.

No. 81–1244. HENSLEY ET AL. *v.* ECKERHART ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 664 F. 2d 294.

No. 81–1271. FALLS CITY INDUSTRIES, INC. *v.* VANCO BEVERAGE, INC. C. A. 7th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 654 F. 2d 1224.

Certiorari Denied. (See also No. 81–1035, *supra.*)

No. 80–1527. LUMMIS, TEMPORARY ADMINISTRATOR, ET AL. *v.* LOS ANGELES AIRWAYS, INC. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 603 S. W. 2d 246.

No. 81–152. WEIT ET AL. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 641 F. 2d 457.

No. 81–373. BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., ET AL. *v.* ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ET AL.; and

No. 81–374. CITY OF BRIDGEPORT ET AL. *v.* ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 256.

No. 81–789. RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* TAYLOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–836. LEICHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 1153.

No. 81–926. CONNECTICUT *v.* GORDON. Sup. Ct. Conn. Certiorari denied. Reported below: 185 Conn. 402, 441 A. 2d 119.

No. 81–942. MONTANA WILDERNESS ASSN. ET AL. *v.* UNITED STATES FOREST SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 951.

No. 81–987. WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. Reported below: 662 F. 2d 899.

No. 81–1046. GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 68.

No. 81–1060. SIEGEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 2d 279.

No. 81–1081. BRUSCHI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 915.

No. 81–1123. CATALINA *v.* CITY OF COLUMBUS, OHIO, ET AL.; and OHIO EX REL. CATALINA *v.* MOODY, MAYOR OF COLUMBUS, ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 81–1126. TRUCK DRIVERS & HELPERS LOCAL UNION NO. 728 ET AL. *v.* ALLEN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 653 F. 2d 1016.

No. 81–1127. F. W. WOOLWORTH CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 655 F. 2d 151.

No. 81–1228. WATKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 1090.

No. 81–1247. SPIELER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 646 F. 2d 955.

No. 81–1248. DENNINGHAM *v.* DENNINGHAM. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 328, 431 A. 2d 755.

No. 81–1252. BOGGS *v.* MCDONALD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1306.

No. 81–1258. SHAHEEN ET AL. *v.* CLARKSON COMPANY LTD., TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 2d 506.

No. 81–1266. IVIE ET AL. *v.* BROWN. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 62.

No. 81–1276. MCLISTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–1277. MCGUINN *v.* CRIST, WARDEN, MONTANA STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 657 F. 2d 1107.

No. 81–1279. BROWN ET AL., DBA THUNDERGUARDS MOTORCYCLE CLUB *v.* COUNTY COMMISSIONERS OF KENT COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 729.

No. 81–1280. DUMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 411.

No. 81–1286. CALIFORNIA ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 2d 1355.

No. 81–1342. COWETTA NEWS, INC., DBA PLAYMATE VISUAL CENTER *v.* CITY OF MEMPHIS. Ct. App. Tenn. Certiorari denied.

No. 81–1364. EATON *v.* DRAKE UNIVERSITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 703.

No. 81–1398. SKRUZNY *v.* MYERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–1401. SCHMIDT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 914.

No. 81–1403. TAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 105.

No. 81–1412. CONNOR *v.* PHILLIPS, ADMINISTRATOR, ET AL. Sup. Ct. N. J. Certiorari denied.

No. 81–1424. CARNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 348.

No. 81–1429. LONGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81–1440. RHODES ET AL. *v.* STEWART ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 656 F. 2d 1216.

No. 81–1443. DRESSEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–1451. MAYNARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1181.

No. 81–5635. COATS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 2d 1076.

No. 81–5802. TSUI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 2d 365.

No. 81–5828. SHEIKH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 1057.

No. 81–5852. SANFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 2d 342.

No. 81–6002. FIORINI *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81–6006. AHMED ET UX. *v.* KUNKLE ET UX. Ct. App. Ariz. Certiorari denied.

No. 81–6013. HICKS *v.* ROSE, WARDEN, TENNESSEE STATE PENITENTIARY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81–6017. CURTIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1201, 426 N. E. 2d 1288.

No. 81–6018. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 486, 442 N. Y. S. 2d 300.

No. 81–6031. SMITH *v.* RABALAIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 539.

No. 81–6037. WILLIAMS *v.* WYRICK, WARDEN, MISSOURI PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 193.

No. 81–6040. TOWNSEND *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 418 N. E. 2d 554.

No. 81–6041. ADAMSON *v.* HILL, SHERIFF OF MARICOPA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 81–6080. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 894.

No. 81–6096. SUTTERER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1077.

No. 81–6099. WILLIAMS *v.* CARMEN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81–6117. WATKINS *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1042.

No. 81–6125. IN RE NEARIS. C. A. 1st Cir. Certiorari denied.

No. 81–6141. RODRIGUES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1032.

No. 81–6149. GARZA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 664 F. 2d 135.

No. 81–6154. IN RE RANDOLPH T. Ct. App. Md. Certiorari denied. Reported below: 292 Md. 97, 437 A. 2d 230.

No. 81–6155. ANTONELLI *v.* LIPPMAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 81–868. DEVITO, DIRECTOR OF THE ILLINOIS DEPARTMENT OF MENTAL HEALTH *v.* HARRINGTON ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 656 F. 2d 264.

No. 81–1133. MISSOURI BOARD OF PROBATION AND PAROLE ET AL. *v.* WILLIAMS ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 F. 2d 697.

No. 81–1470. MEYER, WARDEN *v.* WILSON. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 665 F. 2d 118.

No. 81–900. NUCLEAR ENGINEERING CO., INC. *v.* FAHNER, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 660 F. 2d 241.

No. 81–1263. DEVON CORP. ET AL. *v.* MILLER, DIRECTOR, WEST VIRGINIA DEPARTMENT OF MINES, ET AL. Sup. Ct. App. W. Va. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: —— W. Va. ——, 280 S. E. 2d 108.

No. 81–1154. COX ENTERPRISES, INC., DBA LUFKIN NEWS, ET AL. *v.* VASCOCU, JUDGE, DISTRICT COURT OF ANGELINA COUNTY, TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 81–1270. LOCKHEED CORP. *v.* SCHNEIDER ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 212 U. S. App. D. C. 87, 658 F. 2d 835.

No. 81–1307. CHELSEA HOUSE PUBLISHERS, A DIVISION OF CHELSEA HOUSE EDUCATIONAL COMMUNICATIONS, INC., ET AL. *v.* NICHOLSTONE BOOK BINDERY, INC. Sup. Ct. Tenn. Certiorari denied. Reported below: 621 S. W. 2d 560.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

As I stated in dissenting from the denial of a writ of certiorari in *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 445 U. S. 907 (1980), "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts." *Id.*, at 909. I cited 22 cases in which lower courts had split 14–8 on the question and stressed the "considerable importance [of the issue] to contractual dealings between purchasers and sellers located in different States." *Id.*, at 909–910. This case presents the same issue as *Lakeside*, and the disarray among federal and state courts noted in *Lakeside* has continued. Compare *Taubler* v. *Giraud*, 655 F. 2d 991 (CA9 1981), with *Nu-Way Systems of Indianapolis, Inc.* v. *Belmont Marketing, Inc.*, 635 F. 2d 617 (CA7 1980). For the reasons stated in *Lakeside*, I would grant the petition and set the case for oral argument.

Rehearing Denied

No. 81–743. COWGILL ET AL. *v.* FLORIDA, 454 U. S. 1134;

No. 81–833. ROSS *v.* BIRD, CHIEF JUSTICE, CALIFORNIA SUPREME COURT, ET AL.; and ROSS *v.* SAN DIEGO COUNTY SUPERIOR COURT ET AL., 454 U. S. 1147;

No. 81–5612. IN RE BEACH, *ante*, p. 906;

No. 81–5641. FISCHETTI *v.* ASCIONE, 454 U. S. 1135;

No. 81–5648. WARD *v.* UNITED STATES, *ante*, p. 922;

No. 81–5675. CARABALLO *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, 454 U. S. 1153;

No. 81–5676. BAILEY *v.* REDMAN, WARDEN, DELAWARE CORRECTIONAL CENTER, ET AL., 454 U. S. 1153;

No. 81–5739. GALLO *v.* MASSACHUSETTS, 454 U. S. 1155; and

No. 81–5860. CRENSHAW *v.* UNITED STATES ET AL., *ante*, p. 912. Petitions for rehearing denied.

MARCH 3, 1982

Dismissal Under Rule 53

No. 81–1309. REINSTEIN *v.* SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 661 F. 2d 255.

MARCH 8, 1982

Affirmed on Appeal

No. 81–865. METROCENTRE IMPROVEMENT DISTRICT NO. 1, CITY OF LITTLE ROCK, ARKANSAS *v.* FEDERAL RESERVE BANK OF ST. LOUIS. Affirmed on appeal from C. A. 8th Cir. JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 657 F. 2d 183.

Appeals Dismissed

No. 81–1315. WESTPHALEN *v.* CITY OF CHICAGO ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 93 Ill. App. 3d 1110, 418 N. E. 2d 63.

No. 81–6055. HERNANDEZ *v.* DEPARTMENT OF LABOR AND HUMAN RESOURCES ET AL. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 81–1324. ESPOSITO *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Reported below: 54 N. Y. 2d 886, 429 N. E. 2d 425.

Vacated and Remanded on Appeal

No. 80–2003. HONDA MOTOR CO., LTD. *v.* COONS. Appeal from Super. Ct. N. J., App. Div. Judgment vacated and case remanded for further consideration in light of *G. D. Searle & Co.* v. *Cohn*, *ante*, p. 404. JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR would dismiss the appeal for want of jurisdiction. Reported below: 176 N. J. Super. 575, 424 A. 2d 446.

Certiorari Granted—Vacated and Remanded

No. 81–1038. DUCKWORTH, WARDEN, ET AL. *v.* COWELL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the Northern District of Indiana to dismiss the petition for writ of habeas corpus. *Rose* v. *Lundy*, *ante*, p. 509. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of certiorari. Reported below: 665 F. 2d 1050.

No. 81–1098. CENTRAL INTELLIGENCE AGENCY ET AL. *v.* HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY. C. A. D. C. Cir. Certiorari granted. Upon the representation of counsel for respondent set forth in her letter of February 18, 1982, and the response of the Solicitor General filed February 24, 1982, the judgment is vacated insofar as it affirms the decision of the United States District Court for the District of Columbia requiring the disclosure of the six documents in question and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit with directions that it instruct the United States District Court to dismiss this aspect of the case as moot. Reported below: 205 U. S. App. D. C. 91, 636 F. 2d 838.

No. 81–5047. RODRIQUEZ *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the Southern District of New York to dismiss the petition for writ of habeas corpus. *Rose* v. *Lundy*, *ante*, p. 509. JUSTICE STEVENS would grant the petition for writ of certiorari and set case for oral argument. Reported below: 659 F. 2d 1062.

Miscellaneous Orders

No. ——. GITRE *v.* BACHE, HALSEY, STUART, SHIELDS, INC. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. 89, Orig. CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES. Motion of the Solicitor General for leave to file a supplemental brief granted. [For earlier order herein, see, *e. g.*, 454 U. S. 1096.]

No. A–710 (81–1589). HUNT *v.* COLLINS. Super. Ct. Ga., Fulton County. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–724. LORDEON *v.* PETERS, COMMISSIONER, DIVISION OF MOTOR VEHICLES, DEPARTMENT OF TRANSPORTATION OF NORTH CAROLINA. Sup. Ct. N. C. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–746 (81–1114). ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL. C. A. 7th Cir. Application of "undisclosed respondents" for an order to keep identities of certain respondents held *in camera*, presented to JUSTICE STEVENS, and by him referred to the Court, granted.

No. 81–731. ARKANSAS ELECTRIC COOPERATIVE CORP. *v.* ARKANSAS PUBLIC SERVICE COMMISSION. Sup. Ct. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81–1055. POYTHRESS, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* DUNCAN ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 937.] Motion of respondents to advance case for oral argument and for abridgement of time to file briefs denied.

No. 81–1565. VSL CORP. *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for an order placing the petition for writ of certiorari, brief in opposition, and record under seal denied.

No. 81–6068. IN RE SMILEY. Petition for writ of mandamus denied.

No. 81–6046. IN RE BOWINE. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 81–1320. KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. *v.* LAWSON. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 658 F. 2d 1362.

Certiorari Granted

No. 81–1251. CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA *v.* MYERS. C. A. 5th Cir. Certiorari granted. Reported below: 654 F. 2d 719.

No. 81–638. HEWITT ET AL. *v.* HELMS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 655 F. 2d 487.

No. 81–827. JEFFERSON COUNTY PHARMACEUTICAL ASSN., INC. *v.* ABBOTT LABORATORIES ET AL. C. A. 5th Cir. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 656 F. 2d 92.

Certiorari Denied. (See also Nos. 81–1315 and 81–6055, *supra.*)

No. 80–704. GIBBONS, TRUSTEE, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 7th Cir. Certiorari before judgment denied.

No. 80–2036. JOSEPH *v.* CANNON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 206 U. S. App. D. C. 405, 642 F. 2d 1373.

No. 80–6902. STEDMAN *v.* MAYNARD, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 81–752. CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 653 F. 2d 732.

No. 81–986. McLEMORE'S WHOLESALE & RETAIL STORES, INC. *v.* PAYNE. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 1130.

No. 81–996. MANNEY, BY HIS MOTHER, MANNEY *v.* FARE, LOS ANGELES COUNTY CHIEF PROBATION OFFICER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 1280.

No. 81–1071. VANNIER *v.* UNITED STATES; and
No. 81–1108. HERMANN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 423.

No. 81–1084. ILLINOIS ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 2d 923.

No. 81–1087. ALASKA *v.* HEFFLE ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 633 P. 2d 264.

No. 81–1091. PAUK *v.* BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 654 F. 2d 856.

No. 81–1101. DEPARTMENT OF TRANSPORTATION OF CALIFORNIA ET AL. *v.* SAN DIEGO UNIFIED PORT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 1306.

No. 81–1143. YETTKE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 95 Ill. App. 3d 365, 420 N. E. 2d 194.

No. 81–1157. DOE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 2d 1073.

No. 81–1250. RAILWAY LABOR EXECUTIVES' ASSN. *v.* OGILVIE, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 1149.

No. 81–1294. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* VANSKIKE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 665 F. 2d 188.

No. 81–1297. LOCAL LODGES 743 ET AL., INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 2d 909.

No. 81–1299. ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–1301. UNITED STATES *v.* DiSALVATORE, ADMINISTRATOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 902.

No. 81–1311. SACKS *v.* INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 672 F. 2d 920.

No. 81–1321. ROYAL NETHERLANDS STEAMSHIP CO. *v.* SINGER. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 495.

No. 81–1325. GRAHAM ET AL. *v.* KENTUCKY. Cir. Ct. Ky., Hardin County. Certiorari denied.

No. 81–1327. NATIONAL HEALTH AGENCIES *v.* UNITED WAY OF SAN DIEGO COUNTY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 941.

No. 81–1329. BOLLOTIN *v.* SCHWARTZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 491.

No. 81–1355. MALONE *v.* RICHARDSON ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1205, 420 N. E. 2d 1211.

No. 81–1362. MONTREAL TRADING LTD. *v.* AMAX, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 661 F. 2d 864.

No. 81–1363. HOLT MARINE TERMINAL, INC. *v.* TRANSPORT INTERNATIONAL POOL, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–1400. PRESTON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 634 F. 2d 1285.

No. 81–1416. THOMAS *v.* SOARES, JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1054.

No. 81–1417. THOMAS *v.* PURNELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1054.

No. 81–1430. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 81–1435. COLACURCIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 684.

No. 81–1445. PETERS *v.* DIAMOND, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 362, 672 F. 2d 896.

No. 81–1457. CITIZENS AGAINST UFO SECRECY *v.* NATIONAL SECURITY AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 359, 672 F. 2d 893.

No. 81–1459. POSTON *v.* BOLGER, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 912.

No. 81–1465. PRING ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (UNITED STATES, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 81–1466. DOYLE *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 215 U. S. App. D. C. 333, 668 F. 2d 1365.

No. 81–5677. BIBBY *v.* UNITED STATES; and

No. 81–5790. REED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 658 F. 2d 624.

No. 81–5777. MEFFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 658 F. 2d 588.

No. 81–5858. GRANVIEL *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 655 F. 2d 673.

No. 81–5867. BACON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81–5882. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 73.

No. 81–6025. LEVY *v.* HIGH'S DAIRY STORES ET AL. Sup. Ct. Va. Certiorari denied.

No. 81–6032. FORD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 30 Cal. 3d 209, 635 P. 2d 1176.

No. 81–6039. MARTIN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–6042. MINCEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 130 Ariz. 389, 636 P. 2d 637.

No. 81–6043. POE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 81–6047. NOTARO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 81–6048. MORRIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81–6053. HATCH *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 81–6057. CODY *v.* UNION ELECTRIC CO. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 292.

No. 81–6058. MORRIS *v.* FAULKNER, SHERIFF OF TULSA COUNTY, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6060. BETTS *v.* KEEBLER CO. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 2d 1043.

No. 81–6063. COLLINS *v.* HOUSEWRIGHT. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 181.

No. 81–6065. JAMES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 81–6066. NYMAN *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–6067. MCCOLPIN *v.* BARNES. C. A. 10th Cir. Certiorari denied.

No. 81–6069. MITCHELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 48 Md. App. 779.

No. 81–6071. COGGINS *v.* AUSTIN, WARDEN, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 663 F. 2d 106.

No. 81–6091. BOZEMAN *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1025.

No. 81–6123. CURRIER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 81–6135. HOOTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 628.

No. 81–6165. MERCADO *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 673 F. 2d 1297.

No. 81–6169. HALE *v.* KANSAS ET AL. C. A. 8th Cir. Certiorari denied.

No. 81–6177. SERE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 882.

No. 81–6178. VANDER PAUWERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81–6179. CAMERON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

No. 81–6181. BELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 286.

No. 81–6185. HOWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 101.

No. 81–6188. MAGILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 2d 69.

No. 81–6189. RAMSEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 1013.

No. 81–6193. TINSLEY *v.* UNITED STATES AIR FORCE. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 705.

No. 81–6195. HENDRIX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 590.

No. 81–415. CASBAH, INC., ET AL. *v.* THONE, GOVERNOR OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 651 F. 2d 551.

No. 81–998. BRACHE ET AL. *v.* COUNTY OF WESTCHESTER ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 658 F. 2d 47.

No. 81–6201. TOWSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1302.

No. 81–899. BAXTER ET AL. *v.* MOUZAVIRES. Ct. App. D. C. Certiorari denied. Reported below: 434 A. 2d 988.

JUSTICE WHITE, with whom JUSTICE POWELL joins, dissenting.

In this case, the District of Columbia Court of Appeals concluded that the Due Process Clause permitted the trial court to exercise personal jurisdiction over petitioners, members of a Florida law firm, on the basis of an agreement with respondent, a District of Columbia patent attorney, to assist them in defending a suit filed against one of their clients in a Federal District Court in Florida. The Court of Appeals acknowledged that under *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958), "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." It concluded, however, that, by voluntarily entering into a contractual arrangement with a forum plaintiff, defendant satisfied this standard. The opinion equated the defendant law firm's entering this contract with the solicitation of business by the defendant insurance company in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957).

The standard of the District of Columbia Court of Appeals would permit a District of Columbia merchant who, in response to a telephone order, sends merchandise to Florida, to sue for the price in the District of Columbia. As I wrote in dissenting from denial of certiorari in *Chelsea House Publishers* v. *Nicholstone Book Bindery*, *ante*, p. 994, and in *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 445 U. S. 907 (1980), the disarray among federal and state courts on the issue of minimal contacts based on contractual dealings continues unabated. This case, which involves services instead of goods, further demonstrates that

this Court should address the issue. I dissent from the denial of certiorari.

No. 81–1011. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* GRANVIEL. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 655 F. 2d 673.

No. 81–1318. CATHOLIC SOCIAL SERVICES OF TUCSON *v.* P. C. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 130 Ariz. 202, 635 P. 2d 187.

No. 81–1012. INSURANCE COMPANY OF NORTH AMERICA *v.* KEENE CORP. ET AL.;

No. 81–1197. HARTFORD ACCIDENT & INDEMNITY CO. *v.* KEENE CORP. ET AL.;

No. 81–1298. AETNA CASUALTY & SURETY CO. *v.* KEENE CORP. ET AL.; and

No. 81–1328. LIBERTY MUTUAL INSURANCE CO. *v.* KEENE CORP. ET AL. C. A. D. C. Cir. Motions of Commercial Union Insurance Cos. and American Home Assurance Co. et al. for leave to file briefs as *amici curiae* in No. 81–1012 granted. Motion of Walbrook Insurance Co., Ltd., et al. for leave to file a brief as *amici curiae* in No. 81–1328 granted. Motions of Armstrong World Industries, Inc., et al. and Home Insurance Co. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE POWELL would grant certiorari. JUSTICE BRENNAN took no part in the consideration or decision of these petitions and motions. Reported below: 215 U. S. App. D. C. 156, 667 F. 2d 1034.

No. 81–1198. MINNESOTA *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 660 F. 2d 1240.

No. 81–1239. STEPHENS ET AL. *v.* BLACK ET UX. C. A. 3d Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR would grant certiorari. Reported below: 662 F. 2d 181.

No. 81–1349. DELLWAY VILLA OF TENNESSEE, LTD., ET AL. *v.* JORDAN ET AL. C. A. 6th Cir. Motion of respondent Charlie Mai Jordan for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 F. 2d 588.

No. 81–5876. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 622 S. W. 2d 116.

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. 81–6056 (A–711). MUINA ET AL. *v.* MONTANA ET AL. C. A. 9th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied. Reported below: 659 F. 2d 1089.

Rehearing Denied

No. 81–819. STAINBROOK *v.* PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, 454 U. S. 1146;

No. 81–830. GIESEY *v.* DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL., *ante*, p. 908;

No. 81–965. GUTTER *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *ante*, p. 909;

No. 81–5624. ARNOLD *v.* MARSHALL ET AL., *ante*, p. 922;

No. 81–5632. IN RE DOWNS, 454 U. S. 1121;

No. 81–5713. CORTEZ, AKA CORTEZ-ESPINOZA *v.* UNITED STATES, *ante*, p. 923; and

No. 81–5749. MORGAN *v.* MONTGOMERY, WARDEN, GEORGIA STATE PRISON, *ante*, p. 927. Petitions for rehearing denied.

No. 81–5805. CHICCO *v.* CITY OF NEW BEDFORD ET AL., *ante*, p. 924; and

No. 81–5842. MOSS *v.* POLLAND ET AL., *ante*, p. 925. Petitions for rehearing denied.

No. 81–198. INSURANCE COMPANY OF NORTH AMERICA *v.* FORTY-EIGHT INSULATIONS, INC., ET AL., 454 U. S. 1109; and

No. 81–200. AETNA CASUALTY & SURETY CO. *v.* PORTER ET AL., 454 U. S. 1109. Petitions for rehearing denied. JUSTICE BRENNAN and JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

MARCH 10, 1982

Dismissal Under Rule 53

No. 81–741. U. S. MARKETING, INC., ET AL. *v.* IDAHO ET AL. Sup. Ct. Idaho. [Probable jurisdiction noted, 454 U. S. 1140.] Appeal dismissed under this Court's Rule 53.

MARCH 22, 1982

Affirmed on Appeal

No. 81–1356. JONES *v.* MORRIS ET AL. Affirmed on appeal from D. C. S. D. Ohio. Reported below: 541 F. Supp. 11.

Appeals Dismissed

No. 81–5827. IN RE TURNER. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Reported below: 402 So. 2d 383.

No. 81–6073. FLUKER *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Reported below: 248 Ga. 290, 282 S. E. 2d 112.

No. 81–6097. RICHARDS *v.* CITY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 81–6106. IVEY *v.* ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question.

No. 81–6157. WOLFSON *v.* MURRAY 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. Reported below: 665 F. 2d 1056.

Certiorari Granted—Reversed and Remanded. (See No. 81–1049, *ante*, p. 603.)

Certiorari Granted—Vacated and Remanded. (See also No. 81–844, *ante*, p. 591.)

No. 76–1234. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ROSS ET AL. C. A. 4th Cir.; and

No. 76–1261. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ABRAMS ET AL. C. A. 9th Cir. Upon consideration of the motion to vacate filed by the Solicitor General on March 11, 1982, the judgments of the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Ninth Circuit are vacated and the cases are remanded to the United States District Court for the District of Maryland and the United States District Court for the Central District of California, respectively, with directions to dismiss the causes as moot when the parties jointly so move. Reported below: No. 76–1234, 544 F. 2d 514; No. 76–1261, 547 F. 2d 1062.

Certiorari Granted—Reversed. (See No. 81–362, *ante*, p. 586.)

Miscellaneous Orders

No. — — ——. CHICAGO FIRE FIGHTERS UNION, LOCAL NO. 2, ET AL. *v.* CITY OF CHICAGO. Application to direct the Clerk to file the petition for writ of certiorari denied.

No. A–582. WORTLEY *v.* UNITED STATES. Application for bail pending appeal, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A–720 (81–1636). FLORIDA *v.* BRADY ET AL. Sup. Ct. Fla. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–733. OPPENHEIM ET AL. *v.* MOREAU ET AL. C. A. 5th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–748 (81–1729). NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Application for an injunction, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. The order heretofore entered by JUSTICE MARSHALL on March 4, 1982, is vacated.

No. A–764. CALIFORNIA *v.* RAMOS. Sup. Ct. Cal. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. D–244. IN RE DISBARMENT OF IVLER. Disbarment entered. [For earlier order herein, see 454 U. S. 935.]

No. D–245. IN RE DISBARMENT OF PRESSMAN. Disbarment entered. [For earlier order herein, see 454 U. S. 936.]

No. D–246. IN RE DISBARMENT OF KAHN. Disbarment entered. [For earlier order herein, see 454 U. S. 936.]

No. D–247. IN RE DISBARMENT OF COSTELLO. Disbarment entered. [For earlier order herein, see 454 U. S. 936.]

No. D–251. IN RE DISBARMENT OF GOLD. Disbarment entered. [For earlier order herein, see 454 U. S. 938.]

No. D–252. IN RE DISBARMENT OF RAWLINS. Disbarment entered. [For earlier order herein, see 454 U. S. 1027.]

No. D–253. IN RE DISBARMENT OF CALDWELL. Disbarment entered. [For earlier order herein, see 454 U. S. 1027.]

No. D–257. IN RE DISBARMENT OF GOTKIN. It is ordered that Martin E. Gotkin, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–258. IN RE DISBARMENT OF ROOT. It is ordered that Stanley Roy Root, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–259. IN RE DISBARMENT OF COVEN. It is ordered that Bernard J. Coven, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–260. IN RE DISBARMENT OF BUSSEY. It is ordered that Richard M. Bussey, of Santa Rosa, Cal., 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. 80–2205. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS *v.* MURRAY. C. A. 7th Cir. [Certiorari granted, 454 U. S. 962.] Motion of Chicago Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted.

No. 81–150. NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.; and

No. 81–546. UNITED STATES *v.* MARATHON PIPE LINE CO. ET AL. D. C. Minn. [Probable jurisdiction noted, 454 U. S. 1029.] Motion of Beneficial Corp. for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied. Motion of Commercial Law League of America to reconsider order denying motion for leave to participate in oral argument as *amicus curiae* denied.

No. 81–213. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HOGAN ET AL. D. C. Mass. [Probable jurisdiction noted, 454 U. S. 891.] Motion of the Solicitor General to permit George W. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 81–280. GENERAL BUILDING CONTRACTORS ASSN., INC. *v.* PENNSYLVANIA ET AL.;

No. 81–330. UNITED ENGINEERS & CONSTRUCTORS, INC. *v.* PENNSYLVANIA ET AL.;

No. 81–331. CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA ET AL. *v.* PENNSYLVANIA ET AL.;

No. 81–332. GLASGOW, INC. *v.* PENNSYLVANIA ET AL.; and

No. 81–333. BECHTEL POWER CORP. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 454 U. S. 939.] Motion of Black Economic Survival for leave to file a brief as *amicus curiae* out of time denied.

No. 81–334. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of Associated General Contractors of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 81–389. UNION LABOR LIFE INSURANCE CO. *v.* PIRENO; and

No. 81–390. NEW YORK STATE CHIROPRACTIC ASSN. *v.* PIRENO. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1052.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Arizona et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied. Motion of petitioner in No. 81–390 to reconsider order denying divided argument denied.

No. 81–406. MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN. C. A. 5th Cir. [Certiorari granted, 454 U. S. 962.] Motion of petitioners for leave to file reply brief out of time granted.

No. 81–750. FIDELITY FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* DE LA CUESTA ET AL. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction noted, *ante*, p. 917.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 81–825. PILLSBURY CO. ET AL. *v.* CONBOY. C. A. 7th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of Mead Corp. for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 81–1374. BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* STENSON. C. A. 2d Cir. Motion of respondent Ellen Stenson for leave to proceed *in forma pauperis* granted.

No. 81–5152. TAYLOR *v.* ALABAMA. Sup. Ct. Ala. [Certiorari granted, 454 U. S. 963.] Motion of petitioner for leave to file reply brief out of time granted.

No. 81–1641 (A–768). REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* BURTON ET AL. Sup. Ct. Cal. Motion of appellants to expedite consideration of the appeal denied. Application to stay enforcement of the judgment of the Supreme Court of California, addressed to JUSTICE WHITE and referred to the Court, denied.

No. 81–5321. ENMUND *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, 454 U. S. 939.] Motion of Washington Legal Foundation for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81–1500. IN RE CHING YEE. Petition for writ of common-law certiorari and for all other relief denied.

Certiorari Granted

No. 81–1044. UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS *v.* AIKENS. C. A. D. C. Cir. Certiorari granted. Reported below: 214 U. S. App. D. C. 239, 665 F. 2d 1057.

No. 81–1114. ILLINOIS *v.* ABBOTT & ASSOCIATES, INC., ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 659 F. 2d 800.

No. 81–1180. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC. C. A. 4th Cir. Certiorari granted. Reported below: 649 F. 2d 216.

No. 81–1062. UNITED STATES *v.* EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY. C. A. 9th Cir. Motion of respondent Mary Josephine Vasquez for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 645 F. 2d 836.

No. 81–1404. BRISCOE ET AL. *v.* LAHUE ET AL. C. A. 7th Cir. Motion of petitioners Chris P. Vickers, Sr., and James N. Ballard for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 663 F. 2d 713.

Certiorari Denied. (See also Nos. 81–1500 and 81–6157, *supra.*)

No. 80–2092. SCM CORP. *v.* XEROX CORP. C. A. 2d Cir. Certiorari denied. Reported below: 645 F. 2d 1195.

No. 81–363. KARR *v.* KARR. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 628 P. 2d 267.

No. 81–672. IRWIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 654 F. 2d 671.

No. 81–834. CLARKE ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 81–917. ST. PETER *v.* MARSH, SECRETARY OF THE ARMY. C. A. D. C. Cir. Certiorari denied. Reported below: 212 U. S. App. D. C. 249, 659 F. 2d 1133.

No. 81–950. JAMIESON-MCKAMES PHARMACEUTICALS, INC., ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 651 F. 2d 532.

No. 81–955. POTOMAC ELECTRIC POWER CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 650 F. 2d 509.

No. 81–1090. RENO, STATE ATTORNEY, ET AL. *v.* ABRAMS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 649 F. 2d 342.

No. 81–1103. THERMOFIL INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 650 F. 2d 858.

No. 81–1110. SALPETER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 905.

No. 81–1106. JOINT APPRENTICESHIP COMMITTEE LOCAL NO. 130, U. A. *v.* EGGLESTON ET AL.;

No. 81–1208. PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY *v.* PLUMMER ET AL.; and

No. 81–1209. CHICAGO JOURNEYMEN PLUMBERS' LOCAL UNION NO. 130, U. A. *v.* PLUMMER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 2d 890.

No. 81–1116. O. HOMMEL CO. *v.* FERRO CORP. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 340.

No. 81–1142. STUCKEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 494.

No. 81–1168. JENTGEN, TRUSTEE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 527, 657 F. 2d 1210.

No. 81–1170. BERNOTAS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 277 S. C. 106, 283 S. E. 2d 580.

No. 81–1175. INTERNATIONAL MEDICATION SYSTEMS, LTD. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 1110.

No. 81–1186. GREER *v.* CITY OF SEGUIN, TEXAS, ET AL. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied.

No. 81–1207. DELTONA CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 476, 657 F. 2d 1184.

No. 81–1223. CARGO GASOLINE CO. ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 2d 676.

No. 81–1262. MCDONNELL DOUGLAS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 2d 932.

No. 81–1272. SALKIN ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 2d 526.

No. 81–1316. MCCUTCHEON *v.* CHICAGO BOARD OF EDUCATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 94 Ill. App. 3d 993, 419 N. E. 2d 451.

No. 81–1323. MURPHY TUGBOAT CO. *v.* SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 2d 1256.

No. 81–1330. OHIO STATE BOARD OF EDUCATION ET AL. *v.* REED ET AL.; and OHIO STATE BOARD OF EDUCATION ET AL. *v.* PENICK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 662 F. 2d 1219 (first case); 663 F. 2d 24 (second case).

No. 81–1331. COUNTY OF SAN DIEGO *v.* NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1051.

No. 81–1336. PAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 661 F. 2d 1080.

No. 81–1340. F. D. RICH HOUSING OF THE VIRGIN ISLANDS, INC., ET AL. *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 2d 419.

No. 81–1343. ROSENBAUM *v.* ROSENBAUM. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 94 Ill. App. 3d 352, 418 N. E. 2d 939.

No. 81–1344. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 299.

No. 81–1345. SIMONS *v.* SOUTH-WESTERN PUBLISHING CO. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 653.

No. 81–1347. CHIAZOR ET AL. *v.* TRANSWORLD DRILLING CO., LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 648 F. 2d 1015.

No. 81–1348. FALLS STAMPING & WELDING CO. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81–1352. ROMANO'S NETCONG, INC., ET AL. *v.* LERNER, DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 81–1354. MUELLER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–1358. FLEER CORP. *v.* TOPPS CHEWING GUM, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 139.

No. 81–1367. FRIERSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 625 S. W. 2d 872.

No. 81–1369. SCHWANECKE ET AL. *v.* HARRIS COUNTY HOSPITAL DISTRICT. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 81–1375. KERR-MCGEE REFINING CORP. *v.* THOMPSON. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 1380.

No. 81–1377. DRESSER INDUSTRIES, INC. *v.* ALASKA DEPARTMENT OF LABOR. Sup. Ct. Alaska. Certiorari denied. Reported below: 633 P. 2d 998.

No. 81–1383. HASKON, INC., ET AL. *v.* LESUEUR CREAMERY, INC. C. A. 8th Cir. Certiorari denied. Reported below: 660 F. 2d 342.

No. 81–1384. PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION, ET AL. *v.* SULLIVAN. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 2d 443.

No. 81–1386. PACIFIC FIRST FEDERAL SAVINGS & LOAN ASSN. *v.* GUINASSO ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 1364.

No. 81–1390. MISKOW, EXECUTOR, ET AL. *v.* BOEING CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 205.

No. 81–1407. BENHAM-BLAIR & AFFILIATES, INC., DBA W. R. HOLWAY & ASSOCIATES *v.* CITY OF BROKEN ARROW, OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 660 F. 2d 450.

No. 81–1410. REHBERGER *v.* DARNELL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 1207, 427 N. E. 2d 1056.

No. 81–1415. BUTTERWORTH, SHERIFF OF BROWARD COUNTY, FLORIDA *v.* SEMINOLE TRIBE OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 2d 310.

No. 81–1418. QUALITY AUTO BODY, INC. *v.* ALLSTATE INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 1195.

No. 81–1419. MADISON *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 32, 661 F. 2d 253.

No. 81–1420. STILL *v.* PERSONNEL BOARD OF JEFFERSON COUNTY ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 406 So. 2d 860.

No. 81–1422. SMOKE-CRAFT, INC. *v.* UNITED STEEL WORKERS OF AMERICA, AFL–CIO–CLC. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 1356.

No. 81–1423. WILSON *v.* RENNER, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MINNESOTA (MUTUAL OF OMAHA INSURANCE CO., REAL PARTY IN INTEREST). C. A. 8th Cir. Certiorari denied.

No. 81–1431. JOINT COUNCIL OF TEAMSTERS NO. 42, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 531.

No. 81–1436. PAINTER, SUPERVISOR OF LYONS TOWNSHIP *v.* NEKOLNY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 2d 1164.

No. 81–1442. LEWIS ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–1461. CONTRERAS ET AL. *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 1267.

No. 81–1462. GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* NALORE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 841.

No. 81–1473. KLINSKI *v.* FOUR WINDS TRAVEL, INC. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 81–1482. KENDALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 2d 126.

No. 81–1499. COLORADO SPANISH PEAKS RANCH, INC. *v.* TRAVELERS INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 759.

No. 81–1509. HINDS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 362.

No. 81–1510. MCLAUGHLIN ET AL. *v.* UNITED STATES;
No. 81–6198. TOUCHARD *v.* UNITED STATES; and
No. 81–6199. TOUCHARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81–1518. HAYDEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 1152.

No. 81–1530. WOODARD *v.* MARSH, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 989.

No. 81–1542. MAZALESKI *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 216 U. S. App. D. C. 416, 670 F. 2d 1235.

No. 81–1567. FAGREY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 504.

No. 81–5017. EDWARDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 430 A. 2d 1321.

No. 81–5614. WEST *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–5682. PASSMAN *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 559.

No. 81–5756. FASICK *v.* HILTON, WARDEN, TRENTON STATE PRISON. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 2d 914.

No. 81–5759. SANDERS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 635 P. 2d 1023.

No. 81–5795. CARTWRIGHT *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1103.

No. 81–5822. KENDZIA *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 2d 722.

No. 81–5887. UNITED STATES EX REL. FULTON *v.* FRANZEN, DIRECTOR, DEPARTMENT OF CORRECTIONS OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 741.

No. 81–5960. VON LUDWITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1090.

No. 81–5961. VON LUDWITZ *v.* LAPPIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–5968. MOSS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 313.

No. 81–5986. WILSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–5988. NETTLES BEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81–6028. SPINNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 498.

No. 81–6044. SPRINGER ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 81–6052. JOHNSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81–6070. LEBRIGHT *v.* CHRISTIAN, UNITED STATES DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6074. ABU-BAKR *v.* KOON ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6075. LONG *v.* SMITH, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 18.

No. 81–6077. MCDONALD *v.* GEORGIA KRAFT CO. Ct. App. Ga. Certiorari denied. Reported below: 160 Ga. App. 696, 288 S. E. 2d 60.

No. 81–6083. JURAS *v.* AMAN COLLECTION SERVICE, INC. Sup. Ct. Mont. Certiorari denied.

No. 81–6087. MINAYA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 360, 429 N. E. 2d 1161.

No. 81–6088. CLARK *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 81–6095. MATHIS *v.* MONTGOMERY, WARDEN, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 295.

No. 81–6100. SKINNER *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81–6102. THORNE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 102, 622 S. W. 2d 178.

No. 81–6103. KINCAID *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 87 Ill. 2d 107, 429 N. E. 2d 508.

No. 81–6105. CELESTINE *v.* MUNICIPAL CORRECTION INSTITUTION. C. A. 8th Cir. Certiorari denied.

No. 81–6107. HUFF *v.* BORDENKIRCHER, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1026.

No. 81–6108. SIMPSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 81–6111. VENERI *v.* CIRCUIT COURT OF GASCONADE COUNTY ET AL. C. A. 8th Cir. Certiorari denied.

No. 81–6114. BARBER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 794, 441 N. Y. S. 2d 757.

No. 81–6118. NORDSTROM *v.* WALT DISNEY PRODUCTIONS, INC. C. A. 10th Cir. Certiorari denied.

No. 81–6119. JAFFER *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–6120. BEHLIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 83 App. Div. 2d 557, 440 N. Y. S. 2d 948.

No. 81–6122. AUSTIN *v.* OSBORNE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 906.

No. 81–6124. TYLER *v.* WOODSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 702.

No. 81–6127. JOHNSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1074.

No. 81–6132. HAMILTON *v.* MAYS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81–6134. HAMPTON *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6136. GRIM ET AL. *v.* OHIO. Ct. App. Ohio, Champaign County. Certiorari denied.

No. 81–6133. SULLIVAN *v.* LANE, ACTING WARDEN, ET AL.; SULLIVAN *v.* LANDHOUISE ET AL.; SULLIVAN *v.* BURGESS ET AL.; SULLIVAN *v.* THOMPSON, GOVERNOR OF ILLINOIS, ET AL.; and SULLIVAN *v.* JOHNSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6137. BEARDEN *v.* WHITE, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 704.

No. 81–6138. BEACH *v.* LEBEL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1077.

No. 81–6139. BRAY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–6146. COOKS *v.* SPALDING, WARDEN, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 2d 738.

No. 81–6147. HALL *v.* THOMAS. Sup. Ct. Va. Certiorari denied.

No. 81–6148. FRANKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 636 P. 2d 361.

No. 81–6150. FILLYAW *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 104 Wis. 2d 700, 312 N. W. 2d 795.

No. 81–6153. ELLISON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 437 A. 2d 1127.

No. 81–6159. MONTANA *v.* COMMISSIONERS COURT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 19.

No. 81–6160. HOLIFIELD *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 710.

No. 81–6162. IN RE GAINES. C. A. 5th Cir. Certiorari denied.

No. 81–6168. CRATER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 1200, 426 N. E. 2d 1287.

No. 81–6173. WHITE *v.* THOMAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 680.

No. 81–6184. BRODY *v.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE. C. A. 1st Cir. Certiorari denied. Reported below: 664 F. 2d 10.

No. 81–6206. WERNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 896.

No. 81–6208. STOUTE *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–6212. BEGAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 504.

No. 81–6217. MATTHEIS *v.* ANDERSON, WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 917.

No. 81–6219. ESPINOSA-FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 81–6223. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1032.

No. 81–6228. BUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 532.

No. 81–6233. GHOLSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81–6234. TALBERT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1042.

No. 81–6240. KITCHENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1055.

No. 81–6251. MELNICK *v.* CITY OF PUEBLO. Dist. Ct. Colo., Pueblo County. Certiorari denied.

No. 81–6257. GALVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–6259. HAWK *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 940.

No. 81–6273. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 95.

No. 81–855. ANDERSON, WARDEN *v.* FULLER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 662 F. 2d 420.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Although I believe that *Jackson* v. *Virginia*, 443 U. S. 307, was decided incorrectly, it is not at all clear to me that the Court of Appeals in this case misapplied the dicta in the Court's opinion in *Jackson*. The Court of Appeals did not purport to resolve any conflict in the evidence. Quite properly it attached no weight to the fact that the defendant did not testify, or to the fact that his mother may have testified falsely in support of an alibi defense. Neither of those facts is affirmative evidence of guilt.

Based on their duty to "review the evidence in the light most favorable to the prosecution," 662 F. 2d 420, 423 (CA6 1981), a majority of the judges of the Court of Appeals concluded—as had the District Court and two of five justices of the Michigan Supreme Court—that there was insufficient evidence in the record that the respondent had intended to commit a crime. It is quite misleading to describe the slim record in this case as "a classic case of conflicting evidence,"

post, at 1031, or to imply that these conscientious federal judges chose "to sit as a jury and set aside the lawful jury's findings of fact." *Post*, at 1033. What the Court of Appeals did conclude was that evidence that the respondent, like several other boys, was present at the scene of the crime was legally insufficient to permit any rational trier of fact to find beyond a reasonable doubt that respondent was a participant in that crime. See 662 F. 2d, at 423. The essence of the Court of Appeals decision is explained in the following few paragraphs:

> "The district court correctly concluded that the evidence introduced at petitioner's trial only showed that on the morning of May 18 Fuller was present at the Turner residence along with Zerious Meadows and the other boys. The evidence showed that Fuller looked around while Meadows started the fires. But as Judge Feikens pointed out:
>
> "'This *suggests*, as Jefferey Coleman surmised, that the petitioner *may have been* acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew that Zerious Meadows planned to do *[sic]* is simply too meager to support conviction.' (emphasis in original)
>
> "We note that there was no evidence at trial that the 'Molotov cocktail' which started the fire was prepared in advance, or, if it was, whether any of the boys other than Zerious Meadows knew that the 'Molotov cocktail' existed. There was of course no evidence that any of the boys, except Fuller *[sic]*, participated in the manufacture of the 'Molotov cocktail'.
>
> "Moreover, there was no direct evidence that the youths approached the Turner house with intent to set the house on fire. Assuming Zerious Meadows had this

intent, however, there was no evidence that it was shared by petitioner or the other boys.

"The only direct evidence supporting the State's contention that Fuller 'stood guard and acted as a lookout' for Zerious Meadows was Jefferey Coleman's testimony that over a period of several minutes Fuller turned his head from side to side 'more than twice.' We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid Meadows' commission of arson." *Id.*, at 424.

In my judgment it would not be an appropriate use of this Court's scarce resources to grant certiorari and review every record in which a federal court makes a conscientious effort to apply the dictates of *Jackson* v. *Virginia*. For that reason, without reaching the question whether I would have decided this case the same way the Court of Appeals did had I been a member of that court, I think this Court wisely denies certiorari.

CHIEF JUSTICE BURGER, with whom JUSTICE O'CONNOR joins, dissenting.

Respondent Fuller was convicted of felony murder in 1970, following a fire in which two children died. The fire occurred on the morning of May 18, 1970. The prosecution's evidence showed that Fuller served as a lookout while Meadows set the fire. Fuller was 17 years old at the time. A neighbor testified that she saw Fuller, along with a few other boys, standing in front of the Turner house on the morning of the fire. A 14-year-old, Coleman, testified that he saw Fuller and Meadows behind the house. Meadows was on the back porch. As Coleman watched, for 5 or 10 minutes, Meadows stuffed a rag inside a bottle, ignited the rag, and threw the bottle against the house, starting a fire. Meadows then set another fire. Fuller, meanwhile, stood by a gate leading from the backyard to an alley. Coleman testified that Fuller looked up and down the alley while Meadows was setting the fires. Fuller and Meadows then left the yard

through the gate and ran down the alley together. Coleman went to the house of a friend, Martin, and reported that the Turner house was on fire.

The defense moved for a directed verdict of acquittal at the close of the State's evidence. The trial judge ruled that the evidence against Fuller established a prima facie case and denied the motion.

The defense put on one witness, Fuller's mother. She testified that Fuller was at home asleep until 9 o'clock on the morning of the fire; therefore, he could not have been involved in setting the fires. The defense case was based solely on this alibi and an attempt to discredit Coleman's testimony. Defense counsel told the jury that the only real issue in the case was whether Fuller or someone else was standing behind the Turner house.

There was no challenge to the trial judge's instructions on reasonable doubt and the presumption of innocence. This, then, was a classic case of conflicting evidence in which the jury had to pass on the credibility of the witnesses. The jury returned a verdict of guilty. The verdict shows the jury did not believe Fuller's mother and accept his alibi defense. The jury obviously accepted as true the testimony of Coleman and the testimony of two other witnesses who said that they saw Fuller at the scene on the morning of the fire. The trial judge denied a motion for a new trial, and Fuller received a mandatory life sentence as an accessory to murder by arson. Meadows was convicted of first-degree murder in a separate trial.

Fuller appealed directly to the Michigan Court of Appeals, which unanimously affirmed the conviction. *People* v. *Fuller*, 44 Mich. App. 297, 205 N. W. 2d 287 (1973). It held that the evidence was sufficient to convict Fuller because, if the jury believed Coleman, it could reasonably conclude that Fuller acted as a lookout for Meadows. A divided Michigan Supreme Court affirmed. 395 Mich. 451, 236 N. W. 2d 58 (1975). It also noted that evidence was presented, which, if believed by the jury, showed that Fuller acted as a lookout.

In another in a series of cases in which federal courts retry issues of fact and credibility, the District Court for the Eastern District of Michigan granted Fuller's application for a writ of habeas corpus under 28 U. S. C. § 2254. The court purported to apply *Jackson* v. *Virginia*, 443 U. S. 307 (1979). It noted that *Jackson* held that habeas relief could only be granted if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.*, at 324. The District Court then reviewed and reweighed the evidence presented at trial and concluded that the evidence which persuaded 12 jurors, who heard all the evidence and observed the demeanor of *all* the witnesses, was too meager to support the prosecution's contention that Fuller acted as a lookout. The District Court relied heavily on the fact that no evidence was presented to show Fuller knew that Meadows planned to burn the Turner home; Fuller, of course, did not take the stand.

A divided Court of Appeals for the Sixth Circuit affirmed. 662 F. 2d 420 (1981). That court again reweighed the evidence which 12 jurors found sufficient under instructions not questioned. Like the District Court, two of the members of the panel concluded that there was insufficient evidence presented to establish that Fuller knew Meadows intended to commit arson.

Dissenting, Judge Weick cogently contended that the federal courts were improperly usurping the function of the state-court jury. If the jury which saw and heard the witnesses chose to believe Coleman's testimony, it was reasonable to infer that Fuller acted as a lookout for Meadows. The jury clearly chose to believe Coleman, just as it chose to disbelieve Fuller's alibi.

The District Court and the Court of Appeals incorrectly applied *Jackson*. There we held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a rea-

sonable doubt." 443 U. S., at 319. It is sheer nonsense to suggest that, on this record, the 12 jurors acted irrationally. With all respect, I suggest that the District Court and the Court of Appeals' majority forgot that it is the function of the jury to determine who is telling the truth. Judges betray their function when they arrogate themselves over the legal factfinder. Either we accept the jury system with the risk of human fallibility or we ought to change the structure of the system and redefine the standard of review under the habeas corpus statutes. The District Court and the Court of Appeals did not view the evidence in the light most favorable to the prosecution, as the law and their oaths require. If they had, they could not have rationally concluded that the jury could not reasonably reach the result it reached. Instead, the courts reweighed Coleman's testimony, noting that he was young, that he had been placed in a youth house because he ran away from home, and that he attended a "special school." Put simply—and bluntly, as this case demands—the federal judges who set aside this state-court judgment acted like jurors, not jurists.

This Court cannot sit as a court of errors to correct every mistake by other courts. But the decision here warrants consideration by this Court because the courts have misapplied *Jackson* in a way that threatens to lead to reversals of state-court criminal convictions whenever a federal court chooses to sit as a jury and set aside the lawful jury's findings of fact. There was a flagrant refusal here to review the evidence in the light most favorable to the prosecution, as the law commands. *Jackson* did not authorize such gross interference with the functioning of state criminal justice systems.

I would grant certiorari and reverse the decision below, with appropriate reminders to my colleagues as to certain fundamental propositions concerning their role. Our heavy docket is an insufficient reason to allow this erroneous judgment to stand.

No. 81–871. AMERICAN PETROLEUM INSTITUTE ET AL. *v.* GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.; and

No. 81–1019. CITY OF HOUSTON, TEXAS *v.* GORSUCH, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE, JUSTICE POWELL, and JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 214 U. S. App. D. C. 358, 665 F. 2d 1176.

No. 81–959. SAXTON, MOTHER AND NATURAL GUARDIAN OF DENNIS ET AL. *v.* DENNIS. Sup. Ct. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 309 N. W. 2d 298.

No. 81–1152. STANDARD OIL COMPANY OF CALIFORNIA *v.* WILTSHIRE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition. Reported below: 652 F. 2d 837.

No. 81–1341. DEL RIO LAND, INC., ET AL. *v.* CITY OF PHOENIX ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 81–1371. HOOPA VALLEY TRIBE OF INDIANS *v.* SHORT ET AL.; and

No. 81–1373. UNITED STATES *v.* SHORT ET AL. Ct. Cl. Motion of Quinault Indian Nation for leave to file a brief as *amicus curiae* in No. 81–1371 granted. Motion of National Congress of American Indians et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 228 Ct. Cl. 535, 661 F. 2d 150.

No. 81–1406. GREENE *v.* GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT. Ct. App. N. Y. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE POWELL would grant certiorari, vacate the judgment, and remand the case for further consideration in light of *In re R. M. J.*, *ante*, p. 191. Reported below: 54 N. Y. 2d 118, 429 N. E. 2d 390.

No. 81–1421. SEDELBAUER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for certiorari and reverse the conviction. Reported below: —— Ind. ——, 428 N. E. 2d 206.

No. 81–5908. ZEIGLER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 402 So. 2d 365.

JUSTICE BRENNAN, dissenting.

Adhering to my view 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 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Petitioner seeks review of the State Supreme Court's decision upholding his murder conviction and death sentence. He argues that his conviction and death sentence should be set aside because they were based in part on evidence obtained in flagrant violation of his Fourth Amendment rights. He objects to the State Supreme Court's holding that, by calling the Chief of Police for assistance, he consented to a broad-ranging 12-day search of his furniture store. Because I believe that this petition raises serious Fourth Amendment claims[1] and offers an opportunity for this Court to clarify the

[1] Petitioner also objects that his alleged consent to a search of his home was not voluntary. The morning after the crimes, police asked to see peti-

standards for consent to search under *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), I dissent from the denial of certiorari.[2]

On December 24, 1975, four persons were killed at a furniture store owned by petitioner. Petitioner's wife, her parents, and another person had been shot to death, and petitioner had been shot in the abdomen and was seriously wounded. That night, shortly after the shootings, petitioner called the local Police Chief, a personal friend of petitioner, and requested immediate assistance. The Police Chief testified: "He told me that he had been shot. I said, what happened. He said please come help me, hurry." In response to this call, the police entered the store, found petitioner, who was bleeding badly, and rushed him to the hospital. The police found four bodies, searched for the killer, and secured the building.

Later that night, a local detective arrived to direct the investigation. The store was searched again that night and repeatedly over the next *12 days*. No effort was made to ob-

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tioner in the hospital, but were refused admission because of his physical and emotional condition. Petitioner had come out of surgery only six hours earlier, was under the influence of anesthesia, and had recently been given morphine for pain. The officers drafted a consent form and asked two nurses to obtain petitioner's signature. The nurses awoke petitioner and told him that the police would like to search his home and would like him to sign the form, which they read to him. Although the nurses testified that he was coherent when he signed the form, petitioner stated that he had no recollection of signing.

As a result of this purported consent, the police searched petitioner's home and seized numerous items of evidence that were introduced at trial. These circumstances—the extraction of consent from a recuperating and drugged patient in a hospital bed—demand the most careful scrutiny before the consent may be deemed voluntary. If the petition for certiorari were granted, I would address this issue as well.

[2] Because I continue to believe that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth Amendment, I would also grant the petition for certiorari in this case and vacate the judgment below insofar as it leaves undisturbed the death sentence.

tain a warrant until January 6, 1976. On December 26, police made a warrantless entry into petitioner's office, which was separated from the area where the victims were found, breaking two locks in the process. They went through petitioner's personal papers, checkbooks, and corporate records, and seized several documents. In searching through one of petitioner's desks, police found an insurance policy that petitioner had taken out on his wife's life. A second policy was seized in a search the next day. The two policies were introduced at trial to support the State's theory that petitioner had a pecuniary motive for killing his wife. On January 2, police searched the store yet again. They entered a backroom separated from the area in which the victims had been found, searched the inside of a closed storage cabinet, and seized a large amount of damaging evidence that was introduced at trial.

The detective testified that in conducting these warrantless searches, he relied on a so-called crime scene exception to the warrant requirement. He specifically stated that he did *not* have petitioner's consent to all of the searches. The trial court upheld the searches under this crime scene rationale. Although the State Supreme Court recognized that a crime scene exception is inconsistent with *Mincey* v. *Arizona*, 437 U. S. 385 (1978), it nevertheless upheld the searches, reasoning that the police were at the store at the "invitation" of petitioner. 402 So. 2d 365, 372 (Fla. 1981).[3]

The decision below stretches the consent exception to the warrant requirement beyond recognition. Particularly when the defendant's life hangs in the balance, courts should be careful that convictions are not based on illegally obtained evidence. Here, the conclusion that a seriously wounded de-

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[3] The State contends that petitioner shot himself and called the police as part of a deliberate scheme to pin the blame on another. This contention is irrelevant to the scope of petitioner's consent. Whether or not the call for help was self-serving, the question remains whether it can reasonably be construed as a consent to a search unlimited in time and location.

fendant who requests police aid thereby consents to an unlimited 12-day search of his business premises ignores the relevant context of the consent—the need for immediate medical assistance—and amounts to a rule that a cry for help waives all Fourth Amendment protection. I would set the case for plenary argument.

No. 81–6082. RUFFIN *v.* AUSTIN, WARDEN, GEORGIA STATE PRISON. Super. Ct. Ga., Tatnall County;

No. 81–6131. EVANS *v.* VIRGINIA. Sup. Ct. Va.;

No. 81–6143. ROOK *v.* NORTH CAROLINA. Sup. Ct. N. C.; and

No. 81–6151. CUNNINGHAM *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 81–6131, 222 Va. 766, 284 S. E. 2d 816; No. 81–6143, 304 N. C. 201, 283 S. E. 2d 732; No. 81–6151, 248 Ga. 558, 284 S. E. 2d 390.

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. 80–6843. HIGH *v.* GEORGIA, *ante*, p. 927;

No. 81–23. HUTTO, DIRECTOR, VIRGINIA STATE DEPARTMENT OF CORRECTIONS, ET AL. *v.* DAVIS, 454 U. S. 370;

No. 81–1013. JOHNSON *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (BANK OF AMERICA ET AL., REAL PARTIES IN INTEREST), *ante*, p. 921;

No. 81–1078. GELLER *v.* MERIT SYSTEMS PROTECTION BOARD ET AL., *ante*, p. 901;

No. 81–5566. DENARDO *v.* MURPHY, 454 U. S. 1096;

No. 81–5801. WALLACE *v.* GEORGIA, *ante*, p. 927;

No. 81–5831. LEUSCHNER *v.* MARYLAND, *ante*, p. 951; and

No. 81–5841. SABIR *v.* RAINIER NATIONAL BANK, 454 U. S. 1157. Petitions for rehearing denied.

No. 81–5621. JOHNSON *v.* AETNA CASUALTY & SURETY COMPANY OF HARTFORD, CONNECTICUT, ET AL., 454 U. S. 1118. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

MARCH 23, 1982

Miscellaneous Order

No. 81–1724. UPHAM ET AL. *v.* SEAMON ET AL. D. C. E. D. Tex. Motion of appellants to expedite is granted insofar as the appellees are directed to file motions to dismiss or affirm on or before Monday, March 29, 1982.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1039 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

REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* BURTON ET AL.

ON APPLICATION FOR STAY

No. A–768 (81–1641). Decided March 11, 1982

An application for a stay, pending appeal, of the California Supreme Court's judgment—which held that a statewide referendum petition had effectively suspended the operation of California statutes redistricting congressional districts after the 1980 census, but that the June 8, 1982, primary election nonetheless should be conducted in accordance with the districts established by those statutes—is denied. Even assuming that the California Supreme Court wrongly interpreted the effect of a pertinent federal statute, that court's judgment appears to be based on adequate and independent state grounds, and this Court has no jurisdiction to review decisions based on such grounds.

JUSTICE REHNQUIST, Circuit Justice.

Applicants ask that I stay, pending their appeal therefrom, the judgment of the Supreme Court of California entered on January 28, 1982, in mandate proceeding S. F. No. 24354. That proceeding concerns certain redistricting statutes enacted by the California Legislature in response to the 1980 decennial census which allotted California two additional congressional seats, the effect upon such statutes of a petition calling for their review in a statewide referendum, and the congressional districts to be used by the State in the interim. The California Supreme Court held that the referendum petition effectively suspended the operation of the redistricting statutes, but that the June 8, 1982, primary election nonetheless should be conducted in accordance with the district boundaries set forth in those statutes. *Assembly of State of*

California v. *Deukmejian*, 30 Cal. 3d 638, 639 P. 2d 939 (1982).

Applicants argue that the June election should be conducted according to district boundaries in effect prior to the 1980 census, with the two new seats to be filled by at-large elections. They contend that the California Supreme Court erred when it held that 2 U. S. C. § 2c, which requires that each Representative be elected from a separate district, superseded 2 U. S. C. § 2a(c)(2), which requires that newly allotted seats be filled by at-large elections if the State has not completed redistricting. Applicants assert that this holding merits review by this Court, and they present such arguments in a jurisdictional statement filed simultaneously with this application.

Even if the applicants are correct in their contention that the California Supreme Court wrongly interpreted the effect of § 2c—a question on which I express no opinion—I think it is highly unlikely that this Court will give plenary consideration to their appeal. In addition to construing provisions of the United States Code, the decision of the California Supreme Court recites several state-law reasons for its holding that the boundaries of the new redistricting scheme should be followed in the June election.* Thus, the judgment appears to be based on adequate and independent state grounds. Of course, this Court has no jurisdiction to review decisions based on adequate, nonfederal grounds. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 281 (1961). Accordingly, the application for a stay of the judgment is denied, and the application for expedited oral argument is referred to the full Court.

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*It does not appear that a contrary holding on the federal statutory question would alter the validity of the state grounds, for 2 U. S. C. § 2a(c)(2) by its terms applies only "[u]ntil a State is redistricted *in the manner provided by the law thereof.*" (Emphasis added.)

KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL.

ON APPLICATION FOR STAY

No. A–783 (81–2057). Decided March 15, 1982

An application for a stay, pending appeal, of the District Court's judgment—which declared that a New Jersey statute creating new election districts for United States Representatives in response to the 1980 census was unconstitutional because of population variances among the districts, and which enjoined any primary or general congressional elections under the statute—is granted. There is a reasonable probability that four Justices of this Court will consider the issue of the proper interpretation of the controlling standard of *Kirkpatrick* v. *Preisler*, 394 U. S. 526, concerning permissible population variances to be sufficiently meritorious to note probable jurisdiction, and there is a fair prospect of reversal of the District Court's judgment. Moreover, applicants will suffer irreparable harm if the stay is not granted, and apportionment plans created by the legislature are to be preferred to judicially constructed plans.

JUSTICE BRENNAN, Circuit Justice.

Applicants, the Speaker of the New Jersey Assembly, the President of the New Jersey Senate, and eight Members of the United States House of Representatives from New Jersey, have applied to me for a stay pending this Court's review on appeal of the judgment of a three-judge District Court for the District of New Jersey entered March 3, 1982. *Daggett* v. *Kimmelman*, 535 F. Supp. 978. The judgment declared unconstitutional 1982 N. J. Laws, ch. 1, which creates districts for the election of the United States Representatives from New Jersey, and enjoined the defendant state officers from conducting primary or general congressional elections under the terms of that statute.

On the basis of the 1980 decennial census, the number of United States Representatives to which New Jersey is entitled has been decreased from 15 to 14. Consequently the

New Jersey Legislature was required to apportion 14 congressional districts. Chapter 1 is the product of the state legislature's effort to meet that requirement. The District Court found that in drafting ch. 1 the legislature was concerned not only with drawing districts of equal population as an "aspirational" goal but also with recognizing such factors as the preservation of the cores of pre-existing districts, the preservation of municipal boundary lines, and the preservation of the districts of incumbent Democratic Congressmen. Chapter 1 creates 14 congressional districts with an overall absolute range of deviation of 3,674 people and an overall relative range of deviation of 0.6984% from the "ideal" map of 14 districts of 526,059 persons each. There were, however, several other proposals brought before the legislature that yielded total deviations of less than 0.6984%. The opinion for the majority of the District Court says of these:

> "For example, the Roeck plan contained a total deviation of .3250%, and only .2960% after it was amended. The DiFrancesco plan . . . had a total deviation of .1253%. The Hardwick plan . . . contained a total deviation of .4515%. The Bennett plan . . . and the Kavanaugh plan . . . contain total deviations of .1369% and .0293%, respectively." 535 F. Supp., at 982.

All three judges of the District Court agreed that the constitutionality of 1982 N. J. Laws, ch. 1, was to be determined under the standard announced in *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and its progeny, *e. g.*, *White* v. *Weiser*, 412 U. S. 783 (1973). But the judges divided 2 to 1 on what that standard is. The majority read *Kirkpatrick* as holding that, even if 0.6984% was to be regarded as a *de minimis* variance,

> "P. L. 1982, c. 1 can withstand constitutional attack only if the population variances 'are unavoidable despite a good-faith effort to achieve absolute equality . . . .' *Kirkpatrick*, 394 U. S. at 531 . . . . It is clear that the .6984% population deviation of P. L. 1982, c. 1 is not un-

> avoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%." 535 F. Supp., at 982.

The dissenting judge, on the other hand, read *Kirkpatrick* to suggest:

> "[V]ariances may be justified which do not achieve statistically significant dilutions of the relative representation of voters in larger districts when compared with that of voters in smaller districts. . . . [*Kirkpatrick* is to be read to announce] a prohibition against toleration of *de minimis* dilutions of relative representation rather than as a prohibition against toleration of *de minimis* population variances which have no statistically relevant effect on relative representation. A plus-minus deviation of 0.6984% falls within the latter category." 535 F. Supp., at 982.

The appeal would thus appear to present the important question whether *Kirkpatrick* v. *Preisler* requires adoption of the plan that achieves the most precise mathematical exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey Legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably "statistically insignificant" variances from the constitutional ideal of absolute precision.

The principles that control my determination as Circuit Justice of this in-chambers application were stated in *Rostker* v. *Goldberg*, 448 U. S. 1306 (1980) (BRENNAN, J., in chambers):

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable

> probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*, at 1308 (citations omitted).

The importance of a definitive answer from this Court as to the proper interpretation of the *Kirkpatrick* standard is self-evident: Doubtless all 50 States would be assisted by that answer in any review of the apportionment of congressional seats in consequence of the 1980 census. My task is not to adjudicate this application on my own view of the merits of that question, but rather to determine whether there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction of this appeal, and, if so, whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. Neither event can be predicted with anything approaching certainty, but nonetheless it does seem to me that there is a reasonable probability that jurisdiction of the appeal will be noted, and that there is a fair prospect of reversal.

As to the third *Rostker* requirement, I conclude that applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before March 22 next or face the prospect that the District Court will implement its own redistricting plan. With respect to

the balance of the equities, this Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans.

Accordingly, I am today entering an order granting the application for a stay pending the filing of a jurisdictional statement and, if probable jurisdiction is noted, final disposition of the appeal.

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timely claims with EEOC, notwithstanding objection by intervenor union that had not itself been found guilty of discrimination. Zipes v. Trans World Airlines, Inc., p. 385.

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

Motion for award of attorney's fees—Applicability of Federal Rule of Civil Procedure 59(e).—Where District Court approved parties' consent decree in petitioner's action based on respondent New Hampshire Department of Employment Security's failure to make timely determinations of certain entitlements to unemployment compensation, petitioner's motion, filed approximately four and one-half months after entry of District Court's judgment, requesting an award of attorney's fees under Act is not governed by Federal Rule of Civil Procedure 59(e)'s requirement that a motion to alter or amend a judgment be served not later than 10 days after entry of judgment. White v. New Hampshire Dept. of Employment Security, p. 445.

CLASS ACTIONS. See **Civil Rights Act of 1964.**

COAL MINERS AND PRODUCERS. See **Antitrust Acts,** 1; **Labor Management Relations Act; National Labor Relations Act.**

COIN-OPERATED AMUSEMENT ESTABLISHMENTS. See **Constitutional Law,** IV, 5; **Mootness,** 5.

COLLECTIVE-BARGAINING AGREEMENTS. See **Antitrust Acts,** 1; **Labor Management Relations Act; National Labor Relations Act.**

COMMERCE CLAUSE. See **Constitutional Law,** II; V.

COMMERCIAL SPEECH. See **Constitutional Law,** VII.

COMPENSABLE "INJURY." See **Longshoremen's and Harbor Workers' Compensation Act.**

CONFIDENTIALITY OF CENSUS BUREAU'S ADDRESS LISTS. See **Census Act.**

CONGRESSIONAL DISTRICTS. See **Stays.**

CONSENT ORDER AS MOOTING CASE. See **Mootness,** 1.

CONSENT TO SEARCH. See **Constitutional Law,** X.

CONSTITUTIONAL LAW. See also **Federal-State Relations,** 1; **Jurisdiction; Mootness,** 2, 4, 5; **Stays,** 2.

I. Bankruptcy Clause.

Uniformity of laws—Validity of Rock Island Railroad Transition and Employee Assistance Act.—Rock Island Railroad Transition and Employee Assistance Act (RITA), which governs relationships between bankrupt Chicago, Rock Island and Pacific Railroad Co. and its creditors, as

CONSTITUTIONAL LAW—Continued.
amended by Staggers Rail Act of 1980, which—in response to District Court's preliminary injunction against enforcement of RITA provisions that require trustee of Railroad's estate to pay benefits to Railroad's employees who were not hired by other carriers and that provide for guarantee by United States of Railroad's employee protection obligations—reenacted such RITA provisions, is repugnant to provision of Constitution empowering Congress to enact "uniform laws on the subject of Bankruptcies throughout the United States." Railway Labor Executives' Assn. v. Gibbons, p. 457.

II. Commerce Clause.

1. *Exportation of hydroelectric energy—Validity of state statute.*—New Hampshire statute prohibiting a hydroelectric energy corporation from transmitting such energy out of State unless approved by New Hampshire Public Utilities Commission, which can withhold approval if it determines that such energy is needed within State, conflicts with Commerce Clause, and saving clause of Federal Power Act does not provide an affirmative grant of authority for such state action. New England Power Co. v. New Hampshire, p. 331.

2. *Oil and gas leases—Indian reservation—Validity of severance tax.*—Respondent Indian Tribe's imposition of severance tax—pursuant to ordinance approved by Secretary of Interior—on oil and gas production on tribal reservation lands by petitioners as Tribe's lessees under mineral leases approved by Secretary does not violate Commerce Clause and is within Tribe's inherent power to govern and to pay for costs of self-government. Merrion v. Jicarilla Apache Tribe, p. 130.

III. Cruel and Unusual Punishment.

Death penalty—Consideration of mitigating factors.—Where petitioner, who was 16 years old at time of offense, was convicted of first-degree murder, and where trial judge, in imposing death sentence, refused as a matter of law to consider petitioner's evidence at sentencing hearing concerning his unhappy upbringing and emotional disturbance, death sentence must be vacated as it was imposed without type of individualized consideration of mitigating factors required by Eighth and Fourteenth Amendments in capital cases. Eddings v. Oklahoma, p. 104.

IV. Due Process.

1. *Defendant's postarrest silence—Use for impeachment purposes.*—In state-court trial resulting in manslaughter conviction, due process was not denied by prosecutor's use of defendant's postarrest silence for impeachment purposes after defendant testified—asserting self-defense and accidental stabbing for first time—where record did not indicate that defendant had been given *Miranda* warnings during period in which he remained silent immediately after his arrest. Fletcher v. Weir, p. 603.

CONSTITUTIONAL LAW—Continued.

2. *Employment discrimination—Failure of state agency to act within statutory period—Effect on employee's rights.*—Under Illinois statute which barred employment discrimination on basis of physical handicap unrelated to ability and which required Illinois Fair Employment Practices Commission to convene factfinding conference within 120 days from receipt of an employee's charge against his employer, Illinois Supreme Court's interpretation of statute as requiring dismissal of an employee's charge when Commission failed to comply with 120-day convening requirement violates employee's rights under Due Process and Equal Protection Clauses of Fourteenth Amendment. Logan v. Zimmerman Brush Co., p. 422.

3. *Right to fair trial—Conduct of juror and prosecuting attorneys.*—Respondent, who was convicted of murder in state prosecution, was not denied due process by conduct of juror, who, during trial, submitted an application for employment as an investigator in District Attorney's Office, or by conduct of prosecuting attorneys, who withheld information about juror from trial court and defense counsel until after trial. Smith v. Phillips, p. 209.

4. *Termination of parental rights—Standard of proof.*—Under Fourteenth Amendment, a State must provide natural parents fundamentally fair procedures at state-initiated neglect proceedings to terminate parental rights in their natural child, and due process requires that State support its allegations by at least clear and convincing evidence, not just a fair preponderance of evidence. Santosky v. Kramer, p. 745.

5. *Vagueness of ordinance—License for coin-operated amusement establishment.*—A city ordinance directing that Chief of Police consider whether applicant for license for coin-operated amusement establishment has any "connections with criminal elements" before Chief of Police makes recommendations to City Manager, who decides whether to grant a license, is not unconstitutionally vague. City of Mesquite v. Aladdin's Castle, Inc., p. 283.

V. Equal Protection of the Laws.

Limitation of actions—Foreign corporations—Validity of state statute tolling limitation period.—A New Jersey statute which tolls limitation period for an action against a foreign corporation that is not represented in State by any person upon whom process may be served does not violate Equal Protection Clause notwithstanding subsequent institution of long-arm jurisdiction in New Jersey; however, Court of Appeals' judgment upholding validity of tolling statute is vacated, and case is remanded for initial consideration of whether statute violates Commerce Clause. G. D. Searle & Co. v. Cohn, p. 404.

VI. Freedom of Religion.

Social security taxes—Members of Amish faith.—Imposition of social security taxes is not unconstitutional as applied to such persons as appel-

CONSTITUTIONAL LAW—Continued.

lee—a member of Old Order Amish who employed other Amish to work on his farm and in his carpentry shop—who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. United States v. Lee, p. 252.

VII. Freedom of Speech.

1. *Advertising by lawyers—Validity of restrictions.*—Where Missouri Supreme Court Rule specified areas of practice that could be included in lawyers' advertisements and limited persons to whom professional announcement cards could be sent, and where appellant lawyer received a private reprimand in a disciplinary action resulting from his having (1) published advertisements that listed areas of practice in language other than as specified in Rule, and that listed courts in which he was admitted to practice (information not authorized under Rule), and (2) mailed announcement cards to persons not specified in Rule, such restrictions upon appellant's First Amendment rights could not be sustained. In re R. M. J., p. 191.

2. *License to sell drug paraphernalia—Validity of ordinance.*—A village ordinance requiring a business to obtain a license to sell items that are "designed or marketed for use with illegal cannabis or drugs" does not violate First Amendment and is not facially overbroad or vague. Hoffman Estates v. Flipside, Hoffman Estates, Inc., p. 489.

VIII. Full Faith and Credit Clause.

Rehabilitation proceedings—Indiana court judgments—Effect in North Carolina courts.—Where Indiana state court, in rehabilitation proceedings against petitioner Indiana insurance company, entered judgments holding that it had jurisdiction over parties and over funds deposited by petitioner with North Carolina Commissioner of Insurance for protection of petitioner's North Carolina policyholders, and that all claims to North Carolina deposit were compromised and settled by court's adoption of a rehabilitation plan, and where in meantime respondent North Carolina association—to which petitioner was required to belong and which under North Carolina law was responsible for fulfilling insolvent members' policy obligations—sought a declaratory judgment in a North Carolina state court to establish that it was entitled to use North Carolina deposit to fulfill pre-rehabilitation obligations to North Carolina policyholders, North Carolina courts violated Full Faith and Credit Clause by refusing to treat Indiana court's judgments as res judicata. Underwriters National Assur. Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., p. 691.

IX. Right to Counsel.

Effective assistance—Failure to file timely application for certiorari in state court.—State criminal defendant was not deprived of effective assistance of counsel by latter's filing of an untimely application for certiorari in Florida Supreme Court to review Florida Court of Appeal's affirmance of

CONSTITUTIONAL LAW—Continued.
conviction where review by Florida Supreme Court was discretionary. Wainwright v. Torna, p. 586.

X. Searches and Seizures.

Arrest of university student—Seizure of contraband in dormitory room.—Fourth Amendment was not violated where a university police officer, after arresting a student and accompanying him to his dormitory room to retrieve his identification, (1) observed marihuana seeds and a pipe in plain view in room while waiting in doorway, (2) then entered room, and (3) after student and his roommate waived their *Miranda* rights, was given a box containing more marihuana and cash, and where more marihuana and another controlled substance were discovered upon search of room to which students consented. Washington v. Chrisman, p. 1.

XI. States' Powers.

Operation of railroad—Applicability of Railway Labor Act.—Where New York State acquired an interstate railroad from private owners, application to railroad of Railway Labor Act's provisions regulating labor relations in railroad industry does not so impair State's ability to carry out its constitutionally preserved sovereign function as to conflict with Tenth Amendment, and labor dispute between union and railroad was not covered by state law prohibiting strikes by public employees. Transportation Union v. Long Island R. Co., p. 678.

CONTRIBUTIONS BY EMPLOYER TO EMPLOYEE HEALTH AND RETIREMENT FUNDS. See **Antitrust Acts**, 1; **National Labor Relations Act.**

CONTRIBUTIONS TO TRADE ASSOCIATIONS AND POLITICAL ACTION COMMITTEES. See **Federal Election Campaign Act of 1971.**

"CONTROLLED GROUP OF CORPORATIONS." See **Internal Revenue Code**, 2.

CONVICTION AS MOOTING CONSTITUTIONAL CLAIM ARISING FROM DENIAL OF PRETRIAL BAIL. See **Mootness**, 4.

CORPORATE INCOME TAXES. See **Internal Revenue Code**, 2.

CRIMINAL LAW. See also **Constitutional Law**, III; IV, 1, 3; IX; X; **Habeas Corpus; Jurisdiction; Mootness**, 2, 4.

Forged securities—Transportation in "interstate" commerce.—Title 18 U. S. C. § 2314, which makes it a crime to transport "in interstate or foreign commerce any . . . forged . . . securities . . . , knowing the same to have been . . . forged," does not require proof that securities were forged before being taken across state lines. McElroy v. United States, p. 642.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law, III.**

CUSTODY OF CHILDREN. See **Constitutional Law, IV, 4.**

DEATH PENALTY. See **Constitutional Law, III.**

"DEEMING" SPOUSE'S INCOME AS AVAILABLE TO MEDICAID APPLICANT. See **Social Security Act.**

DENVER, COLO. See **Census Act.**

DISABILITY BENEFITS. See **Longshoremen's and Harbor Workers' Compensation Act.**

DISCLOSURE OF CENSUS BUREAU'S ADDRESS LISTS. See **Census Act.**

DISCRIMINATION AGAINST BLACKS. See **Fair Housing Act of 1968; Mootness, 1.**

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law, II.**

DISCRIMINATION AGAINST PHYSICALLY HANDICAPPED PERSONS. See **Constitutional Law, IV, 2.**

DISCRIMINATION AGAINST WOMEN. See **Civil Rights Act of 1964.**

DISCRIMINATION IN HOUSING. See **Fair Housing Act of 1968; Mootness, 1.**

DISTRIBUTION OF POLITICAL LITERATURE ON UNIVERSITY CAMPUS. See **Jurisdiction.**

DORMITORY ROOM SEARCHES. See **Constitutional Law, X.**

DUE PROCESS. See **Constitutional Law, IV; VII, 2; Mootness, 2, 5.**

EFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law, IX.**

EIGHTH AMENDMENT. See **Constitutional Law, III; Mootness, 4.**

ELECTIONS. See **Stays.**

ELECTRIC ENERGY. See **Constitutional Law, II, 1.**

EMERGENCY PETROLEUM ALLOCATION ACT. See **Federal-State Relations, 2.**

EMOTIONAL DISTURBANCE AS MITIGATING AGAINST DEATH PENALTY. See **Constitutional Law, III.**

EMPLOYER AND EMPLOYEES. See **Antitrust Acts, 1; Civil Rights Act of 1964; Constitutional Law, I; IV, 2; VI; XI; Internal Revenue Code, 1; Labor Management Relations Act; Mootness, 3; National Labor Relations Act.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law,** IV, 2.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV, 2; V.

ESSEX COUNTY, N. J. See **Census Act.**

EVIDENCE. See **Constitutional Law** IV, 4; **Criminal Law.**

EXCESSIVE BAIL CLAUSE. See **Mootness,** 4.

EXEMPTIONS FROM INCOME TAXES. See **Internal Revenue Code,** 2.

EXEMPTIONS FROM SOCIAL SECURITY TAXES. See **Internal Revenue Code,** 1.

EXEMPTION 3 OF FREEDOM OF INFORMATION ACT. See **Census Act.**

EXHAUSTION OF STATE REMEDIES. See **Habeas Corpus,** 1.

EXPEDITING ACTIONS. See **Federal Election Campaign Act of 1971.**

EXPORTATION OF HYDROELECTRIC ENERGY. See **Constitutional Law,** II, 1.

FAIR HOUSING ACT OF 1968. See also **Mootness,** 1.

Racial discrimination in housing—Standing to sue—Limitation of actions.—A black person employed as a "tester" by a corporation organized to ensure equal housing opportunity has standing to sue under Act in capacity as a "tester" on basis of alleged misrepresentation by apartment complex owner and its employee that apartments were not available, but such claim was time barred under Act's requirement that suit be brought within 180 days after alleged discriminatory act; a white person, also employed by corporation, has no standing to sue in "tester" capacity since he alleged that he was informed that apartments *were* available; both individual testers' claims, as area residents, that defendants' alleged acts deprived them of benefits of interracial association were not subject to dismissal on pretrial motion, and were not time barred since they were based on a "continuing" violation extending into 180-day period; and corporation has standing to sue for damages on asserted basis that defendants' alleged acts injured corporation's housing counseling and referral services, with a consequent drain on its resources, and such claim is not barred since it was based on a "continuing" violation theory. Havens Realty Corp. v. Coleman, p. 363.

FAIR TRIALS. See **Constitutional Law,** IV, 3.

FEDERAL ELECTION CAMPAIGN ACT OF 1971.

Limitations on soliciting funds—Validity—Expediting action.—In an action brought by appellant trade associations and political action committees challenging validity of Act's provisions limiting extent to which such types of organizations may solicit funds for political purposes, appellants were not within categories of plaintiffs listed in § 310(a) of Act and thus could not invoke Act's expedited procedures requiring District Court to certify constitutional questions to Court of Appeals. Bread Political Action Committee v. FEC, p. 577.

FEDERAL GIFT TAXES.

Treasury Regulation—Transfer of property interest by will—Refusal to accept.—"Transfer," under Treasury Regulation excepting from federal gift tax a refusal to accept ownership of an interest in property transferred by will if such refusal is effective under local law and made within a reasonable time after knowledge of existence of transfer, occurs when interest is created, not at later time when interest vests or becomes possessory. Jewett v. Commissioner, p. 305.

FEDERAL GOVERNMENT CONTRACTORS AS INDEPENDENT TAXABLE ENTITIES. See **Federal-State Relations,** 1.

FEDERAL INCOME TAXES. See **Internal Revenue Code,** 2.

FEDERAL POWER ACT. See **Constitutional Law,** II, 1.

FEDERAL RULES OF CIVIL PROCEDURE. See **Census Act; Civil Rights Attorney's Fees Awards Act of 1976.**

FEDERAL-STATE RELATIONS. See also **Antitrust Acts,** 2; **Constitutional Law,** II, 1; XI; **Habeas Corpus; Social Security Act; Stays.**

1. *Government contractors—State's power to tax.*—As independent taxable entities, contractors engaged to construct, repair, or manage Federal Government facilities in New Mexico under contracts whereby they may use "advanced" Government funds to pay creditors and employees, are not protected by Constitution's guarantee of federal supremacy and thus are subject to New Mexico's gross receipts tax, which operates as a tax on sales of goods and services, and its compensating use tax on property used within State but acquired out of State. United States v. New Mexico, p. 720.

2. *State gross receipts tax—Pre-emption by federal law—Expiration of federal law.*—Temporary Emergency Court of Appeals' judgment—affirming District Court's decision that New York statute prohibiting oil companies from passing on cost of New York's gross receipts tax on revenues derived from activities within State in prices of their products sold in State was pre-empted by federal price control authority under Emergency Petroleum Allocation Act—was vacated, and case was remanded for reconsideration in light of subsequent expiration of federal price control authority. Tully v. Mobil Oil Corp., p. 245.

FIFTH AMENDMENT. See **Jurisdiction.**

FINAL JUDGMENTS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

FIRST AMENDMENT. See **Constitutional Law,** VI; VII; **Jurisdiction.**

FLIGHT ATTENDANTS. See **Civil Rights Act of 1964.**

FLORIDA. See **Constitutional Law,** IX.

FOREIGN CORPORATIONS. See **Constitutional Law,** V.

FORGED SECURITIES. See **Criminal Law.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** III–V; VII, 1; **Jurisdiction; Mootness,** 5.

FOURTH AMENDMENT. See **Constitutional Law,** X.

FRAUD. See **Securities Regulation.**

FREEDOM OF INFORMATION ACT. See **Census Act.**

FREEDOM OF RELIGION. See **Constitutional Law,** VI.

FREEDOM OF SPEECH. See **Constitutional Law,** VII.

FULL FAITH AND CREDIT CLAUSE. See **Constitutional Law,** VIII.

GIFT TAXES. See **Federal Gift Taxes.**

GOVERNMENT CONTRACTORS AS INDEPENDENT TAXABLE ENTITIES. See **Federal-State Relations,** 1.

GOVERNMENT EMPLOYEES. See **Constitutional Law,** XI.

GROSS RECEIPTS TAXES. See **Federal-State Relations.**

GUILTY PLEAS. See **Mootness,** 2.

HABEAS CORPUS. See also **Mootness,** 2.

1. *Federal relief—Exhaustion of state remedies.*—Under 28 U. S. C. § 2254, which provides that a state prisoner's application for habeas corpus in a federal district court based on an alleged federal constitutional violation will not be granted unless prisoner has exhausted remedies available in state courts, a district court must dismiss habeas petitions containing both unexhausted and exhausted claims. Rose v. Lundy, p. 509.

2. *Federal relief—State-court findings of fact—Presumption of correctness.*—In federal habeas corpus proceedings challenging state conviction, constitutionality of pretrial photographic identification procedures is a mixed question of law and fact that is not governed by 28 U. S. C. § 2254, which requires federal habeas courts to presume correctness of state-court findings of fact unless specified factors are present, but questions of fact that underlie ultimate conclusion are governed by statutory presumption. Sumner v. Mata, p. 591.

HANDICAPPED PERSONS. See **Constitutional Law,** IV, 2.

HEALTH BENEFITS. See **Labor Management Relations Act.**

HOFFMAN ESTATES, ILL. See **Constitutional Law,** VII, 2.

"HOT CARGO" CLAUSE. See **Anitrust Acts; National Labor Relations Act.**

HOUSING DISCRIMINATION. See **Fair Housing Act of 1968; Mootness,** 1.

HUSBAND AND WIFE. See **Social Security Act.**

HYDROELECTRIC ENERGY. See **Constitutional Law,** II, 1.

ILLINOIS. See **Constitutional Law,** IV, 2; **Mootness,** 2.

IMMUNITY FROM ANTITRUST LIABILITY. See **Antitrust Acts,** 2.

IMMUNITY OF FEDERAL GOVERNMENT CONTRACTORS FROM STATE TAXATION. See **Federal-State Relations,** 1.

INDIANA. See **Constitutional Law,** VII.

INDIAN REORGANIZATION ACT OF 1934. See **Constitutional Law,** II, 2.

IN PERSONAM JURISDICTION. See **Constitutional Law,** VIII.

INSURANCE COMPANIES. See **Constitutional Law,** VIII.

INTERNAL REVENUE CODE. See also **Constitutional Law,** VI; **Federal Gift Taxes.**

1. *Social security taxes—Exemption—Self-employed Amish.*—Exemption under § 1402(g) of Code of self-employed Amish and others from payment of social security taxes was not applicable to appellee, a member of Old Order Amish, and his employees, other Amish who worked on appellee's farm and in his carpentry shop. United States v. Lee, p. 252.

2. *Surtax exemption—"Controlled group of corporations."*—Code provisions limiting a "controlled group of corporations" to a single surtax exemption and defining such a group as including a "brother-sister controlled group," as determined by ownership of specified percentages of corporations' stock by five or fewer persons, apply only where each person whose stock is taken into account owns stock in each corporation of group, and implementing Treasury Regulation to contrary is invalid. United States v. Vogel Fertilizer Co., p. 16.

INTERSTATE COMMERCE. See **Constitutional Law,** II; **Criminal Law.**

IOWA. See **Social Security Act.**

JURISDICTION. See also **Constitutional Law,** V; VIII; **Mootness,** 5.

Supreme Court—Appeal from State Supreme Court—Reversal of trespass conviction.—Appeal to this Court from New Jersey Supreme Court's judgment—which reversed appellee's trespass conviction based on his distributing political materials on a university campus without having first

JURISDICTION—Continued.

received permission from university officials as required by a university regulation—is dismissed for want of jurisdiction where (1) State, while joining in university's jurisdictional statement, declined to take a position on merits in its brief, asking only that issues be decided, and (2) university lacked standing to invoke this Court's jurisdiction because of mootness, having amended its pertinent regulations while appeal was pending and State Supreme Court not having passed on validity of revised regulations. Princeton University v. Schmid, p. 100.

JUROR'S MISCONDUCT. See **Constitutional Law**, IV, 3.

KENTUCKY. See **Constitutional Law**, IV, 1.

LABOR MANAGEMENT RELATIONS ACT.

Collective-bargaining agreements—Provisions allocating health benefits.—Section 302(c)(5) of Act, which requires jointly administered pension trusts to be maintained for sole benefit of employees and their families and dependents, does not authorize federal courts to review for reasonableness provisions of a collective-bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund—such as provisions of bargaining agreement increasing health benefits for widows of employee coal miners who were receiving pensions at time of their death but not increasing health benefits for widows of employees who, though eligible for pensions, were still working at time of their death. UMWA Health & Retirement Funds v. Robinson, p. 562.

LABOR UNIONS. See **Antitrust Acts**, 1; **Civil Rights Act of 1964; Constitutional Law**, XI; **Labor Management Relations Act; National Labor Relations Act.**

LAWYER ADVERTISING. See **Constitutional Law**, VII, 1.

LEASES OF OIL AND GAS INTERESTS ON INDIAN LANDS. See **Constitutional Law**, II, 2.

LICENSES FOR COIN-OPERATED AMUSEMENT ESTABLISHMENTS. See **Constitutional Law**, IV, 5; **Mootness**, 5.

LICENSES TO SELL DRUG PARAPHERNALIA. See **Constitutional Law**, VII, 2.

LIMITATION OF ACTIONS. See **Civil Rights Act of 1964; Constitutional Law**, IV, 2; V; **Fair Housing Act of 1968.**

LOAN GUARANTEE AGREEMENT AS "SECURITY." See **Securities Regulation.**

LONG-ARM JURISDICTION. See **Constitutional Law**, V.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Compensable "injury"—Presumption.—Where Administrative Law Judge found that accident which allegedly happened during course of re-

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—Continued.

spondent's employment had not in fact occurred, Court of Appeals erred (1) in presuming under § 20(a) of Act that claim fell within Act's provisions on theory that injury occurred on morning after alleged accident when respondent awoke with pain, and (2) in its use of term "injury" as including such attack of pain. U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, p. 608.

MANDATORY PAROLE TERMS. See **Mootness**, 2.

MARKETING OF DRUG PARAPHERNALIA. See **Constitutional Law**, VII, 2.

MEDICAID. See **Social Security Act.**

MESQUITE, TEX. See **Constitutional Law**, IV, 5; **Mootness**, 5.

MINERAL LEASES ON INDIAN LANDS. See **Constitutional Law**, II, 2.

MIRANDA WARNINGS. See **Constitutional Law**, IV, 1.

MISSOURI. See **Constitutional Law**, VII, 1.

MITIGATING CIRCUMSTANCES IN CONSIDERING DEATH PENALTY. See **Constitutional Law**, III.

MOOTNESS. See also **Jurisdiction.**

1. *Action under Fair Housing Act of 1968—Effect of consent order and agreement liquidating damages.*—In an action under Fair Housing Act of 1968 against petitioners, an apartment complex owner and one of its employees for alleged "racial steering" in rental of apartments, claims of respondents, a corporation organized to ensure equal housing opportunity and two "testers" employed by it, were not rendered moot by either (1) District Court's entry of a consent order granting relief to another plaintiff, a black person who attempted to rent an appartment but was allegedly falsely told none were available, or (2) an agreement between petitioners and respondents—reached prior to grant of certiorari—liquidating respondents' damages if certiorari was denied or if lower court's judgment was affirmed upon review. Havens Realty Corp. v. Coleman, p. 363.

2. *Mandatory parole term—Expiration as affecting constitutional challenge.*—Respondents' claims, asserted in federal habeas corpus proceedings, that they were denied due process when, in their guilty plea acceptance hearings in Illinois burglary prosecutions, neither was informed that his negotiated sentence included a mandatory 3-year parole term, were moot where (1) their habeas corpus petitions were filed after they had completed their prison terms and after they had been reincarcerated for parole violation, (2) District Court ultimately declared their mandatory parole terms void, respondents having already been discharged from custody since their parole terms had expired, and (3) respondents had not sought to

MOOTNESS—Continued.
have their convictions set aside and to plead anew, but instead elected to attack only their sentences. Lane v. Williams, p. 624.

3. *Reorganization of railroad—Enactment of Staggers Rail Act—Mootness of preliminary injunction.*—In bankruptcy reorganization proceedings by Chicago, Rock Island and Pacific Railroad Co. where court ordered abandonment of Railroad's system, disallowed any claim or arrangement for employee labor protection payable out of Railroad assets, and issued a preliminary injunction against enforcement of Rock Island Railroad Transition and Employee Assistance Act's provisions requiring trustee of Railroad's estate to pay benefits to Railroad's employees who were not hired by other carriers and providing for guarantee by United States of Railroad's employee protection obligations, injunction was rendered moot by subsequent enactment of Staggers Rail Act of 1980. Railway Labor Executives' Assn. v. Gibbons, p. 457.

4. *State criminal prosecution—Denial of pretrial bail—Effect of conviction.*—Where appellee, pending trial on state sexual-offense charges, filed suit in Federal District Court under 42 U. S. C. § 1983, seeking declaratory and injunctive relief on ground that his federal constitutional rights were violated by a Nebraska constitutional provision prohibiting bail in certain cases of first-degree sexual offenses, such as appellee's, and where appellee was convicted in state prosecutions before Court of Appeals, in reversing District Court's dismissal of complaint, held that exclusion of violent sexual offenses from pretrial bail violated Excessive Bail Clause of Eighth Amendment, appellee's constitutional claim became moot following his state-court convictions. Murphy v. Hunt, p. 478.

5. *Validity of ordinance—Amendment pending appeal.*—In an action where District Court held unconstitutional for vagueness a city ordinance directing that consideration be given to any "connections with criminal elements" of applicants for license for coin-operated amusement establishments, case is not rendered moot by fact that quoted phrase was eliminated from ordinance while case was pending in Court of Appeals. City of Mesquite v. Aladdin's Castle, Inc., p. 283.

MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980. See **Antitrust Acts, 1; National Labor Relations Act.**

NATIONAL LABOR RELATIONS ACT.

Collective-bargaining agreement—Employee health and retirement funds—Employer contributions.—In an action to enforce collective-bargaining provision whereby petitioner coal producer, as a member of a multiemployer bargaining unit, agreed to contribute to employee health and retirement funds on basis of its purchases of coal from producers not under contract with union, petitioner was entitled to plead and have adjudicated its defense based on alleged illegality of contract provision under § 8(e) of Act. Kaiser Steel Corp. v. Mullins, p. 72.

NATURAL GAS POLICY ACT OF 1978. See **Constitutional Law, II, 2.**

NEBRASKA. See **Mootness, 4.**

NEGLECT OF CHILDREN. See **Constitutional Law, IV, 4.**

NEW HAMPSHIRE. See **Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law, II, 1.**

NEW JERSEY. See **Constitutional Law, V; Stays, 2.**

NEW MEXICO. See **Federal-State Relations, 1.**

NEW YORK. See **Constitutional Law, IV, 3, 4; XI; Federal-State Relations, 2.**

NORTH CAROLINA. See **Constitutional Law, VIII.**

OIL. See **Constitutional Law, II, 2; Federal-State Relations, 2.**

OKLAHOMA. See **Constitutional Law, III.**

PARAPHERNALIA USED WITH ILLEGAL DRUGS. See **Constitutional Law, VII, 2.**

PARENT AND CHILD. See **Constitutional Law, IV, 4.**

PAROLE. See **Mootness, 2.**

PENSION FUNDS. See **Antitrust Acts, 1; Labor Management Relations Act; National Labor Relations Act.**

PHOTOGRAPHIC IDENTIFICATION. See **Habeas Corpus, 2.**

"PLAIN-VIEW" EXCEPTION. See **Constitutional Law, X.**

PLEA BARGAINING. See **Mootness, 2.**

POLITICAL CONTRIBUTIONS TO TRADE ASSOCIATIONS AND POLITICAL ACTION COMMITTEES. See **Federal Election Campaign Act of 1971.**

POSTARREST SILENCE AS ADMISSIBLE FOR IMPEACHMENT PURPOSES. See **Constitutional Law, IV, 1.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Federal-State Relations, 2.**

PRELIMINARY INJUNCTIONS. See **Mootness, 3.**

PRESUMPTIONS. See **Habeas Corpus, 2; Longshoremen's and Harbor Workers' Compensation Act.**

PRETRIAL BAIL. See **Mootness, 4.**

PRIMARY ELECTIONS. See **Stays.**

PRIVILEGED INFORMATION. See **Census Act.**

PROFESSIONAL ANNOUNCEMENT CARDS OF LAWYERS. See **Constitutional Law, VII, 1.**

PROSECUTORIAL MISCONDUCT. See **Constitutional Law, IV, 3.**

PUBLIC DISCLOSURE OF INFORMATION. See **Census Act.**

PUBLIC EMPLOYEES. See **Constitutional Law,** XI.

RACIAL DISCRIMINATION IN HOUSING. See **Fair Housing Act of 1968; Mootness,** 1.

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mary election should be conducted in accordance with districts established by such statutes, is denied. Republican National Committee v. Burton (REHNQUIST, J., in chambers), p. 1301.

2. *District Court judgment—Redistricting congressional districts.*—Application to stay District Court's judgment declaring unconstitutional, because of population variances, a New Jersey statute creating new congressional districts and enjoining any primary or general elections under statute, is granted. Karcher v. Daggett (BRENNAN, J., in chambers), p. 1303.

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2. *"Controlled group of corporations."* §§ 1561(a), 1563(a)(2), Internal Revenue Code of 1954, 26 U. S. C. §§ 1561(a), 1563(a)(2). United States v. Vogel Fertilizer Co., p. 16.

3. *"Injury."* § 2(2), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902(2). U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, p. 608.

4. *"Interstate . . . commerce."* 18 U. S. C. § 2314. McElroy v. United States, p. 642.

5. *"Security."* § 10(b), Securities Exchange Act of 1934, 15 U. S. C. § 78j(b). Marine Bank v. Weaver, p. 551.

6. *"Specifically exempted from disclosure by statute."* Freedom of Information Act, 5 U. S. C. § 552(b)(3). Baldrige v. Shapiro, p. 345.

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