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UNITED STATES REPORTS

VOLUME 456

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1981

MARCH 29 THROUGH JUNE 1, 1982

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1984

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.)

DEATH OF JUSTICE FORTAS

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, APRIL 28, 1982

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

THE CHIEF JUSTICE said:

Before we open our regular proceedings this morning on this, the last day of oral argument for the 1981 Term, we pause to note with sadness, the death of our colleague former Justice Abe Fortas in his 72nd year. Justice Fortas served on this Court from 1965 to 1969 after a rich and unusually varied experience in government, in private practice and a variety of activities relating to the law. He served as a legal adviser to the United Nations Organization and the American delegation to that Conference at San Francisco, as a visiting professor of law at the Yale Law School and a periodic lecturer at other law schools. His career in government at a very early age included service as General Counsel of the Public Works Administration under President Roosevelt and as Under Secretary of the Interior. After his return to private practice, he served from 1970 until the time of his death as a member of the very important Committee on Appellate Rules of the Judicial Conference of the United States. He had appeared as counsel at this lectern often, and his final appearance in this Court was on March 22, 1982—barely two weeks before his death.

The record will show that the recess of the Court on this final day of oral argument of the Term will be in memory of Mr. Justice Fortas, and in the October Term coming, there will be the traditional memorial service in this Chamber.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

Page

Abbott Laboratories; Jefferson County Pharmaceutical Assn. *v.* . . 959,987
ABC; Hyppolite *v.* 979
Abeita *v.* Gutierrez 930
Abrams; Kramer *v.* 990
Abramson; Federal Bureau of Investigation *v.* 615
Abu-Bakr *v.* Reed 963
Adams; Johnson *v.* 981
Adams Extract Co.; CFS Continental, Inc. *v.* 998
Adams Extract Co.; Mead Corp. *v.* 937
Adams Extract Co.; Three J Farms, Inc. *v.* 1012
Addison *v.* Chester 967
Addison Savmor, Inc. *v.* United States 965
Adkinson *v.* Campbell 928
Ad World, Inc.; Doylestown *v.* 975
Aetna Casualty & Surety Co. *v.* Keene Corp. 951
Africa *v.* Pennsylvania 908
Agurs *v.* Keller 947
Ah Lo *v.* Hawaii 981
Ahmed *v.* Eikerenkoetter 979
Air Pollution Control Comm'n *v.* Gorsuch 972
Akron *v.* Akron Center for Reproductive Health, Inc. 988
Akron; Akron Center for Reproductive Health, Inc. *v.* 988
Akron Center for Reproductive Health, Inc. *v.* Akron 988
Akron Center for Reproductive Health, Inc.; Akron *v.* 988
Akron Center for Reproductive Health, Inc.; Seguin *v.* 989
Alabama; Ballenger *v.* 907
Alabama; Berry *v.* 934
Alabama *v.* McCurley 1006
Alabama; Smith *v.* 947
Alabama; Streeter *v.* 932

Page
Alabama; Woods *v.* 975
Alabama Hospital Assn. *v.* United States 943
Alaska; Ivey *v.* 950
Alaska Marine Trucking *v.* Carnation Co. 964
Albert *v.* United States 916
Alford *v.* Lubbock 975
Allen *v.* Iowa 909
Allen; Lane *v.* 928
Allen Park *v.* Michigan 927
Allied International, Inc.; Longshoremen *v.* 212
Allison *v.* Continental Group, Inc. 906
Allnutt *v.* United States 905
Amalgamated. For labor union, see name of trade.
Aman Collection Service, Inc.; Juras *v.* 950
American Airlines, Inc.; Murnane *v.* 915
American Bank & Trust Co. *v.* Dallas County 970
American Commercial Lines, Inc. *v.* Griffith 914
American Cyanamid Co.; Bd. of Trustees of Internal Imp. Tr. Fund *v.* 986
American Cyanamid Co. *v.* Oil Workers 969
American Indians Residing on Maricopa-Ak Chin Res. *v.* U. S. .. 989
American Medical Assn. *v.* Federal Trade Comm'n 941,966
American Society of Mechanical Engineers *v.* Hydrolevel Corp. .. 556
American Society of Mechanical Engineers; Hydrolevel Corp. *v.* 989
American Tobacco Co. *v.* Patterson 63
Aminoil, USA, Inc.; Oliver *v.* 916
Amsted Industries, Inc.; Baker *v.* 945
Andersen *v.* United States 929
Anderson *v.* Celebrezze 960
Anderson *v.* Conner 937
Anderson; Conner *v.* 917
Anderson *v.* Flateau 956
Anderson *v.* United States 916
Andrew Martin Marine Corp. *v.* Motoren-Werke Mannheim, A.G. 989
Angelilli *v.* United States 939
Anglomar Bulkcarriers, Ltd.; Maecom S.A., Geneva *v.* 977
Antone *v.* Warden 993
Antonelli *v.* Chicago Police Dept. 909
Antonelli *v.* Schrieber 1010
Antonelli *v.* United States 918
Apachito *v.* Watt 963
Appleby *v.* WTIC–FM Radio Station 933
Arizona *v.* California 912
Arizona; Chambers *v.* 931
Arizona; Hartford *v.* 933,1001

Page
Arizona; Ortiz *v.* 984
Arizona; Watson *v.* 981
Arizona Downs; Turf Paradise, Inc. *v.* 1011
Arizona Electric Power Cooperative *v.* Mid-Louisiana Gas Co. ... 987
Arkansas; Coble *v.* 1008
Arkansas *v.* Mississippi 912
Arkansas; Scott *v.* 993
Arkansas; Singleton *v.* 938
Army and Air Force Exchange Service *v.* Sheehan 728
Arrow Transportation Co. *v.* United States 915
Arroyo *v.* New York 979
Artway, *In re* 920
Artway *v.* Kramer 948
Ashcroft *v.* Planned Parenthood Assn. of Kansas City 988
Ashcroft; Planned Parenthood Assn. of Kansas City *v.* 988
Associated General Contractors of California, Inc. *v.* Carpenters . 903
Athena Products, Ltd. *v.* U. S. Postal Service 915
Atherton *v.* Atherton 947
Atkins *v.* Eldridge 910
Atkinson *v.* Atkinson 905,965
Atkinson *v.* Goelz 905,965
Atlanta *v.* Owen 972
Atlantic Container Line; Yellow Forwarding Co. *v.* 962
Attorney General; Boyden *v.* 982
Attorney General; Gaines *v.* 949
Attorney General of Cal.; Bilofsky *v.* 1002
Attorney General of Mich.; Lake Carriers' Assn. *v.* 985
Attorney General of Mo. *v.* Planned Parenthood Assn. of K. C. .. 988
Attorney General of Mo.; Planned Parenthood Assn. of K. C. *v.* .. 988
Attorney General of N. Y.; Kramer *v.* 990
Au *v.* Financial Plaza of Pacific 952
Au *v.* Kelly 952
Auwaerter, *In re* 902
Avagliano *v.* Sumitomo Shoji America, Inc. 912
Avagliano; Sumitomo Shoji America, Inc. *v.* 912
Avedisian *v.* Hubbard 939
Avon *v.* United States 982
Ayres; Lustgarten *v.* 991
B. *v.* Illinois 963
Bacik *v.* Pennsylvania 967
Bagnariol *v.* United States 962
Baird, *In re* 982
Baker *v.* Amsted Industries, Inc. 945
Baker *v.* Estelle 908

Page
Baker; Raymond International, Inc. *v.* 983
Balash *v.* New York City Employees' Retirement System 952
Baldwin *v.* Blackburn 950
Baldwin *v.* Minnesota Comm'r of Revenue 929
Balkcom *v.* Baty 1011
Ballenger *v.* Alabama 907
Balsley *v.* Gulley 974
Banco de Credito Rural Argentino *v.* Banque Arabe et Int'l 966
BankAmerica Corp. *v.* United States 1005
Bankers Trust Co. *v.* BP Oil, Inc. 961
Bank of Mount Vernon; McNew *v.* 974
Bank of Texas *v.* Childs 970
Banque Arabe et Int'l D'Investissement; Banco de Credito *v.* 966
Barbee *v.* Mitchell 979
Barham *v.* United States 947,1012
Barksdale *v.* United States 991
Barnes; McColpin *v.* 919
Barnes *v.* United States 962
Barrett; Dallas County *v.* 936
Barrett; Thomas *v.* 925
Barry; Madison *v.* 985
Bass *v.* Texas 965
Bassett *v.* Virginia 938
Battaglia *v.* Union County Welfare Bd. 965
Baty; Balkcom *v.* 1011
Bautista *v.* California 916
Beach *v.* Kapner 980
Beachwood *v.* Central Motors, Inc. 976
Beasley *v.* Oklahoma 934
Beatty, *In re* 902
Beckman *v.* Equal Employment Opportunity Comm'n 999
Beckstrom *v.* California 916
Bedford Associates *v.* United States 914
Belasco *v.* California 979
Bell *v.* Dougherty County School System 986
Bell; North Haven Bd. of Ed. *v.* 512
Bell; Perini *v.* 107,1001
Bell; Stafos *v.* 1007
Bellanca; New York State Liquor Authority *v.* 1006
Benavidez *v.* United States 983
Benjamin S. *v.* Kuriansky 956
Bennett *v.* United States 1011
Benson *v.* Wyoming 1006
Bergman *v.* Burton 953

Page
Berry *v.* Alabama 934
Best Investment Co. *v.* Dallas 921
Beyer; Diaz *v.* 904,985
Bilford *v.* Florida 920
Bilofsky *v.* Deukmejian 1002
Bingaman *v.* King 940
Birden *v.* Smith 948
Black; Stephens *v.* 950
Blackburn; Baldwin *v.* 950
Blackburn; Taylor *v.* 917
Blake; Hall *v.* 983
B & L Distribution Center *v.* Teamsters 911,974
Bledsoe *v.* United States 934
Blinken *v.* Maryland 973
Block *v.* Neal 988
Block *v.* United States 907
Blue Diamond Coal Co. *v.* United States 1007
Blue Dot Investment, Inc.; Jerguson *v.* 946
Blum *v.* Yaretsky 903
Board of Comm'rs, Adams Cty. Pub. Hosp. Dist. No. 1; Ritter *v.* 969
Board of County Comm'rs of Weld County; Howard *v.* 927,968
Board of Directors, Bur Oak Library; Chaka *v.* 931
Board of Ed., Kings Park School Dist. No. 5; Savastano *v.* 974
Board of Governors, FRS; Option Advisory Service, Inc. *v.* 976
Board of Trustees of Insts. of Higher Ed. *v.* Miss. Council on H. R. 971
Board of Trustees of Internal Imp. Tr. Fund *v.* American Cyanamid 986
Board of Trustees of Internal Imp. Tr. Fund *v.* Mobil Oil Corp. .. 956
Board of Trustees of Mich. State Univ.; Hildebrand *v.* 910
Bob Jones Univ. *v.* United States 922
Bobo *v.* ITT, Continental Baking Co. 933
Bochniak; Illinois *v.* 939
Bodette *v.* New York 993
Boice *v.* State Univ. of N. Y. at New Paltz 992
Bolger *v.* Youngs Drug Products Corp. 970
Bollotin *v.* Schwartz 950
Bonen *v.* United States 991
Booth *v.* United States 978
Boss *v.* United States 946
Boston *v.* Difanis 979
Boulder; Community Communications Co. *v.* 1001
Bowen *v.* Zant 939
Bowers *v.* St. Louis Southwestern R. Co. 946
Bowles *v.* United States 982
Bowman *v.* United States 961

Page
Bowman *v.* Wisconsin 931
Bowsher *v.* Merck & Co. 925
Bowsher; Merck & Co. *v.* 925
Boyden *v.* Smith 982
Boyer, *In re* 904
BP Oil, Inc.; Bankers Trust Co. *v.* 961
Bradbury *v.* Wainwright 992
Brady; Florida *v.* 988
Brennin *v.* Kirby 908
Brent *v.* Maryland 908
Brewer *v.* United States 977
Brian Lee W. *v.* California 980
Bridgeport; Bridgeport Ed. Assn. *v.* 976
Bridgeport Ed. Assn. *v.* Bridgeport 976
Bridges *v.* Texas 1010
Bright *v.* United States 926
Briscoe, *In re* 959
Briscoe *v.* LaHue 912
Britt *v.* United States 935
Brock *v.* Kentucky 1006,1009
Broderick *v.* United States 928
Bronston *v.* United States 915
Brookline; Loeterman *v.* 906
Brooks *v.* Oklahoma 999
Brooksher *v.* Harrel 963
Brotherhood. For labor union, see name of trade.
Brown, *In re* 957
Brown *v.* Engle 931
Brown *v.* Harris 948
Brown *v.* Hartlage 45
Brown *v.* Loggins 992
Brown *v.* United States 925,935
Browning-Ferris Industries of Georgia, Inc. *v.* United States 936
Brummitt *v.* United States 977
Brunswick Corp. *v.* Federal Trade Comm'n 915
Bryant; Ceat S.p.A., Pneumatici *v.* 944
Bryant; Maryland *v.* 949
Bryant *v.* United States 992
Bucheit *v.* Laudenberger 940
Bureau of Revenue of N. M.; Ramah Navajo School Bd. *v.* 921
Burkburnett; Helton *v.* 940
Burlington Northern Inc. Pension Plan; Quinn *v.* 928
Burns *v.* United States 1010
Burrell *v.* Union Correctional Institute 931

Page
Burroughs Corp.; Kramarsky *v.* 924
Burton; Bergman *v.* 953
Burton; Republican National Committee *v.* 941
Bustillos *v.* California 930
Butcher *v.* California 932
Butler *v.* United States 939
Butterworth; Kines *v.* 980
C. *v.* California 981
Calhoun *v.* United States 946
California; Arizona *v.* 912
California; Bautista *v.* 916
California; Beckstrom *v.* 916
California; Belasco *v.* 979
California; Brian Lee W. *v.* 980
California; Bustillos *v.* 930
California; Butcher *v.* 932
California; Campbell *v.* 930
California; David Lynn C. *v.* 981
California; Ford *v.* 1010
California *v.* Grace Brethren Church 942
California; Harrison *v.* 934
California; Hemphill *v.* 1010
California; Moreno *v.* 908
California *v.* Nevada 867
California; Valenzano *v.* 934
California; Vineberg *v.* 945
California *ex rel.* Cooper *v.* Mitchell Brothers' Santa Ana Theater 920
California State Bd. of Equalization *v.* United States 901,985
Calvert *v.* Iowa 930
Camellia Corp. *v.* Cornell 901
Campbell; Adkinson *v.* 928
Campbell *v.* California 930
Campbell *v.* Gunn 931
Canda *v.* United States 909
Canham *v.* Oberlin College 977
Cann *v.* Ford Motor Co. 960
Cantrell *v.* United States 978
Carapella *v.* United States 935
Carlone *v.* United States 991
Carlson; Green *v.* 918,982
Carlson; King *v.* 909
Carmen; Williams *v.* 919
Carnation Co.; Alaska Marine Trucking *v.* 964
Carow; Omernick *v.* 933

Page
Carpenter *v.* Jamerson 901
Carpenters; Associated General Contractors of California, Inc., *v.* 903
Carpenters; Huber & Antilla Construction *v.* 977
Carpenters *v.* Pease Co. 974
Carpenters; Summit Valley Industries, Inc. *v.* 717,903
Carpentersville; Fiala *v.* 990
Carr; Patterson *v.* 1008
Carter *v.* Dayton Bd. of Ed. 989
Carter *v.* Jago 980
Casbah, Inc. *v.* Thone 950
Cashell *v.* United States 915
Caterpillar Tractor Co.; Chicago Bridge & Iron Co. *v.* 958
Cavalieri *v.* United States 973
Ceat S.p.A., Pneumatici *v.* Bryant 944
Celebrezze; Anderson *v.* 960
Celifie *v.* United States 1010
Central Bank of Nigeria; Verlinden B. V. *v.* 913
Central Motors, Inc.; Beachwood *v.* 976
Centre for Independence of Judges and Lawyers, *In re* 1005
Cervi *v.* Georgia 938
CFS Continental, Inc. *v.* Adams Extract Co. 998
Chaco Energy Co.; Hospah Coal Co. *v.* 1007
Chaka *v.* Board of Directors, Bur Oak Library 931
Chaka *v.* Leighton 933
Chambers *v.* Arizona 931
Chaney *v.* Oklahoma 919
Chaney *v.* Warden 993
Chang *v.* Texas Youth Council 909
Charmer Industries, Inc.; Liquor Salesmen *v.* 973
Chase *v.* Maggio 979
Chase Manhattan Bank, N.A. *v.* Vishipco Line 924
Chatham Ventures, Inc. *v.* Federal Deposit Ins. Corporation 972
Cheatham *v.* Florida 962
Chemical Construction Corp.; Kremer *v.* 461
Chester; Addison *v.* 967
Cheveres *v.* Miller 994
Cheveres *v.* Superior Court of Cal., Ventura County 994
Chia *v.* Westinghouse Electric Corp. 945
Chicago Bridge & Iron Co. *v.* Caterpillar Tractor Co. 958
Chicago Police Dept.; Antonelli *v.* 909
Childers *v.* Illinois 939
Childs; Bank of Texas *v.* 970
Childs; Wynnewood Bank & Trust *v.* 970
Ching Yee, *In re* 951

Page
Chouinard *v.* New Mexico 930
Christian; LeBright *v.* 939
Christopher *v.* Florida 910
Cianci *v.* Division of Liquor Control 915
Cia. Pervana de Vapores, S.A.; Rex *v.* 926
Cincinnati *v.* Jones 946
City. See name of city.
Claiborne Hardware Co.; NAACP *v.* 958
Clairton School Dist.; Strinich *v.* 982
Clark *v.* Los Angeles 927
Clark *v.* Municipal Employees Credit Union of Baltimore 939
Clark *v.* Wilmot 993
Clawson; Griffith *v.* 962
Clayton Brokerage Co. of St. Louis *v.* Leist 353
Clements; Terrazas *v.* 902
Cleppe *v.* Washington 1006
Coastal Petroleum Co. *v.* Mobil Oil Corp. 956
Coastal Petroleum Co. *v.* United States 915
Cobbs *v.* Virginia 1007
Coble *v.* Arkansas 1008
Cochran *v.* United States 915
Cochrane & Bresnahan *v.* Smith 961
Cohen; Ernest *v.* 1004
Cohen *v.* Kentucky Bar Assn. 921,1007
Cohen; Smith *v.* 948
Cohen *v.* United States 991
Cole *v.* Ohio 906
Colling; Friendly Retirement Center, Inc. *v.* 911
Collins; Dallas County *v.* 936
Collins *v.* Differ 1008
Collins *v.* United States 1006
Collins *v.* Zant 950
Colorado *v.* New Mexico 1004
Combs *v.* Florida 984
Commercial Metals Co.; Southern Pacific Transportation Co. *v.* 336
Commissioner; Hall *v.* 944
Commissioner *v.* Tufts 960
Commissioner; Unvert *v.* 961
Commissioner of Agriculture; Red Owl Stores, Inc. *v.* 986
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Community Communications Co. *v.* Boulder 1001
Community Television of Southern California *v.* Gottfried 913,923,958
Compagnie des Bauxites de Guinee; Insurance Corp. of Ireland *v.* 694

Page
Compton; Horton *v.* 909
Comptroller General of U. S. *v.* Merck & Co. 925
Comptroller General of U. S.; Merck & Co. *v.* 925
Conboy; Pillsbury Co. *v.* 923
Connecticut; Johnson *v.* 911
Conner *v.* Anderson 917
Conner; Anderson *v.* 937
Connor *v.* Phillips 939
Conroy; Regan *v.* 945
Conroy *v.* United States 918
Consolidated Foods Corp. *v.* Unger 1002
Container Corp. of America *v.* Franchise Tax Bd. 960,969
Continental Group, Inc.; Allison *v.* 906
Continental Illinois Nat. Bank & Trust Co. of Chicago; Weit *v.* 938
Conway *v.* Oklahoma 977
Conway *v.* United States 912
Cook *v.* United States 982
Cooper *v.* Mitchell Brothers' Santa Ana Theater 920
Cornell; Camellia Corp. *v.* 901
Corriz; Naranjo *v.* 971
Cotton Belt Ins. Co. *v.* United States 978
Cotton Petroleum Corp. *v.* Edwards 936
Coulter; Michelin Tire Corp. *v.* 906
County. See name of county.
Courier-Journal *v.* McCall 975
Coven, *In re* 987
Coven *v.* United States 916
Coward *v.* United States 946
Cowley; Scott *v.* 993
Creasy *v.* Virginia 911
Creditors' Committee #1; Tanaka *v.* 977
Crossman *v.* United States 977
Crumpacker *v.* Indiana Supreme Court Disciplinary Comm'n 941
Culhane *v.* Harris 978
Cunningham *v.* Georgia 965
Curran; Merrill Lynch, Pierce, Fenner & Smith, Inc. *v.* 353
Cuyler; Hoskins *v.* 1005
Cuyler; Oliver *v.* 947
Cyphers, *In re* 957
Daggett; Karcher *v.* 901
Dallas; Best Investment Co. *v.* 921
Dallas County; American Bank & Trust Co. *v.* 970
Dallas County *v.* Barrett 936
Dallas County *v.* Collins 936

Page
Darby Drug Co. *v.* Ives Laboratories, Inc. 844
Darwin *v.* United States 907
David Lynn C. *v.* California 981
Davis *v.* Parratt 979
Davis *v.* South Bend 991
Davis *v.* United Air Lines, Inc. 965
Davis *v.* United States 930
Dayton Bd. of Ed.; Carter *v.* 989
Dean *v.* United States 1006,1008
De Baca; Schmedt *v.* 926
DeFazio, *In re* 956
DeFrancis, *In re* 957
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 923
Delano; Kitch *v.* 946
DeLeon; Jacob Bros., Inc. *v.* 952
Delta Air Lines, Inc.; Kramarsky *v.* 924
Dently *v.* Irvin 948
Department of Army; Labash *v.* 1008
Department of Education *v.* Seattle Univ. 986
Department of Energy; Wiggins Brothers, Inc. *v.* 905
Department of Labor and Human Resources; Hernandez *v.* 950
Department of State *v.* Washington Post Co. 595
Deukmejian; Bilofsky *v.* 1002
De Vault *v.* Menocal 1007
Devex Corp. *v.* General Motors Corp. 990
Devex Corp.; General Motors Corp. *v.* 988
De Vincent, *In re* 924
Devine *v.* Sullivan 986
DeWitt *v.* Manson 948
Diaz *v.* Beyer 904,985
Dickerson *v.* New Banner Institute, Inc. 923
Difanis; Boston *v.* 979
Differ; Collins *v.* 1008
DiFronzo *v.* United States 1010
Director of Fruit & Vegetable Div.; United Fruit & Veg. Co. *v.* 1007
Director of penal or correctional institution. See name or title of director.
Director, U. S. Bureau of Prisons; Veteto *v.* 935
District Court. See U. S. District Court.
District Grievance Committee of State Bar of Tex.; McInnis *v.* 976
District Judge. See U. S. District Judge.
District of Columbia Dept. of Employment Services; Jackson *v.* 993
Division of Liquor Control; Cianci *v.* 915
Dixon *v.* MacDougall 919

Page
Dohner *v.* Morris 992
Donovan, *In re* 912
Dotson; Indianola *v.* 1002
Dougherty County School System; Bell *v.* 986
Douglas *v.* Florida 976
Douglas *v.* Long 932
Dowdle *v.* Wright 995
Doylestown *v.* Ad World, Inc. 975
Drake Univ.; Eaton *v.* 939
Draper *v.* Merit Systems Protection Bd. 929
Draper *v.* Prescott 947
Dredge General G. L. Gillespie *v.* Merchants National Bank 966
Drefke, *In re* 969
Drysdale *v.* Keith 917
DuBrook, Inc.; W. B. Gibson Co. *v.* 945
Duckworth; Jacks *v.* 984
Dudley *v.* U. S. District Court 981
Dykema *v.* United States 983
Eady *v.* Erbe 990
Eagerton; Exchange Oil & Gas Corp. *v.* 970
Eagerton; Exxon Corp. *v.* 970
Eaton *v.* Drake Univ. 939
Edge; Sumter County School Dist. *v.* 1002
Edinburgh Ins. Co.; Lubin *v.* 945
Edwards; Cotton Petroleum Corp. *v.* 936
Edwards *v.* Louisiana 945
Edward W. Minte Co. *v.* Murphy 962
Edwin M. Green, Inc.; Fla. Marble Polishers H. & W. Tr. Fund *v.* 973
Eicke *v.* Eicke 970
Eikelbloom; McColpin *v.* 947,1001
Eikerenkoetter; Ahmed *v.* 979
Eilberg, *In re* 903,969
Eldridge; Atkins *v.* 910
Electrical Workers *v.* United States 952
Elizabeth; Groff *v.* 980
Ellis *v.* Illinois 907
Ellsworth *v.* United States 944
Elmore; Faker *v.* 991
Energy Reserves Group, Inc. *v.* Kansas Power & Light Co. 904
Engle; Brown *v.* 931
Engle *v.* Hughes 107,1001
Engle *v.* Isaac 107,1001
Engle; Lewis *v.* 980
Engle; Nelson *v.* 908

Page
Engle; Turner *v.* 908
Enmund *v.* Florida 904
EEOC; Beckman *v.* 999
EEOC; Ford Motor Co. *v.* 923
EEOC; Hawkins *v.* 929
EEOC; Southwestern Baptist Theological Seminary *v.* 905
Equifax Services, Inc.; Lamb *v.* 927
Erbe; Eady *v.* 990
Erika, Inc.; United States *v.* 201
Ernest *v.* Cohen 1004
Espinosa; Rusk *v.* 951
Espinoza; O'Dell *v.* 430
Estelle; Baker *v.* 908
Estelle; Lake *v.* 992
Estelle; Linton *v.* 935
Estelle; McKinney *v.* 937
Estelle; Pousson *v.* 917
Estelle; Smith *v.* 911
Estelle; Thomas *v.* 933,947
Estelle; Williams *v.* 932
Estes, *In re* 987
Evans; Hopper *v.* 605
Evans *v.* United States 1008
Everett; Williams *v.* 963
Every *v.* Louisiana 931
E. W. Scripps Co. *v.* Heheman 991
Exchange Oil & Gas Corp. *v.* Eagerton 970
Exxon Co., U.S.A.; Kostantas *v.* 1009
Exxon Corp. *v.* Eagerton 970
Factors Etc., Inc. *v.* Pro Arts, Inc. 927
Fair *v.* Zant 984
Faker *v.* Elmore 991
Falls City Industries, Inc. *v.* Vanco Beverage, Inc. 987
Farina *v.* United States 943
Federal Bureau of Investigation *v.* Abramson 615
Federal Communications Comm'n *v.* Gottfried 913,923,958
Federal Communications Comm'n; Memphis Mobile Tel., Inc. *v.* 990
Federal Communications Comm'n; RKO General, Inc. *v.* 927
Federal Deposit Ins. Corporation; Chatham Ventures, Inc. *v.* 972
Federal Election Comm'n; Machinists *v.* 974
Federal Election Comm'n *v.* National Right to Work Committee 914
Federal Energy Regulatory Comm'n *v.* Mississippi 742
Federal Energy Regulatory Comm'n; Mitchell Energy Corp. *v.* 974
Federal Energy Regulatory Comm'n; Pub. Util. Comm'n of Colo. *v.* 944

Page
Federal Trade Comm'n; American Medical Assn. *v.* 941,966
Federal Trade Comm'n; Brunswick Corp. *v.* 915
Federal Trade Comm'n; Southwest Sunsites, Inc. *v.* 973
Federated Publications, Inc. *v.* Swedberg 984
Feinberg *v.* United States 944
Feldman, *In re* 956
Fendler *v.* United States 937
Ferber; New York *v.* 942
Ferro Corp.; O. Hommel Co. *v.* 965
Fiacco; United Technologies Corp. *v.* 976
Fiala *v.* Carpentersville 990
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 923
Financial Plaza of Pacific; Au *v.* 952
Fince *v.* United States 982
Finley *v.* Murray 604
Finnegan *v.* Leu 431
Fiorot *v.* Oklahoma 1011
First National Bank of St. Paul *v.* Minnesota, by Lord 967
First Pennsylvania Bank N.A. *v.* Zeffiro 1005
Fisher *v.* United States 943
Flateau; Anderson *v.* 956
Flight Attendants *v.* Trans World Airlines, Inc. 940
Flipside, Hoffman Estates, Inc.; Hoffman Estates *v.* 950
Florida; Bilford *v.* 920
Florida *v.* Brady 988
Florida; Cheatham *v.* 962
Florida; Christopher *v.* 910
Florida; Combs *v.* 984
Florida; Douglas *v.* 976
Florida; Enmund *v.* 904
Florida; Jones *v.* 962
Florida; Masser *v.* 984
Florida; Mikenas *v.* 1011
Florida; Odom *v.* 925
Florida; Ragno *v.* 940
Florida; Sandini *v.* 926
Florida; Sayers *v.* 981
Florida; Sireci *v.* 984
Florida; Smith *v.* 951,984
Florida; Swain *v.* 1009
Florida; Tafero *v.* 939
Florida Dept. of Citrus; Kraft, Inc. *v.* 1002
Florida Dept. of Labor and Employment Security; Paschal *v.* 981
Florida Marble Polishers Health & Welf. Tr. Fund *v.* Green, Inc. 973

Page
Florida State Univ. *v.* Joshi 972
Flowers *v.* Scully 949
Flynn *v.* United States 930
Fogg; Johnson *v.* 907
Fogg *v.* United States 905
Ford *v.* California 1010
Fordees Corp. *v.* Vulcan, Inc. 906
Ford Motor Co.; Cann *v.* 960
Ford Motor Co. *v.* Equal Employment Opportunity Comm'n 923
Forston *v.* Orange Unified School Dist. 980
Foster *v.* United States 977
Founding Church of Scientology *v.* United States 926
Founding Church of Scientology of Washington, D. C. *v.* Regan 976
400 E. Baltimore Street, Inc. *v.* Maryland 926
Foust *v.* Garmon 998
Frady; United States *v.* 152,1001
Franchise Tax Bd.; Container Corp. of America *v.* 960,969
Frangella Mushroom Farms, Inc. *v.* United States 916
Frank *v.* Illinois 927
Franklin *v.* Zant 938
Freeman *v.* United States 962
Friedland *v.* United States 989
Friendly Retirement Center, Inc. *v.* Colling 911
Gaines *v.* Illinois 959,1001
Gaines *v.* Smith 949
Gallagher *v.* United States 962
Galloway *v.* United States 1006
Gap Stores, Inc. *v.* Sailor Music 945
Garmon; Foust *v.* 998
Garner; Memphis Bank & Trust Co. *v.* 943
Garner *v.* United States 905
Garrison; Medley *v.* 947
Garza; Spudnik Equipment Co. *v.* 1007
Gay *v.* P. K. Lindsay Co. 975
G. B. *v.* Illinois 963
General Atomic Co. *v.* United Nuclear Corp. 939
General Motors Corp. *v.* Devex Corp. 988
General Motors Corp.; Devex Corp. *v.* 990
General Motors Corp.; Skelton *v.* 974
General Motors Corp.; Toyota Motor Co. *v.* 937
Generix Drug Corp.; United States *v.* 942,958
Georgia; Cervi *v.* 938
Georgia; Cunningham *v.* 965
Georgia; Gilreath *v.* 984

Page
Georgia; Godfrey *v.* 919,1001
Georgia; McCord *v.* 929
Georgia-Pacific Corp. *v.* Lyman Lamb Co. 971
Geraldo *v.* Ohio 962
Getto; Illinois Bell Telephone Co. *v.* 946
Giacomino *v.* United States 1005
Gibbons; Railway Labor Executives' Assn. *v.* 939,998
Gibson *v.* United States 978
Gibson; Washington *v.* 968
Gibson Co. *v.* DuBrook, Inc. 945
Gilbert *v.* South Carolina 984,1004
Gilbert *v.* United States 946
Gillette *v.* Miner 914
Gilliland *v.* Los Angeles County 967
Gilliland *v.* Palmdale 967
Gilliland *v.* United States 905
Gilreath *v.* Georgia 984
Gilstrap; Lee *v.* 907
Glass *v.* Pennsylvania 932
Glenn *v.* United States 963
Godfrey *v.* Georgia 919,1001
Goelz; Atkinson *v.* 905,965
Goldblatt *v.* Vogel 934,985
Golden *v.* United States 919
Goldsboro Christian Schools, Inc. *v.* United States 922
Gonsalves *v.* United States 909
Gonzalez *v.* New York 1010
Gonzalez-Hernandez *v.* United States 994
Goodstein *v.* United States 905
Gorsuch; Pennsylvania *v.* 972
Gorsuch; West Virginia *ex rel.* Air Pollution Control Comm'n *v.* 972
Gottfried; Community Television of Southern California *v.* 913,923,958
Gottfried; Federal Communications Comm'n *v.* 913,923,958
Governor of Ark.; Wells *v.* 906
Governor of Mich.; Johnson *v.* 993
Governor of Neb.; Casbah, Inc. *v.* 950
Governor of N. M.; Bingaman *v.* 940
Governor of Tex.; Terrazas *v.* 902
Grace Brethren Church; California *v.* 942
Grace Brethren Church *v.* United States 942
Grace Brethren Church; United States *v.* 942
Grand Laboratories, Inc. *v.* Schweiker 927
Grant, *In re* 956
Grant *v.* United States 934

Page
Grant *v.* Washington Public Employment Relations Comm'n 955
Gray *v.* United States 919
Green, *In re* 924
Green *v.* Carlson 918,982
Green *v.* Ohio 939
Green; Olson *v.* 1009
Green *v.* Regan 937
Green *v.* Warden 934,994
Green *v.* White 1009
Green *v.* Wilkerson 935
Green *v.* Zant 939
Greene *v.* Lindsey 444
Green, Inc.; Fla. Marble Polishers Health & Welf. Trust Fund *v.* 973
Grendel's Den, Inc.; Larkin *v.* 913
Grentec, Inc.; Stevenson *v.* 943
Griffin *v.* Kentucky 930
Griffin *v.* United States 949
Griffith; American Commercial Lines, Inc. *v.* 914
Griffith *v.* Clawson 962
Griffith *v.* Griffith 962
Grijalva *v.* West 1009
Groff *v.* Elizabeth 980
Gruman; Plotkin *v.* 948
Guerrero *v.* United States 964
Gulf Oil Corp. *v.* Petrol Stops Northwest 983
Gulley; Balsley *v.* 974
Gunn; Campbell *v.* 931
Gutierrez; Abeita *v.* 930
Haberland *v.* Pennsylvania 932
Habluetzel; Mills *v.* 91
Halbert *v.* United States 934
Hall *v.* Blake 983
Hall *v.* Commissioner 944
Hall *v.* Hall 916
Hall *v.* New York City Transit Authority 932
Hall *v.* Thomas 950
Hamilton *v.* Mays 985
Hammersmith, *In re* 902
Hampton *v.* Waters 931
Hance *v.* Zant 965
Hanson, *In re* 904
Harlow *v.* Sargent 928
Harrel; Brooksher *v.* 963
Harris; Brown *v.* 948

Page
Harris; Culhane *v.* 978
Harris; Hayes *v.* 930
Harris; McKee *v.* 917
Harris County; Xerox Corp. *v.* 913
Harris County Hospital Dist.; Schwanecke *v.* 1001
Harrison *v.* California 934
Hartford *v.* Arizona 933,1001
Hartford Accident & Indemnity Co. *v.* Keene Corp. 951
Hartlage; Brown *v.* 45
Hasting *v.* United States 978
Hasting; United States *v.* 971
Hatch *v.* Madsen 962
Hathorn *v.* Lovorn 922
Hauschild; Honda Motor Co. *v.* 961
Hawaii; Ah Lo *v.* 981
Hawaiian Airlines, Inc. *v.* National Mediation Bd. 929
Hawkins *v.* Equal Employment Opportunity Comm'n 929
Hayes *v.* Harris 930
Hayward *v.* U. S. Parole Comm'n 935
Hebel *v.* United States 946
Hedrick; Vance *v.* 978
Hegwood *v.* United States 982
Heheman; E. W. Scripps Co. *v.* 991
Heinold Commodities, Inc. *v.* Leist 353
Hejl *v.* Texas 933,1001
Helgesen *v.* United States 929
Helton *v.* Burkburnett 940
Hemphill *v.* California 1010
Hensley; Washington Metropolitan Area Transit Authority *v.* 904
Heritage Farms, Inc.; Solebury Township *v.* 990
Herman & MacLean *v.* Huddleston 914,958
Herman & MacLean; Huddleston *v.* 914,958
Hernandez *v.* Department of Labor and Human Resources 950
H & H Operations, Inc.; Peachtree City *v.* 961
Higgins; Rafter *v.* 920
High's Dairy Stores; Levy *v.* 939
Hildebrand *v.* Board of Trustees of Mich. State Univ. 910
Hinchy, Witte, Wood, Anderson & Hodges; Vaughn *v.* 962
Hodakievic *v.* Marado 992
Hoffman Estates *v.* The Flipside, Hoffman Estates, Inc. 950
Holiday Inn *v.* Liquor Control Comm'n of Ohio 902
Holman, *In re* 902
Holmes Limestone Co.; Watt *v.* 995
Holober, *In re* 902

Page
Holsey *v.* McCauley 981
Home Indemnity Co. *v.* Oesterle 989
Hommel Co. *v.* Ferro Corp. 965
Honda Motor Co. *v.* Hauschild 961
Hoover, *In re* 959
Hope; Shearson Hayden Stone, Inc. *v.* 910
Hopper *v.* Evans 605
Horton *v.* Compton 909
Hoskins *v.* Cuyler 1005
Hospah Coal Co. *v.* Chaco Energy Co. 1007
Housewright; Pennington *v.* 918
Housewright; Smith *v.* 978
Howard *v.* Board of County Comm'rs of Weld County 927,968
Howard; Tarver *v.* 932
Howard *v.* United States 919,1010
Howell; Raulerson *v.* 919
Howell *v.* Tanner 918
Howell *v.* United States 931
Hubbard *v.* United States 926
Huber & Antilla Construction *v.* Carpenters 977
Huddleston *v.* Herman & MacLean 914,958
Huddleston; Herman & MacLean *v.* 914,958
Hughes; Engle *v.* 107,1001
Hughes Tool Co. *v.* Richards 991
Hughes Tool Co.; Smith International, Inc. *v.* 976
Humphrey *v.* United States 1010
Hunter; Missouri *v.* 914
Hunter *v.* New York State Dept. of Civil Service 985
Hunter; Sinclair *v.* 981
Huntington Memorial Hospital *v.* Missirlian 906
Husted *v.* Illinois 945
Hutto; Pouncy *v.* 933
Hydaburg Cooperative Assn. *v.* United States 1004
Hydrolevel Corp. *v.* American Society of Mechanical Engineers 989
Hydrolevel Corp.; American Society of Mechanical Engineers *v.* 556
Hyppolite *v.* ABC 979
Illinois *v.* Bochniak 939
Illinois; Childers *v.* 939
Illinois; Ellis *v.* 907
Illinois; Frank *v.* 927
Illinois; Gaines *v.* 959,1001
Illinois; G. B. *v.* 963
Illinois; Husted *v.* 945
Illinois; Lewis *v.* 1011

Page
Illinois; Link *v.* 1006
Illinois; Martin-Trigona *v.* 934
Illinois; McMurtry *v.* 943
Illinois; Posey *v.* 993
Illinois; Reimnitz *v.* 906
Illinois; Rodriguez *v.* 947
Illinois; Thomas *v.* 993
Illinois Bell Telephone Co. *v.* Getto 946
Illinois Central Gulf R. Co.; Pandil *v.* 975
Immer *v.* Puerto Rico Maritime Shipping Authority 906,985
Immigration and Naturalization Service; Tejeda-Mata *v.* 994
Incorporated Trustees of Gospel Worker Society *v.* United States 944
Indiana; Kentucky *v.* 958
Indiana Supreme Court Disciplinary Comm'n; Crumpacker *v.* 941
Indianola *v.* Dotson 1002
Ingram; United States *v.* 904,923
Innis *v.* Rhode Island 930,942
In re. See name of party.
Insurance Co. of North America *v.* Keene Corp. 951
Insurance Corp. of Ireland *v.* Compagnie des Bauxites de Guinee 694
International. For labor union, see name of trade.
Interstate Commerce Comm'n; Nitrochem, Inc. *v.* 905
Inwood Laboratories, Inc. *v.* Ives Laboratories, Inc. 844
Iowa; Allen *v.* 909
Iowa; Calvert *v.* 930
Iowa; Koop *v.* 979
Irvin; Dently *v.* 948
Irwin *v.* United States 907
Isaac; Engle *v.* 107,1001
ITT, Continental Baking Co.; Bobo *v.* 933
Ives Laboratories, Inc.; Darby Drug Co. *v.* 844
Ives Laboratories, Inc.; Inwood Laboratories, Inc. *v.* 844
Ivey *v.* Alaska 950
Jacks *v.* Duckworth 984
Jackson, *In re* 913
Jackson *v.* District of Columbia Dept. of Employment Services... 993
Jackson *v.* O'Lone 933
Jackson *v.* Rose 993
Jackson *v.* United States 978
Jacob Bros., Inc. *v.* DeLeon 952
Jaffee *v.* United States 972
Jago; Carter *v.* 980
Jago; Papp *v.* 984
Jago; Wilson *v.* 948,1009

Page
Jamerson; Carpenter *v.* 901
Jefferson County Pharmaceutical Assn. *v.* Abbott Laboratories . 959,987
Jerald *v.* O'Rourke 948
Jerguson *v.* Blue Dot Investment, Inc. 946
Jernigan *v.* Rose 933
Johns-Manville Corp. *v.* Lam, Inc. 1007
Johns-Manville Corp.; Steinhardt *v.* 967
Johns-Manville Sales Corp.; Rosenberg *v.* 967
Johnson *v.* Adams 981
Johnson *v.* Connecticut 911
Johnson *v.* Fogg 907
Johnson *v.* J. Ray McDermott & Co. 990
Johnson *v.* Milliken 993
Joint Legis. Comm. for Performance Review of Miss. *v.* Phillips 960
Jones; Cincinnati *v.* 946
Jones *v.* Florida 962
Jones *v.* Leidinger 950
Jones; Operating Engineers *v.* 987
Jones *v.* United States 909,918
Jordan; Moore *v.* 989
Joshi; Florida State Univ. *v.* 972
J. P. Stevens & Co. *v.* National Labor Relations Bd. 924
J. Ray McDermott & Co.; Johnson *v.* 990
Judge, Boyd Circuit Court, Division II; Meco, Inc. *v.* 969
Judge, Burlington County Court; Artway *v.* 948
Judge, Fifteenth Judicial Circuit of Fla.; Beach *v.* 980
Junction City; Robinson *v.* 989
Juras *v.* Aman Collection Service, Inc. 950
Juvenile Dept. of Klamath County; Maffey *v.* 911
Kansas Power & Light Co.; Energy Reserves Group, Inc. *v.* 904
Kansas Supreme Court; Phelps *v.* 944
Kapner; Beach *v.* 980
Karcher *v.* Daggett 901
Karr *v.* Karr 985
Keene Corp.; Aetna Casualty & Surety Co. *v.* 951
Keene Corp.; Hartford Accident & Indemnity Co. *v.* 951
Keene Corp.; Insurance Co. of North America *v.* 951
Keene Corp.; Liberty Mutual Ins. Co. *v.* 951
Keith; Drysdale *v.* 917
Keller; Agurs *v.* 947
Kelley; Lake Carriers' Assn. *v.* 985
Kelly; Au *v.* 952
Kelly *v.* Louisiana 925
Kennedy; Oregon *v.* 667

Page
Kentucky; Brock *v.* 1006,1009
Kentucky; Griffin *v.* 930
Kentucky *v.* Indiana 958
Kentucky; Kessinger *v.* 911
Kentucky; Ohio *v.* 958
Kentucky; Payne *v.* 909
Kentucky; Stinnett *v.* 933
Kentucky Bar Assn.; Cohen *v.* 921,1007
Kessinger *v.* Kentucky 911
Kibler *v.* United States 961
Kidder County Social Service Bd.; Ripplinger *v.* 963
Kilcoyne *v.* Morgan 928
Kimberlin *v.* United States 964
Kines *v.* Butterworth 980
King; Bingaman *v.* 940
King *v.* Carlson 909
King *v.* Oklahoma 1011
Kirby; Brennin *v.* 908
Kirkpatrick; Schatzle *v.* 904,966
Kitch *v.* Delano 946
Kitchen, *In re* 903,1004
Kleindienst, *In re* 1004
Knyff *v.* United States 977
Kolender *v.* Lawson 959
Koniag, Inc. *v.* Stratman 901
Koop *v.* Iowa 979
Kopack *v.* National Labor Relations Bd. 994
Kostantas *v.* Exxon Co., U.S.A. 1009
Kraft, Inc. *v.* Florida Dept. of Citrus 1002
Kramarsky *v.* Burroughs Corp. 924
Kramarsky *v.* Delta Air Lines, Inc. 924
Kramarsky *v.* Metropolitan Life Ins. Co. 924
Kramer *v.* Abrams 990
Kramer; Artway *v.* 948
Kremer *v.* Chemical Construction Corp. 461
Kreps *v.* New York 1009
Kuriansky; Benjamin S. *v.* 956
Labash *v.* Department of Army 1008
Labor Union. See name of trade.
Lacey *v.* United States 961
Lackey *v.* Rose 933
LaComb; Orwoll *v.* 913,966
LaGrange; McLaughlin *v.* 979
LaHue; Briscoe *v.* 912

Page
Lake *v.* Estelle 992
Lake Carriers' Assn. *v.* Kelley 985
LaMantia *v.* New York 948
Lamb *v.* Equifax Services, Inc. 927
Lam, Inc.; Johns-Manville Corp. *v.* 1007
LaMountain *v.* Raines 948
Lane *v.* Allen 928
Langkam, *In re* 957
Larkin *v.* Grendel's Den, Inc. 913
Larry V. Muko, Inc. *v.* S. W. Pa. Bldg. & Constr. Trades Council 1005
Larson *v.* Valente 228
Laudenberger; Bucheit *v.* 940
Lawson; Kolender *v.* 959
Lazzara *v.* United States 943
Leaf *v.* United States 960
Lebovitz *v.* United States 929
LeBright *v.* Christian 939
Lee *v.* Gilstrap 907
Lee *v.* Montana 1006
Lee *v.* United States 918,919,925
Lehr *v.* Robertson 970
Leidinger; Jones *v.* 950
Leighton; Chaka *v.* 933
Leighton; Wright *v.* 992
Leist; Clayton Brokerage Co. of St. Louis *v.* 353
Leist; Heinold Commodities, Inc. *v.* 353
Leist; New York Mercantile Exchange *v.* 353
Leu; Finnegan *v.* 431
Levenson *v.* United States 944
Levy *v.* High's Dairy Stores 939
Lewis *v.* Engle 980
Lewis *v.* Illinois 1011
Liberty Mutual Ins. Co. *v.* Keene Corp. 951
Liburdi; Narel *v.* 928
Lieberman *v.* University of Chicago 937
Liles *v.* United States 1008
Lindsay Co.; Gay *v.* 975
Lindsey; Greene *v.* 444
Lindsey *v.* United States 908
Linger, *In re* 907
Link *v.* Illinois 1006
Linton *v.* Estelle 935
Liquor Control Comm'n of Ohio; Holiday Inn *v.* 902
Liquor Control Comm'n of Ohio; Queensgate Investment Co. *v.* .. 902

Page
Liquor Salesmen *v.* Charmer Industries, Inc. 973
Lo *v.* Hawaii 981
Local. For labor union, see name of trade.
Lockheed Aircraft Corp. *v.* United States 913
Locklear *v.* United States 917
Loeterman *v.* Brookline 906
Loge *v.* United States 944
Loggins; Brown *v.* 992
London *v.* United States 982
Long; Douglas *v.* 932
Longshoremen *v.* Allied International, Inc. 212
Lord; First National Bank of St. Paul *v.* 967
Los Angeles; Clark *v.* 927
Los Angeles Airways, Inc.; Lummis *v.* 939
Los Angeles County; Gilliland *v.* 967
Louisiana; Edwards *v.* 945
Louisiana; Every *v.* 931
Louisiana; Kelly *v.* 925
Louisiana; Richardson *v.* 963
Louisiana; United States *v.* 865
Lovorn; Hathorn *v.* 922
Lowe *v.* New York City Dept. of Social Services 938
Lubbock; Alford *v.* 975
Lubin *v.* Edinburgh Ins. Co. 945
Lucas; Tapp *v.* 972
Lucky; Williams *v.* 921
Lummis *v.* Los Angeles Airways, Inc. 939
Lustgarten *v.* Ayres 991
Lyman Lamb Co.; Georgia-Pacific Corp. *v.* 971
Lyman Lamb Co.; Weyerhaeuser Co. *v.* 971
Lyons *v.* Nippon Gakki Seizo Kabushiki Kaisha 991
Macaluso *v.* United States 943
MacDonald; United States *v.* 1
MacDougall; Dixon *v.* 919
MacDougall; Ward *v.* 949
Machinists *v.* Federal Election Comm'n 974
Machinists *v.* Terrell 955
Machinists; Terrell *v.* 972
Madison *v.* Barry 985
Madsen; Hatch *v.* 962
Maecom S.A., Geneva *v.* Anglomar Bulkcarriers, Ltd. 977
Maffey *v.* Oregon *ex rel.* Juvenile Dept. of Klamath County 911
Maggio; Chase *v.* 979
Maggio; McZeal *v.* 948

Page
Maggio; Tubbs *v.* 932
Maher *v.* Schweiker 990
Mahroom *v.* Marsh 916
Main Event; New York State Liquor Authority *v.* 1006
Mangiameli *v.* United States 918
Manitowoc Engineering Co. *v.* Terry 928
Manson; DeWitt *v.* 948
Marado; Hodakievic *v.* 992
Marchese *v.* United States 930
Marin *v.* Myers 906
Marquez *v.* United States 929
Marsh; Mahroom *v.* 916
Marshall *v.* United States Steel Corp. 1009
Marshall; Young *v.* 908
Martin; Weaver *v.* 962
Martin *v.* Wyrick 947
Martinez *v.* United States 1008
Martino *v.* United States 929,949
Martin-Trigona *v.* Illinois 934
Maryland; Blinken *v.* 973
Maryland; Brent *v.* 908
Maryland *v.* Bryant 949
Maryland; 400 E. Baltimore Street, Inc. *v.* 926
Mastrangelo *v.* United States 973
Matherne *v.* Terrebonne Parish Police Jury 972
Mathis *v.* United States 992
Matthews *v.* United States 1009
Maxwell *v.* United States 982
Mayo *v.* United States 949
Mayor of Albuquerque *v.* Espinosa 951
Mayor of District of Columbia; Madison *v.* 985
Mays; Hamilton *v.* 985
Mazaleski *v.* Schweiker 985
McBee *v.* United States 949
McCain *v.* United States 991
McCall; Courier-Journal *v.* 975
McCarthy; Silver Bulk Shipping, Inc. *v.* 914
McCarty *v.* United States 991
McCauley; Holsey *v.* 981
McClatchy Newspapers *v.* United States 983
McClatchy Newspapers *v.* U. S. District Court 983
McClure; Schweiker *v.* 188
McCollom *v.* United States 934
McColpin *v.* Barnes 919

Page
McColpin *v.* Eikelbloom 947,1001
McCord *v.* Georgia 929
McCrary *v.* Smith 963
McCurley; Alabama *v.* 1006
McDermott & Co.; Johnson *v.* 990
McDonald *v.* Thompson 981
McElroy *v.* United States 965
McGrath *v.* State Univ. of N. Y. at Plattsburgh 991
McInnis *v.* District Grievance Committee of State Bar of Tex. ... 976
McKee *v.* Harris 917
McKinney *v.* Estelle 937
McLaughlin *v.* LaGrange 979
McLaughlin *v.* United States 931
McMurtry *v.* Illinois 943
McNary *v.* Sowders 1008
McNew *v.* Bank of Mount Vernon 974
McRary *v.* United States 1011
McShane *v.* United States 928
McZeal *v.* Maggio 948
Mead Corp. *v.* Adams Extract Co. 937
Mechler *v.* Texas 933
Meco, Inc. *v.* Sinnette 969,1007
Medley *v.* Garrison 947
Medved *v.* United States 963
Melichar *v.* Ost 927
Memphis Bank & Trust Co. *v.* Garner 943
Memphis Mobile Telephone, Inc. *v.* FCC 990
Menocal; De Vault *v.* 1007
Merchants Nat. Bank of Mobile; Dredge General G. L. Gillespie *v.* 966
Merchants Refrigerating Co. of California *v.* United States 973
Merck & Co. *v.* Bowsher 925
Merck & Co.; Bowsher *v.* 925
Merit Systems Protection Bd.; Draper *v.* 929
Merling *v.* United States 1008
Merrill Lynch, Pierce, Fenner & Smith, Inc. *v.* Curran 353
Messer *v.* Florida 984
Metropolitan Atlanta Transit Authority; Transit Union *v.* 912
Metropolitan Life Ins. Co.; Kramarsky *v.* 924
Michelin Tire Corp. *v.* Coulter 906
Michigan; Allen Park *v.* 927
Michigan *v.* Paintman 995
Micun, *In re* 987
Mid-Louisiana Gas Co.; Arizona Electric Power Cooperative *v.* .. 987
Mikenas *v.* Florida 1011

Page
Miller; Cheveres *v.* 994
Miller; Owens *v.* 908
Miller *v.* United States 907,964
Miller *v.* Webster 960
Milliken; Johnson *v.* 993
Mills *v.* Habluetzel 91
Miner; Gillette *v.* 914
Minis *v.* United States 946
Minneapolis Public Schools; Taylor *v.* 978
Minnesota; Travelers Express Co. *v.* 920
Minnesota, by Lord; First National Bank of St. Paul *v.* 967
Minnesota Comm'r of Revenue; Baldwin *v.* 929
Minte Co. *v.* Murphy 962
Missirlian; Huntington Memorial Hospital *v.* 906
Mississippi; Arkansas *v.* 912
Mississippi; Federal Energy Regulatory Comm'n *v.* 742
Mississippi *v.* Phillips 960
Mississippi Council on Hum. Rel.; Trustees of Insts. of Higher Ed. *v.* 971
Mississippi State Highway Comm'n; Pine Belt Land Co. *v.* 961
Missouri *v.* Hunter 914
Missouri; Turner *v.* 931
Missouri; White *v.* 963
Mitchell; Barbee *v.* 979
Mitchell Brothers' Santa Ana Theater; California *ex rel.* Cooper *v.* 920
Mitchell Energy Corp. *v.* Federal Energy Regulatory Comm'n ... 974
Mizell *v.* Welsh 941
Mobile Mechanical Contractors Assn.; Sheet Metal Workers *v.* ... 975
Mobil Oil Corp.; Bd. of Trustees of Internal Imp. Tr. Fund *v.* ... 956
Mobil Oil Corp.; Coastal Petroleum Co. *v.* 956
Modica *v.* United States 989
Molders *v.* Terrell 968
Monaco *v.* United States 989
Monosso *v.* Wisconsin 931
Montag *v.* Outboard Marine Corp. 975
Montana; Lee *v.* 1006
Montedison S.p.A. *v.* Phillips Petroleum Co. 915
Montez *v.* United States 973
Montgomery *v.* United States 994
Moore *v.* Jordan 989
Moore *v.* Nebraska 984
Moore *v.* United States 917,981
Moreno *v.* California 908
Morgado *v.* United States 943
Morgan; Kilcoyne *v.* 928

Page
Moritz, *In re* 957
Morris; Dohner *v.* 992
Morris; Nash *v.* 932
Morris *v.* Ross 1010
Morris *v.* Slappy 904,942
Morrow; Thompson *v.* 993
Motoren-Werke Mannheim, A.G.; Andrew Martin Marine Corp. *v.* 989
Mount Vernon Memorial Park *v.* Securities and Exchange Comm'n 961
Muhammad *v.* United States 947
Muko, Inc. *v.* Southwestern Pa. Bldg. & Constr. Trades Council 1005
Municipal Employees Credit Union of Baltimore; Clark *v.* 939
Murnane *v.* American Airlines, Inc. 915
Murphy; Edward W. Minte Co. *v.* 962
Murray; Finley *v.* 604
MWP Limited Partnership; Whitelaw *v.* 919
Myers; Marin *v.* 906
Myers; Washington *v.* 921
Najar *v.* Oman 959
Nance *v.* United States 918
Naranjo *v.* Corriz 971
Narel *v.* Liburdi 928
Nash *v.* Morris 932
NAACP *v.* Claiborne Hardware Co. 958
National Assn. of Greeting Card Publishers *v.* U. S. Postal Service 925
National Bank of Commerce; Tatum *v.* 994
NLRB; J. P. Stevens & Co. *v.* 924
NLRB; Kopack *v.* 994
NLRB; Oregon-Columbia Chapter, Assoc. Gen. Contractors *v.* ... 645
NLRB; Pacific Northwest Chapter, Associated Builders *v.* 645
NLRB; Pepsi-Cola Distributing Co. of Knoxville *v.* 936
NLRB; Red Ball Motor Freight, Inc. *v.* 997
NLRB; Shepard *v.* 970
NLRB; Tomy Corp. *v.* 929
NLRB; Woelke & Romero Framing, Inc. *v.* 645
National Mediation Bd.; Hawaiian Airlines, Inc. *v.* 929
National Right To Work Committee; Federal Election Comm'n *v.* 914
Natural Resources Defense Council, Inc. *v.* New York City 920
Neal; Block *v.* 988
Nebraska; Moore *v.* 984
Nelson *v.* Engle 908
Nelson *v.* Scully 1008
Nevada; California *v.* 867
Nevada; Princess Sea Industries *v.* 926
Neville; South Dakota *v.* 971

Page
New Banner Institute, Inc.; Dickerson *v.* 923
New Mexico; Chouinard *v.* 930
New Mexico; Colorado *v.* 1004
New Mexico *v.* United States 926
New Mexico *ex rel.* Rock *v.* Stowers 911
New York; Arroyo *v.* 979
New York; Bodette *v.* 993
New York *v.* Ferber 942
New York; Gonzalez *v.* 1010
New York; Kreps *v.* 1009
New York; LaMantia *v.* 948
New York; Polk *v.* 1009
New York; Richards *v.* 980
New York; Vigorito *v.* 928
New York; Webb *v.* 964
New York City; Natural Resources Defense Council, Inc. *v.* 920
New York City Dept. of Social Services; Lowe *v.* 938
New York City Employees' Retirement System; Balash *v.* 952
New York City Transit Authority; Hall *v.* 932
New York Mercantile Exchange *v.* Leist 353
New York State Dept. of Civil Service; Hunter *v.* 985
New York State Liquor Authority *v.* Bellanca 1006
New York State Liquor Authority *v.* The Main Event 1006
Nickerson *v.* Wright 982
Nippon Gakki Seizo Kabushiki Kaisha; Lyons *v.* 991
Nitrochem, Inc. *v.* Interstate Commerce Comm'n 905
North Carolina; Seagle *v.* 964
North Carolina; Williams *v.* 932
Northern States Power Co. *v.* United States 965
North Haven Bd. of Ed. *v.* Bell 512
North River Ins. Co. *v.* Scali, McCabe, Sloves, Inc. 976
Northside Realty Associates, Inc. *v.* United States 936
Norwood *v.* Woodard 917
Nzongola *v.* Nzongola 933
Oberlin College; Canham *v.* 977
O'Brien *v.* United States 909,925
Oceanic Navigation Corp. *v.* Sarauw 914
O'Dell *v.* Espinoza 430
Odom *v.* Florida 925
O'Grady *v.* Watt 905
Ohio; Cole *v.* 906
Ohio; Geraldo *v.* 962
Ohio; Green *v.* 939
Ohio *v.* Kentucky 958

Page
Ohio; Widner *v.* 934
O. Hommel Co. *v.* Ferro Corp. 965
Oil Workers; American Cyanamid Co. *v.* 969
Oklahoma; Beasley *v.* 934
Oklahoma; Brooks *v.* 999
Oklahoma; Chaney *v.* 919
Oklahoma; Conway *v.* 977
Oklahoma; Fiorot *v.* 1011
Oklahoma; King *v.* 1011
Oklahoma; Pisano *v.* 963
Oklahoma; Shabazz *v.* 931
Olim *v.* Wakinekona 1005
Oliver *v.* Aminoil, USA, Inc. 916
Oliver *v.* Cuyler 947
O'Lone; Jackson *v.* 933
Olson *v.* Green 1009
Oman; Najar *v.* 959
Omernick *v.* Carow 933
Operating Engineers *v.* Jones 987
Option Advisory Service, Inc. *v.* Board of Governors, FRS 976
Orange Unified School Dist.; Forston *v.* 980
Oregon *v.* Kennedy 667
Oregon-Columbia Chapter, Assoc. Gen. Contractors *v.* NLRB ... 645
Oregon *ex rel.* Juvenile Dept. of Klamath County; Maffey *v.* 911
O'Rourke; Jerald *v.* 948
Ortiz *v.* Arizona 984
Orwoll *v.* LaComb 913,966
Ost; Melichar *v.* 927
Osterle; Home Indemnity Co. *v.* 989
Outboard Marine Corp.; Montag *v.* 975
Owen; Atlanta *v.* 972
Owens *v.* Miller 908
Oxman *v.* Pennsylvania 975
Pace *v.* United States 964
Pacific Northwest Chapter, Associated Builders *v.* NLRB 645
Paintman; Michigan *v.* 995
Palermo *v.* United States 943
Palmdale; Gilliland *v.* 967
Pandil *v.* Illinois Central Gulf R. Co. 975
Panther Valley Coin Exchange *v.* United States 907
Papp *v.* Jago 984
Parcell *v.* United States 949
Parker *v.* United States 995
Parma *v.* Record Revolution, No. 6, Inc. 968

Page
Parma *v.* United States 926,1012
Parratt; Davis *v.* 979
Parsons; Stedman *v.* 932
Paschal *v.* Florida Dept. of Labor and Employment Security 981
Patterson; American Tobacco Co. *v.* 63
Patterson *v.* Carr 1008
Payne *v.* Kentucky 909
Payne *v.* Smith 932
Peachtree City *v.* H & H Operations, Inc. 961
Pearson *v.* United States 977
Pease Co.; Carpenters *v.* 974
Pelczarski *v.* Sullivan 917
Pena *v.* United States 978
Penn *v.* Pennsylvania 980
Pennington *v.* Housewright 918
Pennsylvania; Africa *v.* 908
Pennsylvania; Bacik *v.* 967
Pennsylvania; Glass *v.* 932
Pennsylvania *v.* Gorsuch 972
Pennsylvania; Haberland *v.* 932
Pennsylvania; Oxman *v.* 975
Pennsylvania; Penn *v.* 980
Pennsylvania; Siger *v.* 975
Pennzoil Co. *v.* Public Service Comm'n of W. Va. 959
Pentzien, Inc.; Watkins *v.* 944
Pepsi-Cola Distributing Co. of Knoxville *v.* NLRB 936
Perez; Wainwright *v.* 910,985
Perini *v.* Bell 107,1001
Perini; Scott *v.* 909
Perry; Zarcone *v.* 979
Peterson *v.* United States 982
Petrol Stops Northwest; Gulf Oil Corp. *v.* 983
Petrusch *v.* Teamsters 911,974
Phelps *v.* Kansas Supreme Court 944
Phelps; Tyler *v.* 935
Phillips; Connor *v.* 939
Phillips; Joint Legis. Comm. for Performance Review of Miss. *v.* 960
Phillips; Mississippi *v.* 960
Phillips Petroleum Co.; Montedison S.p.A. *v.* 915
Phillips Petroleum Co.; Standard Oil Co. (Indiana) *v.* 915
Pillsbury Co. *v.* Conboy 923
Pine Belt Land Co. *v.* Mississippi State Highway Comm'n 961
Pisano *v.* Oklahoma 963
P. K. Lindsay Co.; Gay *v.* 975

Page
Plaintiffs' Steering Committee; Three J Farms, Inc. *v.* 936
Planned Parenthood Assn. of Kansas City *v.* Ashcroft..... 988
Planned Parenthood Assn. of Kansas City; Ashcroft *v.* 988
Plaquemines Parish Mosquito Control Dist. *v.* United States..... 926
Pleasant Grove *v.* Wheeler 973
Plotkin *v.* Gruman 948
Polk *v.* New York 1009
Porter *v.* Texas 965
Posey *v.* Illinois 993
Pouncy *v.* Hutto..... 933
Pousson *v.* Estelle 917
Prescott; Draper *v.* 947
President and Fellows of Harvard College; Rice *v.*..... 928
President of United States; Romieh *v.* 994
Press-Enterprise Co. *v.* Superior Court of Cal., San Diego County 939
Princess Sea Industries *v.* Nevada 926
Pro Arts, Inc.; Factors Etc., Inc. *v.*..... 927
Procter & Gamble Co.; Purex Corp. *v.* 983
Public Service Comm'n of W. Va.; Pennzoil Co. *v.* 959
Public Utilities Comm'n of Colo. *v.* FERC 944
Pueblo of Santo Domingo *v.* United States 1006
Puerto Rico; Thayer *v.*..... 939
Puerto Rico Maritime Shipping Authority; Immer *v.* 906,985
Pullman-Standard *v.* Swint 273
Purex Corp. *v.* Procter & Gamble Co. 983
Queensgate Investment Co. *v.* Liquor Control Comm'n of Ohio... 902
Quinn *v.* Burlington Northern Inc. Pension Plan 928
Rafter *v.* Higgins 920
Ragno *v.* Florida 940
Railroad Signalmen; St. Louis Southwestern R. Co. *v.* 945
Railway Labor Executives' Assn. *v.* Gibbons 939,998
Railway Labor Executives' Assn. *v.* Scott..... 998
Railway Labor Executives' Assn.; S. E. Pa. Transp. Auth. *v.*..... 990
Raines; LaMountain *v.* 948
Ramah Navajo School Bd. *v.* Bureau of Revenue of N. M. 921
Raulerson *v.* Howell 919
Raymer *v.* United States..... 944
Raymond International, Inc. *v.* Baker 983
Reagan; Romieh *v.* 994
Record Revolution, No. 6, Inc.; Parma *v.* 968
Red Ball Motor Freight, Inc. *v.* National Labor Relations Bd. ... 997
Red Owl Stores, Inc. *v.* Commissioner of Agriculture 986
Reed; Abu-Bakr *v.* 963
Reed; Ross *v.* 921,1001

Page
Reed *v.* Webster 980
Regan *v.* Conroy 945
Regan; Founding Church of Scientology of Washington, D. C. *v.* . 976
Regan; Green *v.* 937
Reilly *v.* Schweiker 916
Reimnitz *v.* Illinois 906
Rembert, *In re* 942
Republican National Committee *v.* Burton 941
Republic National Bank of New York; Sabet *v.* 976
Rex *v.* Cia. Pervana de Vapores, S.A. 926
Rhode Island; Innis *v.* 930,942
Rhodes *v.* United States 983
Rhodes *v.* U. S. Navy 911
Ribotsky *v.* United States 951
Rice *v.* President and Fellows of Harvard College 928
Richards; Hughes Tool Co. *v.* 991
Richards *v.* New York 980
Richardson *v.* Louisiana 963
Richenberger; Westover *v.* 964
Riden *v.* U. S. Nuclear Regulatory Comm'n 916
Ripplinger *v.* Kidder County Social Service Bd. 963
Ritter *v.* Board of Comm'rs of Adams Cty. Public Hospital Dist. 969
Rivenburgh *v.* United States 905
Rivers *v.* Rosenthal & Co. 968
RKO General, Inc. *v.* Federal Communications Comm'n 927
Robbins; White-Wilson Medical Clinic, Inc. *v.* 969
Robertson; Lehr *v.* 970
Robinson *v.* Junction City 989
Rock *v.* Stowers 911
Rodgers; United States *v.* 904,923
Rodriguez *v.* Illinois 947
Rogers *v.* White 928
Romero-Barcelo; Weinberger *v.* 305
Romieh *v.* Reagan 994
Root, *In re* 986
Roots *v.* Wainwright 980
Rose; Jackson *v.* 993
Rose; Jernigan *v.* 933
Rose; Lackey *v.* 933
Rose; Union-Mechling Corp. *v.* 953
Rose; Western Maryland R. Co. *v.* 952
Rosenbaum *v.* Rosenbaum 985
Rosenberg *v.* Johns-Manville Sales Corp. 967
Rosenberg *v.* United States 992

Page
Rosenthal & Co.; Rivers *v.* 968
Rosofsky; Schweiker *v.* 959
Ross; Morris *v.* 1010
Ross *v.* Reed 921,1001
Ross *v.* United States 919
Ross; United States *v.* 798
Rossi; Weinberger *v.* 25
Rowe *v.* United States 978
Rusk *v.* Espinosa 951
Russello *v.* United States 943
Rylander; United States *v.* 943,1005
S. *v.* Kuriansky 956
Sabet *v.* Republic National Bank of New York 976
Sacramento Bee *v.* United States 983
Sacramento Bee *v.* U. S. District Court 983
Sadlowski; Steelworkers *v.* 902
Sailor Music; The Gap Stores, Inc. *v.* 945
St. Louis Southwestern R. Co.; Bowers *v.* 946
St. Louis Southwestern R. Co. *v.* Railroad Signalmen 945
Saint Prix *v.* United States 992
Salazar *v.* San Francisco Bay Area Rapid Transit Dist. 960
Salazar *v.* United States 907
Salman *v.* Swanson 917,964
Sanchez *v.* Schweiker 943
Sanders *v.* United States 964
Sandini *v.* Florida 926
San Francisco Bay Area Rapid Transit Dist.; Salazar *v.* 960
Sarauw; Oceanic Navigation Corp. *v.* 914
Sargent; Harlow *v.* 928
Satterwhite *v.* United States 915
Saunders *v.* Weiner 932
Savastano *v.* Board of Ed., Kings Park School Dist. No. 5 974
Sayers *v.* Florida 981
Scali, McCabe, Sloves, Inc.; North River Ins. Co. *v.* 976
Scarborough *v.* United States 977
Scenic Artists; Theatre Techniques, Inc. *v.* 990
Schatzle *v.* Kirkpatrick 904,966
Schiavo Bros., Inc. *v.* United States Gypsum Co. 961
Schmedt *v.* De Baca 926
Schrieber; Antonelli *v.* 1010
Schroeder *v.* United States 930
Schwanecke *v.* Harris County Hospital Dist. 1001
Schwartz; Bollotin *v.* 950
Schweiker; Grand Laboratories, Inc. *v.* 927

Page
Schweiker; Maher *v.* 990
Schweiker; Mazaleski *v.* 985
Schweiker *v.* McClure 188
Schweiker; Reilly *v.* 916
Schweiker *v.* Rosofsky 959
Schweiker; Sanchez *v.* 943
Scionti *v.* United States 943
SCM Corp. *v.* Xerox Corp. 985
Scott *v.* Arkansas 993
Scott *v.* Cowley 993
Scott *v.* Perini 909
Scott; Railway Labor Executives' Assn. *v.* 998
Scott *v.* United States 994
Scripps Co. *v.* Heheman 991
Scully; Flowers *v.* 949
Scully; Nelson *v.* 1008
Seagle *v.* North Carolina 964
Seamon; Upham *v.* 37,938
Sears; Transportation Union *v.* 964
Seattle Univ.; Department of Education *v.* 986
Secretary of Agriculture *v.* Neal 988
Secretary of Army; Mahroom *v.* 916
Secretary of Defense *v.* Romero-Barcelo 305
Secretary of Defense *v.* Rossi 25
Secretary of Education *v.* Dougherty County School System 986
Secretary of Education; North Haven Bd. of Ed. *v.* 512
Secretary of Education; West Virginia *v.* 941
Secretary of Energy; Cotton Petroleum Corp. *v.* 936
Secretary of Health and Human Services; Grand Laboratories *v.* . 927
Secretary of Health and Human Services; Maher *v.* 990
Secretary of Health and Human Services; Mazaleski *v.* 985
Secretary of Health and Human Services *v.* McClure 188
Secretary of Health and Human Services; Reilly *v.* 916
Secretary of Health and Human Services *v.* Rosofsky 959
Secretary of Health and Human Services; Sanchez *v.* 943
Secretary of Interior; Apachito *v.* 963
Secretary of Interior *v.* Holmes Limestone Co. 995
Secretary of Interior; O'Grady *v.* 905
Secretary of Interior *v.* Western Nuclear, Inc. 988
Secretary of State of Mo.; Schatzle *v.* 904,966
Secretary of State of Ohio; Anderson *v.* 960
Secretary of Treasury; Founding Church of Scientology *v.* 976
Secretary of Treasury; Green *v.* 937
Securities and Exchange Comm'n; Mount Vernon Memorial Park *v.* 961

Page
Security Industrial Bank; United States *v.* 903,922
Seguin *v.* Akron Center for Reproductive Health, Inc. 989
Sells Engineering, Inc.; United States *v.* 960
Sentinel Government Securities *v.* United States 924,977
Shabazz *v.* Oklahoma 931
Shaffner *v.* United States 946
Shearson Hayden Stone, Inc. *v.* Hope 910
Sheehan; Army and Air Force Exchange Service *v.* 728
Sheet Metal Workers *v.* Mobile Mechanical Contractors Assn. 975
Shelby, *In re* 913
Sheldon *v.* Sheldon 941
Shepard *v.* National Labor Relations Bd. 970
Siger *v.* Pennsylvania 975
Siller Bros., Inc. *v.* United States 925
Silver Bulk Shipping, Inc. *v.* McCarthy 914
Simer *v.* United States 917
Simopoulos *v.* Virginia 988
Sinclair *v.* Hunter 981
Singleton *v.* Arkansas 938
Sinnette; Meco, Inc. *v.* 969,1007
Sinow; Szijarto *v.* 908
Sireci *v.* Florida 984
Skelton *v.* General Motors Corp. 974
Slappy; Morris *v.* 904,942
Slatin *v.* United States 1008
Smallwood; United Air Lines, Inc. *v.* 1007
Smith *v.* Alabama 947
Smith; Birden *v.* 948
Smith; Boyden *v.* 982
Smith; Cochrane & Bresnahan *v.* 961
Smith *v.* Cohen 948
Smith *v.* Estelle 911
Smith *v.* Florida 951,984
Smith; Gaines *v.* 949
Smith *v.* Housewright 978
Smith; McCrary *v.* 963
Smith; Payne *v.* 932
Smith *v.* Wade 924
Smith; Williams *v.* 1002
Smith International, Inc. *v.* Hughes Tool Co. 976
Snisky *v.* United States 907
Socialist Workers Party; Stewart *v.* 907
Solebury Township *v.* Heritage Farms, Inc. 990
Souness *v.* Veterans Administration 911

Page
South Bend; Davis *v.* 991
South Carolina; Gilbert *v.* 984,1004
South Carolina; Thompson *v.* 938
South Dakota *v.* Neville 971
Southeastern Pa. Transp. Auth. *v.* Railway Labor Execs.' Assn. . 990
Southern Pacific Transportation Co. *v.* Commercial Metals Co. ... 336
Southwestern Baptist Theological Seminary *v.* EEOC 905
Southwestern Pa. Bldg. & Constr. Trades Council; Muko, Inc. *v.*. 1005
Southwest Sunsites, Inc. *v.* Federal Trade Comm'n 973
Sowders; McNary *v.* 1008
Speaker, N. J. Assembly *v.* Daggett 901
Spudnik Equipment Co. *v.* Garza 1007
Stafos *v.* Bell 1007
Standard Drywall, Inc. *v.* United States 927
Standard Oil Co. (Indiana) *v.* Phillips Petroleum Co. 915
State. See name of State.
State Univ. of N. Y. at New Paltz; Boice *v.* 992
State Univ. of N. Y. at Plattsburgh; McGrath *v.* 991
Staton *v.* Wainwright 909
Stedman *v.* Parsons 932
Steelworkers *v.* Sadlowski 902
Steelworkers *v.* Swint 273
Steinhardt *v.* Johns-Manville Corp. 967
Stephens *v.* Black 950
Stephens; Zant *v.* 410
Stevens & Co. *v.* National Labor Relations Bd. 924
Stevenson *v.* Grentec, Inc. 943
Stewart *v.* Socialist Workers Party 907
Stinnett *v.* Kentucky 933
Stoute *v.* United States 950
Stowers; New Mexico *ex rel.* Rock *v.* 911
Strager *v.* U. S. District Court 949
Strahan *v.* United States 1010
Stratman; Koniag, Inc. *v.* 901
Streeter *v.* Alabama 932
Strinich *v.* Clairton School Dist. 982
Sullivan; Devine *v.* 986
Sullivan; Pelczarski *v.* 917
Sumitomo Shoji America, Inc. *v.* Avagliano 912
Sumitomo Shoji America, Inc.; Avagliano *v.* 912
Summit Valley Industries, Inc. *v.* Carpenters 717,903
Sumter County School Dist. *v.* Edge 1002
Superintendent of penal or correctional institution. See name or title of superintendent.

Page
Superior Court of Cal., San Diego County; Press-Enterprise Co. *v.* 939
Superior Court of Cal., Ventura County; Cheveres *v.* 994
Swain *v.* Florida 1009
Swanson; Salman *v.* 917,964
Swedberg; Federated Publications, Inc. *v.* 984
Swint; Pullman-Standard *v.* 273
Swint; Steelworkers *v.* 273
Szijarto *v.* Sinow 908
Tafero *v.* Florida 939
Tanaka *v.* Creditors' Committee #1 977
Tangren *v.* Wackenhut Services, Inc. 916
Tanner; Howell *v.* 918
Tapp *v.* Lucas 972
Tarver *v.* Howard 932
Tatum *v.* National Bank of Commerce 994
Taylor *v.* Blackburn 917
Taylor *v.* Minneapolis Public Schools 978
Taylor *v.* United States 918
Taylor *v.* Virginia 906
Teamsters; B & L Distribution Center *v.* 911,974
Teamsters; Petrusch *v.* 911,974
Teamsters; Vasile *v.* 992
Tejeda-Mata *v.* Immigration and Naturalization Service 994
Tennessee *v.* Webb 910
Terrazas *v.* Clements 902
Terrebonne Parish Police Jury; Matherne *v.* 972
Terrell *v.* Machinists 972
Terrell; Machinists *v.* 955
Terrell; Molders *v.* 968
Terry; Manitowoc Engineering Co. *v.* 928
Texas; Bass *v.* 965
Texas; Bridges *v.* 1010
Texas; Hejl *v.* 933,1001
Texas; Mechler *v.* 933
Texas; Porter *v.* 965
Texas; Vanderbilt *v.* 910
Texas; Wade *v.* 964
Texas; Walker *v.* 963
Texas; White *v.* 938
Texas; Williams *v.* 908
Texas Youth Council; Chang *v.* 909
Tham *v.* United States 944
Thayer *v.* Puerto Rico 939
Theatre Techniques, Inc. *v.* Scenic Artists 990

Page
The Flipside, Hoffman Estates, Inc.; Hoffman Estates *v.* 950
The Gap Stores, Inc. *v.* Sailor Music 945
The Main Event; New York State Liquor Authority *v.* 1006
Thomas *v.* Barrett 925
Thomas *v.* Estelle 933,947
Thomas; Hall *v.* 950
Thomas *v.* Illinois 993
Thompson; McDonald *v.* 981
Thompson *v.* Morrow 993
Thompson *v.* South Carolina 938
Thompson *v.* United States 935
Thompson; White *v.* 941
Thompson *v.* Woltenberg 1006
Thone; Casbah, Inc. *v.* 950
Three J Farms, Inc. *v.* Adams Extract Co. 1012
Three J Farms, Inc. *v.* Plaintiffs' Steering Committee 936
Tolerton *v.* United States 949
Tolliver *v.* United States 935
Tombrello *v.* United States 994
Tomy Corp. *v.* National Labor Relations Bd. 929
Torres *v.* United States 973
Town. See name of town.
Townley *v.* United States 1010
Toyota Motor Co. *v.* General Motors Corp. 937
Transit Union *v.* Metropolitan Atlanta Transit Authority 912
Transportation Union *v.* Sears 964
Trans World Airlines, Inc.; Flight Attendants *v.* 940
Trapp, *In re* 967
Travelers Express Co. *v.* Minnesota 920
Treasurer of Minn.; First National Bank of St. Paul *v.* 967
Trifa *v.* United States 975
Trimmer *v.* Van Bomel 918
Tubbs *v.* Maggio 932
Tufts; Commissioner *v.* 960
Turf Paradise, Inc. *v.* Arizona Downs 1011
Turner *v.* Engle 908
Turner *v.* Missouri 931
Tyler *v.* Phelps 935
Tyler *v.* Tyler 917
Unger; Consolidated Foods Corp. *v.* 1002
Union. For labor union, see name of trade.
Union Correctional Institute; Burrell *v.* 931
Union County Welfare Bd.; Battaglia *v.* 965
Union-Mechling Corp. *v.* Rose 952

Page
United. For labor union, see name of trade.
United Air Lines, Inc.; Davis *v.* 965
United Air Lines, Inc. *v.* Smallwood 1007
United Fruit & Vegetable Co. *v.* Director of Fruit & Veg. Div. .. 1007
United Nuclear Corp.; General Atomic Co. *v.* 939
United Parcel Service of America, Inc. *v.* U. S. Postal Service ... 925
United States. See name of other party.
U. S. Coast Guard; Yates *v.* 901
U. S. District Court; Dudley *v.* 981
U. S. District Court; McClatchy Newspapers *v.* 983
U. S. District Court; Sacramento Bee *v.* 983
U. S. District Court; Strager *v.* 949
U. S. District Judge; LeBright *v.* 939
U. S. District Judge; Patterson *v.* 1008
U. S. District Judge; Wright *v.* 992
United States Gypsum Co.; Schiavo Bros., Inc. *v.* 961
U. S. Navy; Rhodes *v.* 911
U. S. Nuclear Regulatory Comm'n; Riden *v.* 916
U. S. Parole Comm'n; Hayward *v.* 935
U. S. Postal Service; Athena Products, Ltd. *v.* 915
U. S. Postal Service; National Assn. of Greeting Card Publishers *v.* 925
U. S. Postal Service; United Parcel Service of America, Inc. *v.* .. 925
United States Steel Corp.; Marshall *v.* 1009
United Technologies Corp. *v.* Fiacco 976
University of Chicago; Lieberman *v.* 937
Unvert *v.* Commissioner 961
Upham *v.* Seamon 37,938
Valente; Larson *v.* 226
Valenzano *v.* California 934
Van Bomel; Trimmer *v.* 918
Vance *v.* Hedrick 978
Vanco Beverage, Inc.; Falls City Industries, Inc. *v.* 987
Vanderbilt *v.* Texas 910
Vasile *v.* Teamsters 992
Vaughn *v.* Hinchy, Witte, Wood, Anderson & Hodges 962
Veatch *v.* United States 946
Verlinden B. V. *v.* Central Bank of Nigeria 913
Veterans Administration; Souness *v.* 911
Veteto *v.* Director, U. S. Bureau of Prisons 935
Vigorito *v.* New York 928
Village. See name of village.
Villalta *v.* United States 916
Vineberg *v.* California 945
Virginia; Bassett *v.* 938

Page
Virginia; Cobbs *v.* 1007
Virginia; Creasy *v.* 911
Virginia; Simopoulos *v.* 988
Virginia; Taylor *v.* 906
Vishipco Line; Chase Manhattan Bank, N.A. *v.* 924
Vogel; Goldblatt *v.* 934,985
Voorhies *v.* United States 929
VSL Corp. *v.* United States 974
Vulcan, Inc.; Fordees Corp. *v.* 906
W. *v.* California 980
Wackenhut Services, Inc.; Tangren *v.* 916
Wade; Smith *v.* 924
Wade *v.* Texas 964
Wade *v.* United States 934
Wainwright; Bradbury *v.* 992
Wainwright *v.* Perez 910,985
Wainwright; Roots *v.* 980
Wainwright; Staton *v.* 909
Wajert, *In re* 957
Wakinekona; Olim *v.* 1005
Walgren *v.* United States 962
Walker *v.* Texas 963
Walker *v.* United States 934
Ward *v.* MacDougall 949
Warden. See also name of warden.
Warden; Antone *v.* 993
Warden; Chaney *v.* 993
Warden; Green *v.* 934,994
Washington; Cleppe *v.* 1006
Washington *v.* Gibson 968
Washington *v.* Myers 921
Washington *v.* United States 970
Washington; Watkins *v.* 949
Washington Metropolitan Area Transit Authority *v.* Hensley 904
Washington Metropolitan Area Transit Authority; White *v.* 948
Washington Post Co.; U. S. Department of State *v.* 595
Washington Public Employment Relations Comm'n; Grant *v.* 955
Waters; Hampton *v.* 931
Watkins *v.* Pentzien, Inc. 944
Watkins *v.* Washington 949
Watson *v.* Arizona 981
Watt; Apachito *v.* 963
Watt *v.* Holmes Limestone Co. 995
Watt; O'Grady *v.* 905

Page
Watt *v.* Western Nuclear, Inc. 988
W. B. Gibson Co. *v.* DuBrook, Inc. 945
Weaver *v.* Martin 962
Webb *v.* New York 964
Webb; Tennessee *v.* 910
Webster; Miller *v.* 960
Webster; Reed *v.* 980
Webster *v.* United States 935
Weinberger *v.* Romero-Barcelo 305
Weinberger *v.* Rossi 25
Weiner; Saunders *v.* 932
Weit *v.* Continental Illinois Nat. Bank & Trust Co. of Chicago ... 938
Welch *v.* United States 915
Wells *v.* White 906
Welsh; Mizell *v.* 941
Wencke, *In re* 912
West; Grijalva *v.* 1009
Western Maryland R. Co. *v.* Rose 952
Western Nuclear, Inc.; Watt *v.* 988
Westinghouse Electric Corp.; Chia *v.* 945
Westover *v.* Richenberger 964
West Virginia *v.* Secretary of Education 941
West Virginia *ex rel.* Air Pollution Control Comm'n *v.* Gorsuch .. 972
Weyerhaeuser Co. *v.* Lyman Lamb Co. 971
Wheeler; Pleasant Grove *v.* 973
White; Green *v.* 1009
White *v.* Missouri 963
White; Rogers *v.* 928
White *v.* Texas 938
White *v.* Thompson 941
White *v.* Washington Metropolitan Area Transit Authority 948
White; Wells *v.* 906
Whitelaw *v.* MWP Limited Partnership 919
White-Wilson Medical Clinic, Inc. *v.* Robbins 969
Whitley *v.* United States 1011
Widner *v.* Ohio 934
Wiga *v.* United States 918
Wiggan *v.* United States 1011
Wiggins Brothers, Inc. *v.* Department of Energy 905
Wilkerson; Green *v.* 935
Williams, *In re* 924
Williams *v.* Carmen 919
Williams *v.* Estelle 932
Williams *v.* Everett 963

Page
Williams *v.* Lucky 921
Williams *v.* North Carolina 932
Williams *v.* Smith 1002
Williams *v.* Texas 908
Williams *v.* United States 978,983
Wilmot; Clark *v.* 993
Wilson *v.* Jago 948,1009
Wilson *v.* United States 917,979,985
Wisconsin; Bowman *v.* 931
Wisconsin; Monosso *v.* 931
Woelke & Romero Framing, Inc. *v.* National Labor Relations Bd. 645
Woltenberg; Thompson *v.* 1006
Woodard; Norwood *v.* 917
Woods *v.* Alabama 975
Wooton *v.* United States 978
Wright; Dowdle *v.* 995
Wright *v.* Leighton 992
Wright; Nickerson *v.* 982
WTIC–FM Radio Station; Appleby *v.* 933
Wynnewood Bank & Trust *v.* Childs 970
Wyoming; Benson *v.* 1006
Wyrick; Martin *v.* 947
Xerox Corp. *v.* Harris County 913
Xerox Corp.; SCM Corp. *v.* 985
Yaretsky; Blum *v.* 903
Yates *v.* U. S. Coast Guard 901
Yee, *In re* 951
Yellow Forwarding Co. *v.* Atlantic Container Line 962
Young *v.* Marshall 908
Young *v.* United States 943
Youngs Drug Products Corp.; Bolger *v.* 970
Zambito *v.* United States 982
Zant; Bowen *v.* 939
Zant; Collins *v.* 950
Zant; Fair *v.* 984
Zant; Franklin *v.* 938
Zant; Green *v.* 939
Zant; Hance *v.* 965
Zant *v.* Stephens 410
Zarcone *v.* Perry 979
Zeffiro; First Pennsylvania Bank N.A. *v.* 1005

TABLE OF CASES CITED

Page

Abel v. United States, 362 U.S. 217 829
Abington School Dist. v. Schempp, 374 U.S. 203 246
Abramson v. University of Hawaii, 594 F. 2d 202 84
Adam v. Saenger, 303 U.S. 59 704
Adams v. United States ex rel. McCann, 317 U.S. 269 165
Addington v. Texas, 441 U.S. 418 150
Aero Mayflower Transit Co. v. Hofberger, 259 Ark. 322 342
Affiliated Ute Citizens v. United States, 406 U.S. 128 395
Alabama State Federation of Labor v. McAdory, 325 U.S. 450 264
Albemarle Paper Co. v. Moody, 422 U.S. 405 329, 330
Aleem v. General Felt Industries, Inc., 661 F. 2d 135 487
Alexander v. Gardner-Denver Co., 415 U.S. 36 81, 468, 469, 477, 478, 487, 499, 501–503, 505, 507, 508, 536
Allen v. McCurry, 449 U.S. 90 467, 468, 472, 476, 481, 482, 493, 508
Allen v. State Bd. of Elections, 393 U.S. 544 377
Almeida-Sanchez v. United States, 413 U.S. 266 826
Altiery v. State Div. of Human Rights, 61 App. Div. 2d 780 480
Altman & Co. v. United States, 224 U.S. 583 31
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 721, 722
American Fire & Casualty Co. v. Finn, 341 U.S. 6 702
American Radio Assn. v. Mobil S.S. Assn., 419 U.S. 215 220, 221, 226

Page

American Red Ball Transit Co. v. McCarthy, 114 N. H. 514 342
American Surety Co. v. Baldwin, 287 U.S. 156 706
American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 523
American Tobacco Co. v. Patterson, 456 U.S. 63 293
Amos v. United States, 255 U.S. 313 809
Anderson v. Francis I. duPont & Co., 291 F. Supp. 705 392, 400
Andrus v. Glover Construction Co., 446 U.S. 608 522
Angel v. Bullington, 330 U.S. 183 467
Apex Hosiery Co. v. Leader, 310 U.S. 469 535, 585
Arcambel v. Wiseman, 3 Dall. 306 721, 723
Arizona v. Washington, 434 U.S. 497 672, 682, 683, 685, 690
Arizona Feeds v. Southern Pacific Transp. Co., 21 Ariz. App. 346 342
Arkansas v. Sanders, 442 U.S. 753 801, 803, 812–817, 819, 824–826, 831, 832, 834, 835, 838–841
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 239, 242, 243, 270, 298
Arndt v. Griggs, 134 U.S. 316 448
Arnold v. Bache & Co., 377 F. Supp. 61 392, 400
Arnold v. McCarthy, 566 F. 2d 1377 8, 18
Arnold v. State, 236 Ga. 534 413, 422
Arrowsmith v. United Press International, 320 F. 2d 219 712
Ashe v. Swenson, 397 U.S. 436 1000
Ashwander v. TVA, 297 U.S. 288 257, 272

Page

Askew v. American Waterways Operators, Inc., 411 U.S. 325 789
Aspin v. Department of Defense, 160 U.S. App. D. C. 231 627
Associated General Contractors of Minnesota v. Construction and General Laborers Local No. 563, 612 F. 2d 1060 718, 722
Associated Press v. United States, 326 U.S. 1 576
Atlas S.S. Co. v. Colombian Land Co., 102 F. 358 350
Augusta Aviation, Inc. v. United States, 500 F. Supp. 785 739
Austin v. United States, 127 U.S. App. D. C. 180 171
Aycock-Lindsey Corp. v. United States, 171 F. 2d 518 739
Bachellar v. Maryland, 397 U.S. 564 423
Baker v. Carr, 369 U.S. 186 239
Baldovin v. International Longshoremen's Assn., 626 F. 2d 445 215, 217, 218
Baldwin v. Iowa Traveling Men's Assn., 283 U.S. 522 484, 706
Ballard v. Hunter, 204 U.S. 241 448
B. Altman & Co. v. United States, 224 U.S. 583 31
Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 195 569
Bank of the United States v. Deveaux, 5 Cranch 61 819
Barker v. Muncy, 619 F. 2d 327 122
Barker v. Wingo, 407 U.S. 514 8, 19, 21, 22
Bartlett-Collins Co. v. Surinam Nav. Co., 381 F. 2d 546 342
Bartmess v. Drewrys U. S. A., Inc., 444 F. 2d 1186 84
Bates v. State Bar of Arizona, 433 U.S. 350 761, 763
Batiste v. Furno Constr. Corp., 503 F. 2d 447 470, 488
Baumgartner v. United States, 322 U.S. 665 286–288
Beacon Theaters, Inc. v. Westover, 359 U.S. 500 312

Page

Beck v. Alabama, 447 U.S. 625 608–611
Beck v. Ohio, 379 U.S. 89 829
Beck v. Washington, 369 U.S. 541 121
Beer v. United States, 425 U.S. 130 39
Behring International, Inc. v. NLRB, 675 F. 2d 83 998
Belton v. United States, 121 U.S. App. D. C. 201 157, 168, 169, 174
Benneci v. Department of Labor, New York State Division of Employment, 388 F. Supp. 1080 486
Benton v. Maryland, 395 U.S. 784 671, 1000
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 219–221
Best Medium Pub. Co. v. National Insider, Inc., 385 F. 2d 384 302
Bigelow v. Virginia, 421 U.S. 809 299, 301
Bill v. Elting, 29 Kan. 397 59
Binion v. O'Brien, 273 F. 2d 495 302
Bishop v. Mazurkiewicz, 634 F. 2d 724 121
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 374
Bjorgo v. Bjorgo, 391 S. W. 2d 528 92
Blair v. United States, 250 U.S. 273 272
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 481
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 380, 389, 394, 395
Board of Ed. v. Allen, 392 U.S. 236 252
Board of Public Instruction of Taylor County, Fla. v. Finch, 414 F. 2d 1068 538, 539
Board of Regents v. Tomanio, 446 U.S. 478 478
Board of Trade v. Community Futures Trading Comm'n, 200 U.S. App. D. C. 339 598

Page

Bodek v. Department of Treasury, Bureau of Public Debt, 532 F. 2d 277 739
Bogardus v. Commissioner, 302 U.S. 34 290
Boomer v. Atlantic Cement Co., 26 N. Y. 2d 219 314
Booth v. Peavey Co. Commodity Services, 430 F. 2d 132 392, 400
Botany Worsted Mills v. United States, 278 U.S. 282 405
Bowen v. State, 241 Ga. 492 420
Bradford v. Textile Workers Local 1093, 563 F. 2d 1138 433
Branti v. Finkel, 445 U.S. 507 443
Brantley v. Phoenix Ins. Co., 536 S. W. 2d 72 95
Bread Political Action Committee v. FEC, 455 U.S. 577 635, 639
Brinegar v. United States, 338 U.S. 160 809
Brock v. North Carolina, 344 U.S. 424 686
Brooks v. State, 246 Ga. 262 414
Brooks v. State, 556 P. 2d 147 999
Brown v. Board of Ed., 347 U.S. 483 836
Brown v. Board of Ed., 349 U.S. 294 325
Brown v. EPA, 521 F. 2d 827 755
Brown v. GSA, 425 U.S. 820 378, 658
Brown Transportation Corp. v. Atcon, Inc., 144 Ga. App. 301 342
Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 349
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 575
Buckley v. Valeo, 424 U.S. 1 53, 58, 555
Bullock v. United States, 74 App. D. C. 220 171
Bullock v. Weiser, 404 U.S. 1065 44
Burch v. International Assn. of Machinists & Aerospace Workers, AFL–CIO, 433 F. 2d 561 292
Burdine v. Texas Dept. of Community Affairs, 608 F. 2d 563 285

Page

Burger v. State, 245 Ga. 458 414
Burnett v. Illinois, 619 F. 2d 668 121
Burns v. Alcala, 420 U.S. 575 722
Butler v. United States, 388 A. 2d 883 162
Butz v. Economou, 438 U.S. 478 761
Cady v. Dombrowski, 413 U.S. 433 809, 830, 831
Cafeteria Workers v. McElroy, 367 U.S. 886 483
Calhoon v. Harvey, 379 U.S. 134 373
Califano v. Aznavorian, 439 U.S. 170 206
Califano v. Yamasaki, 442 U.S. 682 200
California v. Krivda, 409 U.S. 33 671
California v. LaRue, 409 U.S. 109 702
California v. Sierra Club, 451 U.S. 287 377, 379, 388, 397
California v. Taylor, 353 U.S. 553 762, 764
California Brewers Assn. v. Bryant, 444 U.S. 598 71, 77
California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 257
Cannon v. University of Chicago, 441 U.S. 677 374, 379, 381, 389, 391, 397, 408, 519, 529, 535, 536, 538, 546
Cantwell v. Connecticut, 310 U.S. 296 230
Carafas v. LaVallee, 391 U.S. 234 113
Carpenters v. NLRB, 357 U.S. 93 222, 223, 654, 655
Carroll v. United States, 267 U.S. 132 799, 801, 804–810, 812, 813, 817–821, 823, 825, 826, 830, 832, 835–838
Carter v. Carter Coal Co., 298 U.S. 238 752, 754
Carter v. Jago, 637 F. 2d 449 122
Case v. Bowles, 327 U.S. 92 762
Case Co. v. Borak, 377 U.S. 426 374, 377
Causey v. Ford Motor Co., 516 F. 2d 416 286, 287
Cavanaugh v. Looney, 248 U.S. 453 312

Page

Center for National Policy Review on Race & Urban Issues v. Weinberger, 163 U.S. App. D. C. 368 627
Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 55
Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 721
Chamber of Commerce of United States v. NLRB, 574 F. 2d 457 720
Chambers v. Maroney, 399 U.S. 42 801, 807, 809, 818, 821, 826, 830, 831, 836–839
Chandler v. Florida, 449 U.S. 560 788
Chandler v. Roudebush, 425 U.S. 840 469, 477, 503
Chapman v. California, 386 U.S. 18 614, 954
Chapman v. Meier, 420 U.S. 1 42
Chardon v. Fernandez, 454 U.S. 6 84
Charlotte-Mecklenburg Hospital Authority v. Perry, 571 F. 2d 195 636
Chase Securities Corp. v. Donaldson, 325 U.S. 304 101
Chevron Oil Co. v. Huson, 404 U.S. 97 1003
Chicago Bd. of Trade v. Olsen, 262 U.S. 1 361
Chicago Junction R. Co. v. Duluth Log Co., 161 Minn. 466 346
Chicago Life Ins. Co. v. Cherry, 244 U.S. 25 484, 704, 705
Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 380, 381
Chicano Police Officer's Assn. v. Stover, 552 F. 2d 918 292
Chimel v. California, 395 U.S. 752 836
Chiot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 702
Chrysler Corp. v. Brown, 441 U.S. 281 35, 526
CIBA Corp. v. Weinberger, 412 U.S. 640 481
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 544

Page

Ciuzio v. United States, 416 U.S. 995 1000
Clements v. Humphreys, 74 Tex. 466 59
Coca-Cola Co. v. Snow Crest Beverages, Inc., 64 F. Supp. 880 851, 854, 861
Coker v. Georgia, 433 U.S. 584 414
Collins v. Perini, 594 F. 2d 592 126
Collins v. State, 246 Ga. 261 414
Commissioner v. Duberstein, 363 U.S. 278 288, 290
Commissioner v. Heininger, 320 U.S. 467 290
Commissioner v. Sunnen, 333 U.S. 591 493
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See also name of Commonwealth.
Commonwealth v. Campana, 452 Pa. 233 1000
Commonwealth v. Hilbert, 476 Pa. 288 122
Commonwealth v. O'Neal, 441 Pa. 17 132
Commonwealth v. Potter, 478 Pa. 251 688
Commonwealth v. Rose, 457 Pa. 380 132
Commonwealth v. Vogel, 440 Pa. 1 132
Commonwealth v. Warfield, 424 Pa. 555 688
Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 650, 653–655, 661, 663, 664
Connor v. Finch, 431 U.S. 407 42, 43
Connor v. Johnson, 402 U.S. 690 42
Connor v. Waller, 421 U.S. 656 44
Consolidated Canal Co. v. Mesa Canal Co., 177 U.S. 296 311
Consolidated Freightways Corp. v. Admiral Corp., 442 F. 2d 56 346, 347, 351
Consolidated Freightways Corp. v. Pacheco, Int'l Corp., 488 F. Supp. 68 342
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 35, 68, 75, 638

Page

Continental Baking Co. v. United States, 281 F. 2d 137 570, 583
Cook v. State, 369 So. 2d 1251 423
Coolidge v. New Hampshire, 403 U.S. 443 828, 830, 832, 840
Cooper v. California, 386 U.S. 58 809
Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 257
Cooper v. Philip Morris, Inc., 464 F. 2d 9 470
Coronado Coal Co. v. Mine Workers, 268 U.S. 295 573, 581
Cort v. Ash, 422 U.S. 66 373, 377–379, 381, 391, 393, 396, 399
Couch v. Steel, 3 El. & Bl. 402 375
County. See name of county.
Cousins v. Maryland, 429 U.S. 1027 1000
Cox v. Department of Justice, 576 F. 2d 1302 637
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 430
Coyle v. Oklahoma, 221 U.S. 559 765, 782
Crawford v. Western Electric Co., 614 F. 2d 1300 285
Cromwell v. County of Sac, 94 U.S. 351 467
Cupp v. Naughten, 414 U.S. 141 169, 178
Curtin v. State, 155 Tex. Crim. 625 93
Dames & Moore v. Regan, 453 U.S. 654 30
Dampier v. State, 245 Ga. 882 414
Dandridge v. Williams, 397 U.S. 471 206
Daniel v. Paul, 395 U.S. 298 521
Danner v. United States Civil Service Comm'n, 635 F. 2d 427 285
Dark v. United States, 641 F. 2d 805 568
Davis v. Davis, 305 U.S. 32 484
Davis v. United States, 411 U.S. 233 159, 164, 167, 178, 185, 186
Day v. Woodworth, 13 How. 363 723

Page

Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 288, 301
Deaktor v. L. D. Schreiber & Co., 479 F. 2d 529 381, 392, 394, 400, 401
Delaware v. Prouse, 440 U.S. 648 671
Delaware State College v. Ricks, 449 U.S. 250 84
De Lima v. Bidwell, 182 U.S. 1 375
DeMarco v. United States, 415 U.S. 449 292
Dempsey v. United States, 423 U.S. 1079 1000
Department of Air Force v. Rose, 425 U.S. 352 600, 601, 630, 636, 637
Detroit Edison Co. v. NLRB, 440 U.S. 301 665
Dillingham v. United States, 423 U.S. 64 7
Director General of Railroads v. Kastenbaum, 263 U.S. 25 808
District of Columbia v. Train, 172 U.S. App. D. C. 311 755
Ditlow v. Brinegar, 161 U.S. App. D. C. 154 627
Donald Schriver, Inc. v. NLRB, 204 U.S. App. D. C. 4 652
Dougherty Cty. School System v. Harris, 662 F. 2d 735 520, 521, 539, 543
Downum v. United States, 372 U.S. 734 684, 690
Drake v. Zant, 449 U.S. 999 415, 427
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 239, 269, 270
Du Pont de Nemours & Co. v. Train, 430 U.S. 112 309, 317
Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 809
East v. Romine, Inc., 518 F. 2d 332 285–287, 296
Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599 739
East Texas Motor Freight Lines v. Franklin County Distilling Co., 184 S. W. 2d 505 346
Eddings v. Oklahoma, 455 U.S. 104 423

Page

E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 309, 317
Electrical Workers v. NLRB, 341 U.S. 694 226
Electrical Workers v. NLRB, 366 U.S. 667 225
Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 536
Elrod v. Burns, 427 U.S. 347 443
Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 85
Engle v. Isaac, 456 U.S. 107 169, 175, 178, 184
English v. 21st Phoenix Corp., 590 F. 2d 723 701
EPA v. Brown, 431 U.S. 99 762
EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 316, 319, 331, 334
EPA v. Mink, 410 U.S. 73 621, 636, 642
EPA v. National Crushed Stone Assn., 449 U.S. 64 316, 332
Epperson v. Arkansas, 393 U.S. 97 246
Erie R. Co. v. Tompkins, 304 U.S. 64 401, 588, 711
Ernst & Ernst v. Hochfelder, 425 U.S. 185 395, 407
Estelle v. Smith, 451 U.S. 454 125
Estelle v. Williams, 425 U.S. 501 130
Eutectic Corp. v. Metco, Inc., 579 F. 2d 1 302
Evans v. Britton, 472 F. Supp. 707 609
Evans v. State, 28 Md. App. 640 132
Evans v. State, 361 So. 2d 654 608
Everson v. Board of Ed., 330 U.S. 1 246
Ex parte. See name of party.
Fairport R. Co. v. Meredith, 292 U.S. 589 555
Familia de Boom v. Arosa Mercantil, S. A., 629 F. 2d 1134 700
Farmer v. Arabian American Oil Co., 379 U.S. 227 724
Farrell Lines, Inc. v. Titan Industrial Corp., 306 F. Supp. 1348 351

Page

Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 570
Fay v. Noia, 372 U.S. 391 117, 126, 130, 144–146, 185
F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 724, 725
FEA v. Algonquin SNG, Inc., 426 U.S. 548 527
FPC v. East Ohio Gas Co., 338 U.S. 464 789
FPC v. Florida Power & Light Co., 404 U.S. 453 755, 757
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 467
Fedorenko v. United States, 449 U.S. 490 208
Ferguson v. Skrupa, 372 U.S. 726 460
F. F. Instrument Corp. v. Union de Tronquistas de Puerto Rico, 558 F. 2d 607 718
Finch v. United States, 433 U.S. 676 687
First National Bank of Boston v. Bellotti, 435 U.S. 765 55
Fisher v. United States, 328 U.S. 463 159, 163
Fisons Ltd. v. United States, 458 F. 2d 1241 712
Flah's, Inc. v. Schneider, 71 App. Div. 2d 993 480, 485, 509
Flanders v. Tweed, 15 Wall. 450 726
Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 721, 724, 726
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 787
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 345
Forsham v. Harris, 445 U.S. 169 626, 632, 637
Forsythe v. Overmyer, 576 F. 2d 779 712
Foss, In re, 10 Cal. 3d 910 132
Founding Church of Scientology of Washington, D. C., Inc. v. Bell, 195 U.S. App. D. C. 363 636
Frady v. United States, 121 U.S. App. D. C. 78 154, 156, 157, 171, 172

Page

Francis v. Henderson, 425 U.S. 536 159, 167, 177, 184–186
Franks v. Bowman Transportation Co., 424 U.S. 747 69, 72–75, 80–82, 84, 85
Friedlander v. Texas & Pacific R. Co., 130 U.S. 416 567, 568, 588
Fry v. United States, 421 U.S. 542 758, 762, 763, 766, 778, 784
Fryer v. United States, 93 U.S. App. D. C. 34 158
Fuentes v. State, 349 A. 2d 1 132
Fulghum v. State, 291 Ala. 71 611, 613
Fullerton Lumber Co. v. Chicago, M., St. P. & P. R. Co., 282 U.S. 520 350
Furman v. Georgia, 408 U.S. 238 413, 419, 428, 611, 614
Furnco Construction Corp. v. Waters, 438 U.S. 567 289
Gabaur v. Woodcock, 520 F. 2d 1084 433
Galena Oaks Corp. v. Scofield, 218 F. 2d 217 286, 287
Garment Workers v. Quality Mfg. Co., 420 U.S. 276 666
Garner v. Giarrusso, 571 F. 2d 1330 470
Gates v. State, 244 Ga. 587 414, 423
General Electric Credit Corp. v. Robbins, 414 F. 2d 208 292
Gertz v. Robert Welch, Inc., 418 U.S. 323 60, 61
Gibson v. Berryhill, 411 U.S. 564 195, 481
Gillette v. United States, 401 U.S. 437 247, 255
Gilmore v. Constitution Life Ins. Co., 502 F. 2d 1344 568
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 268, 270
Glasgow v. Moyer, 225 U.S. 420 165
Gleason v. Seaboard Air Line R. Co., 278 U.S. 349 567, 568, 588
Goddard v. Grand Trunk R. Co., 57 Me. 202 575
Godfrey v. Georgia, 446 U.S. 420 414, 415, 421, 422, 427, 428
Goldberg v. Kelly, 397 U.S. 254 199
Goldberg v. State Comm'n of Human Rights, 54 Misc. 2d 676 507

Page

Goldfarb v. Virginia State Bar, 421 U.S. 773 580, 586
Gomez v. Perez, 409 U.S. 535 92, 93, 95, 97–99, 101, 102
Goodman v. H. Hentz & Co., 265 F. Supp. 440 391, 398–405, 407, 408
Gori v. United States, 367 U.S. 364 677, 684
Gould v. Barnes Brokerage Co., 345 F. Supp. 294 392, 400
Grace v. State, 231 Ga. 113 133
Grand Lodge of International Assn. of Machinists v. King, 335 F. 2d 340 433, 438
Grannis v. Ordean, 234 U.S. 385 449
Green v. Georgia, 442 U.S. 95 414
Green v. State, 246 Ga. 598 414
Green v. United States, 451 U.S. 929 688, 692
Green v. United States, 132 U.S. App. D. C. 98 157, 168, 169, 175
Gregg v. Georgia, 428 U.S. 153 413, 414, 416–418, 420, 421, 424, 427, 428, 611, 614, 910, 919, 938, 950, 965, 984, 1001, 1011
Gregory, In re, 219 U.S. 210 165
Gregory v. New York State Human Rights Appeal Bd., 64 App. Div. 2d 775 484
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 520
Griffin v. Breckenridge, 403 U.S. 88 521
Griffin v. United States, 215 Ct. Cl. 710 739
Griggs v. Duke Power Co., 401 U.S. 424 64, 70, 71, 77, 79, 86, 88–90, 276
Griswold v. Connecticut, 381 U.S. 479 72
Grove City College v. Harris, 500 F. Supp. 253 520
Grubb v. Public Utilities Comm'n, 281 U.S. 470 481
Gryger v. Burke, 334 U.S. 728 121
Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 529
Gunther v. Iowa State Men's Reformatory, 612 F. 2d 1079 466, 477, 487, 504

Page

Haas v. State, 103 Ohio St. 1 111
Haddock v. Haddock, 201 U.S. 562 482
Hagan v. Providence & Worcester R. Co., 3 R. I. 88 589
Hamilton v. State, 246 Ga. 264 414
Hamilton v. United States, 26 App. D. C. 382 170
Hammond Packing Co. v. Arkansas, 212 U.S. 322 705–707, 709
Hankerson v. North Carolina, 432 U.S. 233 117, 123, 127, 131, 134, 150
Hanson v. Denckla, 357 U.S. 235 713, 714
Harris v. Washington, 404 U.S. 55 1000
Harrisonville v. W. S. Dickey Clay Manufacturing Co., 289 U.S. 334 311
Hatzlachh Supply Co. v. United States, 444 U.S. 460 738
Hayes v. Michigan Central R. Co., 111 U.S. 228 375
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 758
Hecht v. Harris, Upham & Co., 283 F. Supp. 417 392, 400
Hecht Co. v. Bowles, 321 U.S. 321 310, 312, 313, 317, 320, 327, 328
Helvering v. Rankin, 295 U.S. 123 290
Helvering v. Tex-Penn Oil Co., 300 U.S. 481 290
Henderson v. Kibbe, 431 U.S. 145 135, 166, 169, 178, 181
Henderson v. State, 234 Ga. 827 132
Henry v. United States, 361 U.S. 98 809, 820
Herb v. Pitcairn, 324 U.S. 117 774
Hill v. United States, 368 U.S. 424 165, 181
Hill v. Wallace, 259 U.S. 44 361
Hirk v. Agri-Research Council, Inc., 561 F. 2d 96 356
Hodel v. Indiana, 452 U.S. 314 753, 754, 756, 758
Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 753–756, 758, 759, 764, 766–768, 770, 775, 776, 778, 783, 786

Page

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 55
Holloway v. Howerdd, 536 F. 2d 690 568
Holloway v. McElroy, 632 F. 2d 605 122
Holmes Limestone Co. v. Andrus, 655 F. 2d 732 995, 996
Home of Holy Infancy v. Kaska, 397 S. W. 2d 208 92
Hooten v. Hooten, 15 S. W. 2d 141 92
Hopkinson v. State, 632 P. 2d 79 423
Hovey v. Elliott, 167 U.S. 409 706
Howard v. United States, 128 U.S. App. D. C. 336 174
Huling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559 448
Humphrey v. Cady, 405 U.S. 504 113, 126
Humphrey v. Moore, 375 U.S. 335 76
Husty v. United States, 282 U.S. 694 809, 818
Illinois v. Somerville, 410 U.S. 458 672, 685, 691
Illinois Brick Co. v. Illinois, 431 U.S. 720 575, 590
Illinois Steel Co. v. Baltimore & O. R. Co., 320 U.S. 508 343
INS v. Stanisic, 395 U.S. 62 538
Imperial Diner, Inc. v. State Human Rights Appeal Bd., 52 N. Y. 2d 72 490, 492
Incres S.S. Co. v. Maritime Workers, 372 U.S. 24 219, 220
Inland Empire Council v. Millis, 325 U.S. 697 483
In re. See name of party.
Intermeat, Inc. v. American Poultry Co., 575 F. 2d 1017 711, 715
International Order of Job's Daughters v. Lindeburg & Co., 633 F. 2d 912 863
International Shoe Co. v. Washington, 326 U.S. 310 448, 703, 713
ICC v. All-American, Inc., 505 F. 2d 1360 349

Page

Islesboro School Comm. v. Califano, 593 F. 2d 424 520, 542, 543, 549
Ivan v. City of New York, 407 U.S. 203 150
Jackson, Ex parte, 96 U.S. 727 812
Jackson v. City of Killeen, 654 F. 2d 1181 285
James v. Stockham Valves & Fittings, Co., 559 F. 2d 310 279–283, 290, 291, 297–300, 302, 303
Jenkins v. Anderson, 447 U.S. 231 125
Jennings v. General Motors Corp., 604 F. 2d 1300 302
J. I. Case Co. v. Borak, 377 U.S. 426 374, 377
Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764 392, 400
Johnson v. Bennett, 393 U.S. 253 132
Johnson v. Johnson, 531 F. 2d 169 290
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 503, 536
Johnson v. Salisburg, 448 F. 2d 374 290
Johnson v. United States, 333 U.S. 10 827, 829
Jones v. Alfred H. Mayer Co., 392 U.S. 409 377, 521
Jones v. Lynn, 477 F. 2d 885 324
Jones v. Morris, 590 F. 2d 684 18, 20
Joshi v. Florida State Univ., 646 F. 2d 981 285
Juidice v. Vail, 430 U.S. 327 485
Junior College Dist. of St. Louis v. Califano, 597 F. 2d 119 520, 543
Katz v. United States, 389 U.S. 347 828, 831, 836
Kaufman v. United States, 394 U.S. 217 149
Keeble v. United States, 412 U.S. 205 612
Keebler Co. v. Rovira Biscuit Corp., 624 F. 2d 366 863
Keener v. Ridenour, 594 F. 2d 581 126, 140

Page

Kelite Products, Inc. v. Binzel, 224 F. 2d 131 575
Kelley v. Southern Pacific Co., 419 U.S. 318 292, 300
Kellogg Co. v. National Biscuit Co., 305 U.S. 111 851
Kendall v. United States, 12 Pet. 524 375
Kentucky v. Dennison, 24 How. 66 761, 763
Kerbs v. Fall River Industries, Inc., 502 F. 2d 731 568
Kirkpatrick v. Preisler, 394 U.S. 526 966
Klopfer v. North Carolina, 386 U.S. 213 8, 9, 15, 16
Kneeland v. Bloom Township High School Dist., 484 F. Supp. 1280 520
Kokoszka v. Belford, 417 U.S. 642 555
Kremer v. Chemical Construction Corp., 456 U.S. 461 1003
Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 778
Lake Shore & M. S. R. Co. v. Prentice, 147 U.S. 101 575, 582, 589
Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F. 2d 596 712
Lakota Girl Scout Council, Inc. v. Havey Fundraising Management, Inc., 519 F. 2d 634 712
Lalli v. Lalli, 439 U.S. 259 98, 99, 101
Lamb v. Miller, 212 U.S. App. D. C. 393 433
Lane v. Phillips, 69 Tex. 240 92
Lane County v. Oregon, 7 Wall. 71 765, 778
Lee v. Missouri, 439 U.S. 461 133
Lee v. United States, 432 U.S. 23 684, 692
Lehman v. Nakshian, 453 U.S. 156 208
Lekkas v. Liberian M/V Caledonia, 443 F. 2d 10 701
Leland v. Oregon, 343 U.S. 790 122
Lemon v. Kurtzman, 403 U.S. 602 235, 237, 251, 252, 255, 258–260

Page

Lesar v. United States Dept. of Justice, 204 U.S. App. D. C. 200 624
Levin v. Mississippi River Fuel Corp., 386 U.S. 162 299, 301
Linda R. S. v. Richard D., 410 U.S. 614 270
Lindsey v. Mississippi Research & Development Center, 652 F. 2d 488 285
Lindsey v. Normet, 405 U.S. 56 457
Little v. Streater, 452 U.S. 1 98, 104
Local 1104, Communications Workers of America v. NLRB, 520 F. 2d 411 665
Local Union No. 984, International Brotherhood of Teamsters v. Humko Co., 287 F. 2d 231 718
Logan v. Zimmerman Brush Co., 455 U.S. 422 498
Longshoremen v. Ariadne Co., 397 U.S. 195 219
Longyear v. Toolan, 209 U.S. 414 448
Lorillard v. Pons, 434 U.S. 575 382, 403, 530
Louisville & Nashville R. Co. v. Central Iron Co., 265 U.S. 59 343, 352
Love v. Pullman Co., 404 U.S. 522 464, 471
MacDonald v. United States, 531 F. 2d 196 5, 9, 10, 12–14, 19, 21
Maceira v. Pagan, 649 F. 2d 8 433, 439
Mackey v. United States, 401 U.S. 667 131
Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 484
Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379 702
Marbury v. Madison, 1 Cranch 137 375
Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 430
Marshall v. Barlow's, Inc., 436 U.S. 307 829
Marshall v. Jerrico, Inc., 446 U.S. 238 195, 196

Page

Marshall v. Local 20, Teamsters, 611 F. 2d 645 433
Martin v. Hunter's Lessee, 1 Wheat. 304 761, 766
Mary, The, 9 Cranch 126 451
Maryland v. Wirtz, 392 U.S. 183 758
Massey v. Commonwealth, 305 S. W. 2d 755 821
Master Commodities, Inc. v. Texas Cattle Management Co., 586 F. 2d 1352 356
Mathews v. Eldridge, 424 U.S. 319 193–195, 198, 206
Mathews v. Lucas, 427 U.S. 495 99, 101
Mayer & Co. v. Evans, 441 U.S. 750 471
Mayo v. Hopeman Lumber & Mfg. Co., 33 App. Div. 2d 310 509, 510
Mayo Hotel Co. v. Danciger, 143 Okla. 196 575, 589
McCarthy v. Burkholder, 448 F. Supp. 41 520
McCord v. Western Union Tel. Co., 39 Minn. 181 569
McCulloch v. Maryland, 4 Wheat. 316 148, 795
McCulloch v. Sociedad Nacional, 372 U.S. 10 32, 219, 220
McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338 392, 400
McDaniel v. Sanchez, 452 U.S. 130 40
McDonald v. Mabee, 243 U.S. 90 449, 455, 482, 701, 703
McDonnell Douglas Corp. v. Green, 411 U.S. 792 276, 468, 469, 477, 502
McElmoyle v. Cohen, 13 Pet. 312 482
McGowan v. Maryland, 366 U.S. 420 246
McKensie v. Sea Land Service, 551 F. 2d 91 302
Mead v. Retail Clerks International Assn., 523 F. 2d 1371 718, 721, 723, 725, 726
Mellinger v. City of Houston, 68 Tex. 37 95
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman, 593 F. 2d 129 356

Page

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 316, 378, 396, 398, 405, 406
Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U.S. 356 344
Miller, In re, 605 S. W. 2d 332 94, 95, 100, 101
Miller v. State, 237 Ga. 557 420
Miller v. United States, 357 U.S. 301 822
Milliken v. Meyer, 311 U.S. 457 703
Mills v. Alabama, 384 U.S. 214 52, 62
Mills v. Duryee, 7 Cranch 481 482
Milnarik v. M-S Commodities, Inc., 457 F. 2d 274 368
Milwaukee v. Illinois, 451 U.S. 304 317–319, 325, 330–332
Mincey v. Arizona, 437 U.S. 385 824, 828, 842
Mine Workers v. Coronado Coal Co., 259 U.S. 344 573, 581, 582
Minnick v. California Dept. of Corrections, 452 U.S. 105 257
Miranda v. Arizona, 384 U.S. 436 129
Mitchell v. National Broadcasting Co., 553 F. 2d 265 465, 486
Mitchell v. W. T. Grant Co., 416 U.S. 600 483
Mize v. State Division of Human Rights, 33 N. Y. 2d 53 492
Mondou v. New York, N. H. & H. R. Co., 223 U.S. 1 760
Monitor Patriot Co. v. Roy, 401 U.S. 265 53, 61
Monroe v. Pape, 365 U.S. 167 823
Montana v. United States, 440 U.S. 147 467, 481
Montana-Dakota Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 376
Moore v. Arizona, 414 U.S. 25 22
Moosavi v. Fairfax County Bd. of Ed., 666 F. 2d 58 466, 496
Morrissey v. Brewer, 408 U.S. 471 199, 200
Moton v. Swenson, 417 U.S. 957 1000
Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 242

Page

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 447–452, 454–456
Mullaney v. Wilbur, 421 U.S. 684 119, 120, 122–124, 133–135, 141, 150, 184
Murchison, In re, 349 U.S. 133 196
Murdock v. Pennsylvania, 319 U.S. 105 234, 235, 247
Murray v. The Charming Betsy, 2 Cranch 64 32
Myers v. Washington, 646 F. 2d 355 130
Nash County Bd. of Ed. v. Biltmore Co., 640 F. 2d 484 482
National Acceptance Co. v. Coal Producers Assn., 604 F. 2d 540 568
NAACP v. Button, 371 U.S. 415 61
National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 703
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 707
NLRB v. Bell Aerospace Co., 416 U.S. 267 522, 535
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 257
NLRB v. Denver Building Trades Council, 341 U.S. 675 223, 224, 660–662, 665
NLRB v. Fixtures Manufacturing Corp., 669 F. 2d 547 998
NLRB v. Fruit Packers, 377 U.S. 58 225, 226, 527
NLRB v. Hershey Foods Corp., 513 F. 2d 1083 665
NLRB v. Iron Workers, 434 U.S. 335 664
NLRB v. Lion Oil Co., 352 U.S. 282 625
NLRB v. Lloyd A. Fry Roofing Co., Inc., of Delaware, 651 F. 2d 442 998
NLRB v. Nevis Industries, Inc., 647 F. 2d 905 998
NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318 666
NLRB v. Operating Engineers, 400 U.S. 297 224
NLRB v. Retail Store Employees, 447 U.S. 607 224, 226

Page

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 621, 627, 640, 642
NLRB v. Robin American Corp., 654 F. 2d 1022 998
NLRB v. Sears, Roebuck & Co., 421 U.S. 132 629–631
NLRB v. Wright Line, 662 F. 2d 899 998
National League of Cities v. Usery, 426 U.S. 833 753, 758, 759, 761, 763, 764, 766, 767, 769, 770, 773, 775, 778, 781, 782, 784, 786, 791
National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 373, 376, 400, 402, 406
National Rifle Assn. v. Kleppe, 425 F. Supp. 1101 309
National Society of Professional Engineers v. United States, 435 U.S. 679 569, 580, 586
National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256 367, 373
National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 655, 657
Navarro v. Leu, 469 F. Supp. 832 434
Neely v. Martin K. Eby Construction Co., 386 U.S. 317 211
Nelson v. State, 208 So. 2d 506 183
New England Medical Society Center Hospital v. NLRB, 548 F. 2d 377 636
New England Power Co. v. New Hampshire, 455 U.S. 331 757
Newman v. Local 1101, Communications Workers, 570 F. 2d 439 433
Newman v. Piggie Park Enterprise, 390 U.S. 400 507
New Orleans S.S. Assn. v. General Longshore Workers, ILA, 626 F. 2d 455 215
New State Ice Co. v. Liebmann, 285 U.S. 262 788

Page

New York v. Belton, 453 U.S. 454 826
New York Airways, Inc. v. United States, 177 Ct. Cl. 800 739
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 489, 503, 506
New York, N. H. & H. R. Co. v. California Fruit Growers Exchange, 125 Conn. 241 343
New York, N. H. & H. R. Co. v. ICC, 200 U.S. 361 344
New York State Div. for Youth v. State Human Rights Appeal Bd., 83 App. Div. 2d 972 480, 510
New York Times Co. v. Sullivan, 376 U.S. 254 60
New York Transit Authority v. Beazer, 440 U.S. 568 90
North Laramie Land Co. v. Hoffman, 268 U.S. 276 451
Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 405
Ocala Star-Banner Co. v. Damron, 401 U.S. 295 61
O'Connor v. United States, 399 A. 2d 21 170
Offutt v. United States, 348 U.S. 11 196
Oklahoma v. CSC, 330 U.S. 127 766
O'Neal v. Gresham, 519 F. 2d 803 292
Oregon v. Hass, 420 U.S. 714 681
Orvis v. Higgins, 180 F. 2d 537 302
Oscar Mayer & Co. v. Evans, 441 U.S. 750 471
Parden v. Terminal R. Co., 377 U.S. 184 762
Parham v. Hughes, 441 U.S. 347 97
Parham v. J. R., 442 U.S. 584 199
Parklane Hosiery Co. v. Shore, 439 U.S. 322 467
Parson v. Kaiser Aluminum & Chemical Corp., 575 F. 2d 1374 286
Patterson v. American Tobacco Co., 535 F. 2d 257 67, 78, 90
Patterson v. New York, 432 U.S. 197 119, 120, 122, 123

Page
Patterson v. State, 233 Ga. 724 133
Payne v. McLemore's Wholesale & Retail Stores, 654 F. 2d 1130 285
Payton v. New York, 445 U.S. 573 822
Peavey Co. v. NLRB, 648 F. 2d 460 998
Pennoyer v. Neff, 95 U.S. 714 448
Pennsylvania Casualty Co. v. McCoy, 167 F. 2d 132 290
Pennsylvania R. Co. v. Marcelletti, 256 Mich. 411 342
Penry v. Wm. Barr, Inc., 415 F. Supp. 126 95
People v. Johnson, 407 Mich. 196 132
People v. Jordan, 51 Mich. App. 710 132
People v. Robbins, 103 Cal. App. 3d 34 815
People v. Weathers, 83 Ill. App. 3d 451 183
People v. White, 390 Mich. 245 1000
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 569, 572
Perrin v. United States, 444 U.S. 37 722
Petrowski v. Hawkeye-Security Co., 350 U.S. 495 704
Pfizer Inc. v. Government of India, 434 U.S. 308 569, 572
Phillips v. Joint Legislative Committee, 637 F. 2d 1014 285
Phillips v. State, 86 Nev. 720 132
Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 520
Picard v. Connor, 404 U.S. 270 140
Piedmont & Northern R. Co. v. ICC, 286 U.S. 299 81, 521
Pierson v. Ray, 386 U.S. 547 584
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 75, 391
Pittsburgh, C., C. & St. L. R. Co. v. Fink, 250 U.S. 577 343
Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 55
Plessy v. Ferguson, 163 U.S. 537 836
Plumbers & Fitters v. Plumbers & Fitters, 452 U.S. 615 226
Police Dept. of Chicago v. Mosley, 408 U.S. 92 60
Pollard v. Bailey, 20 Wall. 520 375
Porter v. Warner Holding Co., 328 U.S. 395 313
Posadas v. National City Bank, 296 U.S. 497 468
Poyner v. Erma Werke GMBH, 618 F. 2d 1186 712
Presnall v. Georgia, 439 U.S. 14 414, 422
Prothro v. State, 370 So. 2d 740 607
Pullman Palace Car Co. v. Lawrence, 74 Miss. 782 575
Pullman-Standard v. Swint, 456 U.S. 273 855, 857
Quarles v. Fuqua Industries, Inc., 504 F. 2d 1358 712
Quarles v. Philip Morris, Inc., 279 F. Supp. 505 295
Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 576
Radio Officers v. NLRB, 347 U.S. 17 665
Radium Mines, Inc. v. United States, 139 Ct. Cl. 144 739
Radzanower v. Touche Ross & Co., 426 U.S. 148 468, 472
Railroad Comm'n v. Pullman Co., 312 U.S. 496 312
Railway Express Agency, Inc. v. New York, 336 U.S. 106 246
Reading Anthracite Co. v. Office of Surface Mining, Reclamation and Enforcement, No. 80–0667 (ED Pa.) 997
Record v. Wagner, 100 N. H. 419 566
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 522
Reeves, Inc. v. Stake, 447 U.S. 429 788
Reiter v. Sonotone Corp., 442 U.S. 330 68, 572, 573
Rescue Army v. Municipal Court, 331 U.S. 549 257
Reserve Mining Co. v. EPA, 514 F. 2d 492 319
Retail Clerks Union Local 648 v. Retail Clerks International Assn., 299 F. Supp. 1012 440

Page

Retail Credit Co. v. Dade County, 393 F. Supp. 577 132
Richards v. United States, 369 U.S. 1 68
Richardson v. Morris, 409 U.S. 464 735
Richardson v. Perales, 402 U.S. 389 197
Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 724, 725
Ricketts v. Pennsylvania R. Co., 153 F. 2d 757 567
Riggs v. State, 50 Ore. App. 109 183
Riley v. Havener, 391 F. Supp. 1177 140
Ritter v. Ritter, 381 Ill. 549 726
Rivers v. Rosenthal & Co., 634 F. 2d 774 356, 379
Robbins v. California, 453 U.S. 420 803, 804, 814–817, 822, 824–826, 834, 841
Roberts v. Louisiana, 428 U.S. 325 611
Rogers v. Bates, 431 F. 2d 16 290
Rohde v. K. O. Steel Castings, Inc., 649 F. 2d 317 285
Romeo Community Schools v. HEW, 600 F. 2d 581 520, 543
Romeo Community Schools v. HEW, 438 F. Supp. 1021 553, 554
Rondeau v. Mosinee Paper Corp., 422 U.S. 49 312
Rose v. Lundy, 455 U.S. 509 124, 136, 138, 141, 175, 953–955
Rowe v. General Motors Corp., 457 F. 2d 348 300
Rule v. International Assn. of Bridge Workers, 568 F. 2d 558 292
Rutherford v. Rideout Bank, 11 Cal. 2d 479 566
R—V—M—, In re, 530 S. W. 2d 921 94
Sampson v. Murray, 415 U.S. 61 312
Sanders v. State, 262 Ark. 595 813
Sanders v. United States, 373 U.S. 1 127
Sandstrom v. Montana, 442 U.S. 510 158, 425, 426, 953–955

Page

Sante Fe Industries, Inc. v. Green, 430 U.S. 462 395
Saxlehner v. Wagner, 216 U.S. 375 863
Schaffer v. Heitner, 433 U.S. 186 448, 450
Schaumburg Village v. Citizens for Better Environment, 444 U.S. 620 236, 267
Scher v. United States, 305 U.S. 251 809, 818
Schneckloth v. Bustamonte, 412 U.S. 218 127, 128
Schonfeld v. Penza, 477 F. 2d 899 441
Schriver, Inc. v. NLRB, 204 U.S. App. D. C. 4 652
Schroeder v. City of New York, 371 U.S. 208 456
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 527, 529
Schweiker v. McClure, 456 U.S. 188 203, 207, 209
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 851
Seattle Univ. v. HEW, 621 F. 2d 992 520, 543, 549
Second Employer's Liability Cases, 223 U.S. 1 769
Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 373
Seligson v. New York Produce Exchange, 378 F. Supp. 1076 392, 393, 400
Shadwick v. City of Tampa, 407 U.S. 345 827
Shaffer v. Heitner, 433 U.S. 186 713
Shaw v. Garrison, 328 F. Supp. 390 689
Sheridan v. Carpenters Local No. 626, 306 F. 2d 152 433, 437, 438
Sherrer v. Sherrer, 334 U.S. 343 465, 483
Shotwell Manufacturing Co. v. United States, 371 U.S. 341 185
Sibbach v. Wilson & Co., 312 U.S. 1 534
Silver v. New York Stock Exchange, 373 U.S. 341 577

Page
Silvus v. State, 22 Ohio St. 90 110
Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 243, 269, 270, 272
Simpson v. City of Abilene, 388 S. W. 2d 760 105
Simpson v. Vance, 208 U.S. App. D. C. 270 598, 602, 603, 623
Singer Manufacturing Co. v. Holdfodt, 86 Ill. 455 575
Sinicropi v. Nassau County, 601 F. 2d 60 465, 466, 486, 487
Smith v. Hooey, 393 U.S. 374 24
Smith v. Smith, 454 F. 2d 572 132
Smith, Kline & French Laboratories v. Clark & Clark, 157 F. 2d 725 852
Smouse v. General Electric Co., 626 F. 2d 333 466, 477, 486
Societe Internationale v. Rogers, 357 U.S. 197 705, 706
South Dakota v. Opperman, 428 U.S. 364 681, 809, 831
Southeastern Community College v. Davis, 442 U.S. 397 523
Southern Pacific Co. v. Arizona, 325 U.S. 761 759
Southern Pacific Co. v. Valley Frosted Foods Co., 178 Pa. Super. 217 351
Southern Pacific Transp. Co. v. Campbell Soup Co., 455 F. 2d 1219 351
Southern Pacific Transp. Co. v. State, 308 S. W. 2d 123 96
Sparks v. Boggs, 339 S. W. 2d 480 50, 52, 54, 59, 60
Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 271
Speiser v. Randall, 357 U.S. 513 149
Spicer v. United States, 217 F. Supp. 44 739
Spokane & Inland R. Co. v. United States, 241 U.S. 344 81
Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178 314
Stafos v. Jarvis, 447 F. 2d 369 290
Standard Oil Co. v. Johnson, 316 U.S. 481 730, 734
Standard Oil Co. v. United States, 221 U.S. 1 584

Page
Standard Surety & Casualty Co. v. Plantsville Nat. Bank, 158 F. 2d 422 566
Stasiak v. Montgomery Ward & Co., 66 App. Div. 2d 962 480, 511
State. See also name of State.
State v. Aber, 55 Ohio St. 2d 251 121
State v. Bible, 389 So. 2d 42 803
State v. Bridgeman, 51 Ohio App. 2d 105 120
State v. Brown, 163 Conn. 52 132
State v. Brown, 262 Ore. 442 1000
State v. Buzynski, 330 A. 2d 422 132
State v. Clifton, 32 Ohio App. 2d 284 121
State v. Commenos, 461 S. W. 2d 9 132
State v. Cuevas, 53 Haw. 110 132
State v. Glaros, 170 Ohio St. 471 115
State v. Gordon, 28 Ohio St. 2d 45 125
State v. Grady, 276 Md. 178 132
State v. Gregory, 66 N. J. 510 1000
State v. Hernandez, 408 So. 2d 911 803
State v. Hughes, No. 75–1026 (Ohio); C. A. No. 7717 (Ct. App. Summit Cty., Ohio) 113
State v. Humphries, 51 Ohio St. 2d 95 116, 124, 125, 138, 139, 140
State v. Irwin, 304 N. C. 93 423
State v. Long, 53 Ohio 2d 91 125
State v. Matthews, No. 74AP–428 (Ct. App. Franklin Cty., Ohio) 111
State v. Moore, 614 S. W. 2d 348 423
State v. Moyer, 387 A. 2d 194 132
State v. Nales, 28 Conn. Supp. 28 132
State v. Opperman, 247 N. W. 2d 673 681
State v. Perry, 10 Ohio St. 2d 175 140
State v. Rathbun, 287 Ore. 421 681
State v. Rathbun, 37 Ore. App. 259 671
State v. Robinson, 47 Ohio St. 2d 103 111, 112, 114, 115, 117, 118, 120, 123, 124, 133, 138, 139, 142

Page

State v. Robinson, 48 Ohio App. 2d 197 132
State v. Rogers, 43 Ohio St. 2d 28 111
State v. Seliskar, 35 Ohio St. 2d 95 110
State v. Simon, No. 6262 (Ct. App. Montgomery Cty., Ohio) 121
State v. Sloan, 45 Ohio App. 2d 24 115
State v. Whistnant, 179 Conn. 576 132
State v. Williams, 51 Ohio St. 2d 112 116, 125
State v. Wood, 89 Wash. 2d 97 104
State Division of Human Rights v. Blanchette, 73 App. Div. 2d 820 480, 510
State Division of Human Rights v. Columbia Univ., 39 N. Y. 2d 612 491
State Division of Human Rights v. County of Monroe, 88 Misc. 2d 16 508
State Division of Human Rights v. Mecca Kendall Corp., 53 App. Div. 2d 201 491
State Division of Human Rights v. New York State Drug Abuse Comm'n, 59 App. Div. 2d 332 481, 483–485, 509
State Division of Human Rights v. Syracuse Univ., 46 App. Div. 2d 1002 491
State ex rel. Bill v. Elting, 29 Kan. 397 59
State ex rel. Clements v. Humphreys, 74 Tex. 466 59
State Office of Drug Abuse Servs. v. State Human Rights Appeal Bd., 48 N. Y. 2d 276 491
Steelworkers v. United States, 361 U.S. 39 322
Steelworkers v. Weber, 443 U.S. 193 86
Stevens v. State, 247 Ga. 698 414
Stewart v. Iowa, 423 U.S. 902 1000
Stoll v. Gottlieb, 305 U.S. 165 701, 702

Page

Stone v. Powell, 428 U.S. 465 127, 149, 178, 184
Street v. New York, 394 U.S. 576 423, 428
Stromberg v. California, 283 U.S. 359 55, 422, 426
Stump v. Bennett, 398 F. 2d 111 131
Sullivan v. Little Hunting Park, 396 U.S. 229 377
Sumner v. Mata, 449 U.S. 539 178, 184
Sunal v. Large, 332 U.S. 174 165
Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6 377, 389
Susi v. Flowers, 423 U.S. 1006 1000
Swain v. Pressley, 430 U.S. 372 161
Szalkai v. State, 96 Ohio St. 36 110
Taylor v. Louisiana, 419 U.S. 522 133
Teamsters v. Morton, 377 U.S. 252 723, 724
Teamsters v. NLRB, 365 U.S. 667 665
Teamsters v. United States, 431 U.S. 324 64, 67, 73, 75, 76, 79, 87, 276, 277, 279, 289, 294, 295, 297, 298, 498
Tenenbaum v. State Div. of Human Rights, 50 App. Div. 2d 257 484
TVA v. Hill, 437 U.S. 153 310, 313–315, 331, 332, 334, 335, 638
Tennon v. Ricketts, 642 F. 2d 161 122
Testa v. Katt, 330 U.S. 386 760, 762, 763, 769, 773, 776, 784, 785
Texas v. White, 7 Wall. 700 777
Texas v. White, 423 U.S. 67 807, 809
Texas Dept. of Human Resources v. Chapman, 570 S. W. 2d 46 96
Texas Dept. of Human Resources v. Delley, 581 S. W. 2d 519 94, 104
Texas Dept. of Human Resources v. Hernandez, 595 S. W. 2d 189 93

Page

Texas Distributors, Inc. v. Local Union No. 100, 598 F. 2d 393 718
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 377, 396, 401, 569, 575, 583, 584, 586, 589
Texas & Pacific R. Co. v. Leatherwood, 250 U.S. 478 342
Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33 373–375, 377, 399
Thompson v. Leland Police Dept., 633 F. 2d 1111 285
Thompson v. Oklahoma, 429 U.S. 1053 1000
Thompson v. Whitman, 18 Wall. 457 701
Tijerina v. New Mexico, 417 U.S. 956 1000
T. I. M. E. Inc. v. United States, 359 U.S. 464 376, 399
Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 721
Toth v. Quarles, 350 U.S. 11 5
Touche Ross & Co. v. Redington, 442 U.S. 560 377, 397, 399, 406
Train v. Colorado Public Interest Research Group, 426 U.S. 1 331
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 377, 396–399, 401, 405
Transportation Union v. Long Island R. Co., 455 U.S. 678 762, 778
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 75, 76, 277, 294
Trimble v. Gordon, 430 U.S. 762 98, 99, 101
Trimble v. State, 229 Ga. 399 133
Truck Drivers' Local No. 421 v. United States, 128 F. 2d 227 570, 582
Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F. 2d 1210 863
Tyler v. Court of Registration, 175 Mass. 71 450
Udall v. Tallman, 380 U.S. 1 538
Ulster County Court v. Allen, 442 U.S. 140 135, 177

Page

Underwriters National Assur. Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn., 455 U.S. 691 465, 484
Unger v. Consolidated Foods Corp., 657 F. 2d 909 466, 486
Unger v. Sirena Division of Consolidated Foods Corp., 60 Ill. App. 3d 840 1003
Union Carbide Corp. v. Andrus, 13 ERC 1481 997
United Airlines, Inc. v. Evans, 431 U.S. 553 75
United Egg Producers v. Bauer International Corp., 311 F. Supp. 1375 392, 400
United States v. Addonizio, 442 U.S. 178 165, 178, 181
United States v. American Radiator & Standard Sanitary Corp., 433 F. 2d 174 570, 582
United States v. A & P Trucking Co., 358 U.S. 121 572
United States v. Atkinson, 297 U.S. 157 163, 179, 180
United States v. Avalos, 541 F. 2d 1100 8, 18
United States v. Ball, 163 U.S. 662 682
United States v. Belmont, 301 U.S. 324 30
United States v. Berg, 636 F. 2d 203 268
United States v. Bergh, 352 U.S. 40 535
United States v. Bishton, 150 U.S. App. D. C. 51 8
United States v. Bowman, 487 F. 2d 1229 819
United States v. Braver, 450 F. 2d 799 132
United States v. Brown, 333 U.S. 18 640
United States v. Brown, 635 F. 2d 1207 803
United States v. Brown, 157 U.S. App. D. C 311 162
United States v. Cabral, 475 F. 2d 715 17
United States v. Cadillac Overall Supply Co., 568 F. 2d 1078 570, 582

Page

United States v. Califano, 297 U.S. 175 762
United States v. Chadwick, 433 U.S. 1 810–817, 819, 825, 834, 839–841
United States v. Chadwick, 393 F. Supp. 763 810
United States v. City and County of San Francisco, 310 U.S. 16 328
United States v. Commonwealth of Puerto Rico, C. A. No. 82–0726 (Dist. Ct. PR) 315
United States v. Continental Group, Inc., 603 F. 2d 444 570, 583, 584
United States v. Darby, 312 U.S. 100 766
United States v. Davis, 487 F. 2d 112 18
United States v. DeTienne, 468 F. 2d 151 18
United States v. DiBenedetto, 542 F. 2d 490 163
United States v. Dickson, 15 Pet. 141 81
United States v. Diez, 515 F. 2d 892 180
United States v. DiFrancesco, 449 U.S. 117 673, 676, 678
United States v. Dinitz, 424 U.S. 600 671–674, 676–679, 683–685, 692
United States v. Erika, Inc., 456 U.S. 201 191, 198
United States v. Evans, 481 F. 2d 990 819
United States v. Finnegan, 568 F. 2d 637 819
United States v. Fisher, 2 Cranch 358 28
United States v. Frady, 456 U.S. 152 134–136
United States v. General Motors Corp., 384 U.S. 127 300, 302
United States v. Gerald, 624 F. 2d 1291 163
United States v. Griffith, 334 U.S. 100 288
United States v. Gualtney, 581 F. 2d 1137 819
United States v. Hayman, 342 U.S. 205 182

Page

United States v. Henry, 615 F. 2d 1223 18, 19
United States v. Hillegas, 578 F. 2d 453 7
United States v. Hilton Hotels Corp., 467 F. 2d 1000 570, 582, 588
United States v. Hopkins, 427 U.S. 123 734, 735, 737, 739, 740
United States v. Issod, 508 F. 2d 990 819
United States v. Jimenez, 626 F. 2d 39 803
United States v. Jorn, 400 U.S. 470 672, 673, 678, 679, 682–685, 690
United States v. Kennebec Log Driving Co., 491 F. 2d 562 319
United States v. Kessler, 530 F. 2d 1246 689, 692
United States v. King, 395 U.S. 1 734
United States v. Lai Ming Tanu, 589 F. 2d 82 18
United States v. Lara, 172 U.S. App. D. C. 60 18
United States v. Lee, 455 U.S. 252 257
United States v. Lovasco, 431 U.S. 783 7, 20
United States v. Mann, 557 F. 2d 1211 180
United States v. Marion, 404 U.S. 307 6, 7, 9, 16, 17, 20
United States v. Martin, 543 F. 2d 577 8, 18
United States v. Martinez-Fuerte, 428 U.S. 543 829
United States v. McKim, 509 F. 2d 769 18, 20
United States v. Merrick, 464 F. 2d 1087 18
United States v. Milhollan, 599 F. 2d 518 819
United States v. Mississippi Tax Comm'n, 421 U.S. 599 734
United States v. Monia, 317 U.S. 424 625, 638
United States v. Morgan, 313 U.S. 409 195
United States v. Nixon, 634 F. 2d 306 18

Page

United States v. O'Brien, 391 U.S. 367 226
United States v. Oregon State Medical Society, 343 U.S. 326 301, 327
United States v. Parke, Davis & Co., 362 U.S. 29 300
United States v. Pender, 309 A. 2d 492 170
United States v. Pennsylvania R. Co., 308 F. Supp. 293 350
United States v. Perez, 9 Wheat. 579 672
United States v. Pink, 315 U.S. 203 30
United States v. Price, 383 U.S. 787 521
United States v. Real Estate Boards, 339 U.S. 485 858
United States v. Ridglea State Bank, 357 F. 2d 495 575, 583
United States v. Roberts, 548 F. 2d 665 18, 19
United States v. Rohm & Haas Co., 500 F. 2d 167 319
United States v. Rutherford, 442 U.S. 544 535
United States v. Sanchez, 521 F. 2d 244 568
United States v. Scott, 437 U.S. 82 676
United States v. Sherwood, 312 U.S. 584 735
United States v. Singer Manufacturing Co., 374 U.S. 174 300, 302, 855
United States v. Small, 345 F. Supp. 1246 18
United States v. Soriano, 497 F. 2d 147 819
United States v. Tateo, 377 U.S. 463 672–674, 678, 685
United States v. Testan, 424 U.S. 392 734, 738–741
United States v. Tramunti, 513 F. 2d 1087 819
United States v. United Continental Tuna Corp., 425 U.S. 164 468
United States v. United States District Court, 407 U.S. 297 829
United States v. United States Gypsum Co., 333 U.S. 364 284, 296, 855, 864

Page

United States v. United States Gypsum Co., 438 U.S. 422 590, 593
United States v. Universal Corp., 344 U.S. 218 28
United States v. Utah Construction & Mining Co., 384 U.S. 394 484, 485
United States v. Van Leeuwen, 397 U.S. 249 812
United States v. Vaughan, 443 F. 2d 92 180
United States v. Vento, 533 F. 2d 838 819
United States v. Western Pacific R. Co., 385 F. 2d 161 350
United States v. Wharton, 139 U.S. App. D. C. 293 158, 175
United States v. Wiltberger, 5 Wheat. 76 638
United States v. W. T. Grant Co., 345 U.S. 629 327
United States v. Yellow Cab Co., 338 U.S. 338 288, 301
United States ex rel. Binion v. O'Brien, 273 F. 2d 495 302
United States ex rel. Burnett v. Illinois, 619 F. 2d 668 121
United States ex rel. Johnson v. Johnson, 531 F. 2d 169 290
United States ex rel. Toth v. Quarles, 350 U.S. 11 5
Universities Research Assn. v. Coutu, 450 U.S. 754 377, 391, 408
University of California Regents v. Bakke, 438 U.S. 265 244, 257
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 270
Vardas v. Texas, 423 U.S. 904 1000
Vaughan v. Atkinson, 369 U.S. 527 721
Vaughn v. Rosen, 173 U.S. App. D. C. 187 637
Velazquez v. Thompson, 451 F. 2d 202 449
Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F. 2d 354 704

Page

Village. See name of village.
Vitek v. Jones, 445 U.S. 480 199
Voutsis v. Union Carbide Co., 452 F. 2d 889 470
Wade v. Hunter, 336 U.S. 684 672, 682–684, 691
Wainwright v. Sykes, 433 U.S. 72 110, 111, 116–119, 123, 125–130, 134–138, 141–146, 148, 149, 151, 159, 167, 168, 175–178, 184, 186, 954, 955
Waller v. Florida, 397 U.S. 387 1000
Walsh v. International Longshoremen's Assn., 488 F. Supp. 524 217
Walz v. Tax Comm'n, 397 U.S. 664 252
Wambles v. International Brotherhood of Teamsters, 488 F. 2d 888 433
Ward v. Village of Monroeville, 409 U.S. 57 196
Warner Bros., Inc. v. Gay Toys, Inc., 658 F. 2d 76 863
Warner & Co. v. Eli Lilly & Co., 265 U.S. 526 852, 854, 860, 861
Warth v. Seldin, 422 U.S. 490 239, 270
Washington v. Norton Manufacturing, Inc., 588 F. 2d 441 715
Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 762, 763, 774, 784
Washington Ethical Society v. District of Columbia, 101 U.S. App. D. C. 371 256
Watt v. Energy Action Educational Foundation, 454 U.S. 151 270
Waugh v. Gray, 422 U.S. 1027 1000
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 101
Weber v. Grand Lodge of Kentucky, F. & A. M., 169 F. 522 447, 448
Weeks v. United States, 232 U.S. 383 809
Weisberg v. Department of Justice, 160 U.S. App. D. C. 71 627
Wells v. Missouri, 419 U.S. 1075 1000
Wesberry v. Sanders, 376 U.S. 1 44
Western Maryland R. Co. v. Cross, 96 W. Va. 666 342, 346
Westover v. United Van Lines, Inc., 154 Ga. App. 865 342
Whalen v. Roe, 429 U.S. 589 788
Wheeldin v. Wheeler, 373 U.S. 647 374
Whitcomb v. Chavis, 396 U.S. 1055 44
Whitcomb v. Chavis, 403 U.S. 124 42, 43
White v. Weiser, 412 U.S. 783 40, 42
Whitney v. California, 274 U.S. 357 61
Wiborg v. United States, 163 U.S. 632 163
Widmar v. Vincent, 454 U.S. 263 247
Wilbur v. Robbins, 349 F. Supp. 149 132
Wilkerson v. Fortuna Corp., 554 F. 2d 745 711
Wilkins v. University of Houston, 454 F. 2d 388 285
William R. Warner & Co. v. Eli Lilly & Co., 265 U.S. 526 852, 854, 860, 861
Williams v. State, 274 Ark. 9 423
Williams v. Tallahassee Motors, Inc., 607 F. 2d 689 286
Williams v. United States, 401 U.S. 646 131
Willis v. Balkcom, 451 U.S. 926 428
Windward Shipping, Ltd. v. American Radio Assn., 415 U.S. 104 220, 221
Winship, In re, 397 U.S. 358 119, 122, 131, 133, 134, 149, 150
Wirtz v. Hotel Employees, 391 U.S. 492 441
Wise v. Lipscomb, 437 U.S. 535 40, 42
Withrow v. Larkin, 421 U.S. 35 195
Wolak v. United States, 366 F. Supp. 1106 739
Wood v. Dennis, 489 F. 2d 849 433, 439, 441

Page

Woods v. State, 233 Ga. 347 132
Woodson v. North Carolina, 428 U.S. 280 423, 611
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 703, 710, 712–714
Wright v. State, 33 Md. App. 68 183
Wyandotte Transportation Co. v. United States, 389 U.S. 191 377
Wynn v. Mahoney, 600 F. 2d 448 122
Yakus v. United States, 321 U.S. 414 312, 313, 326

Page

Yate v. United States, 354 U.S. 298 423
Younger v. Harris, 401 U.S. 37 797
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 329
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 671
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 711, 855
Zorach v. Clauson, 343 U.S. 306 246

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

UNITED STATES *v.* MACDONALD

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

No. 80–1582. Argued December 7, 1981—Decided March 31, 1982

In May 1970, the Army formally charged respondent, a captain in the Army Medical Corps, with the murders earlier that year of his pregnant wife and two children on a military reservation. Later that year, the military charges were dismissed and the respondent was honorably discharged on the basis of hardship, but at the Justice Department's request the Army Criminal Investigation Division (CID) continued its investigation of the homicides. In June 1972, the CID forwarded a report recommending further investigation, and the Justice Department, in 1974, ultimately presented the matter to a grand jury, which returned an indictment in January 1975, charging respondent with the three murders. On an interlocutory appeal from the District Court's denial of respondent's motion to dismiss the indictment, the Court of Appeals reversed, holding that the delay between the June 1972 submission of the CID report to the Justice Department and the 1974 convening of the grand jury violated respondent's Sixth Amendment right to a speedy trial. After this Court's decision that respondent could not appeal the denial of his motion to dismiss on speedy trial grounds until after completion of the trial, 435 U. S. 850, respondent was tried and convicted. The Court of Appeals again held that the indictment violated respondent's right to a speedy trial and dismissed the indictment.

Held: The time between dismissal of the military charges and the subsequent indictment on civilian charges may not be considered in determining whether the delay in bringing respondent to trial violated his right to a speedy trial under the Sixth Amendment. Pp. 6–10.

(a) The Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment or to a claim under any applicable statute of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending. Similarly, any undue delay after the Government, acting in good faith, formally dismisses charges must be scrutinized under the Due Process Clause, not the Speedy Trial Clause. Once charges are dismissed, the speedy trial guarantee—which is designed primarily to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges—is no longer applicable. Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation. Pp. 6–9.

(b) The Court of Appeals erred in holding, in essence, that criminal charges were pending against respondent during the entire period between his military arrest and his later indictment on civilian charges. Although respondent was subjected to stress and other adverse consequences flowing from the initial military charges and the continuing investigation after they were dismissed, he was not under arrest, not in custody, and not subject to any "criminal prosecution" until the civilian indictment was returned. He was legally and constitutionally in the same posture as though no charges had been made; he was free to go about his affairs, to practice his profession, and to continue with his life. Pp. 9–10.

632 F. 2d 258 and 635 F. 2d 1115, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 11. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 12.

Alan I. Horowitz argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, *John Fichter DePue*, and *Brian M. Murtagh*.

Ralph S. Spritzer argued the cause for respondent. With him on the brief were *Bernard L. Segal* and *Michael J. Malley.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the time between dismissal of military charges and a subsequent indictment on civilian criminal charges should be considered in determining whether the delay in bringing respondent to trial for the murder of his wife and two children violated his rights under the Speedy Trial Clause of the Sixth Amendment.

I

The facts in this case are not in issue; a jury heard and saw all the witnesses and saw the tangible evidence. The only point raised here by petitioner involves a legal issue under the Speedy Trial Clause of the Sixth Amendment. Accordingly, only a brief summary of the facts is called for. In the early morning of February 17, 1970, respondent's pregnant wife and his two daughters, aged 2 and 5, were brutally murdered in their home on the Fort Bragg, N. C., military reservation. At the time, MacDonald, a physician, was a captain in the Army Medical Corps stationed at Fort Bragg. When the military police arrived at the scene following a call from MacDonald, they found the three victims dead and MacDonald unconscious from multiple stab wounds, most of them superficial, but one a life-threatening chest wound which caused a lung to collapse.

At the time and in subsequent interviews, MacDonald told of a bizarre and ritualistic murder. He stated that he was asleep on the couch when he was awakened by his wife's screams. He said he saw a woman with blond hair wearing a floppy hat, white boots, and a short skirt carrying a lighted

candle and chanting "acid is groovy; kill the pigs."[1] He claimed that three men standing near the couch attacked him, tearing his pajama top, stabbing him, and clubbing him into unconsciousness. When he awoke, he found his wife and two daughters dead. After trying to revive them and covering his wife's body with his pajama top, MacDonald called the military police. He lost consciousness again before the police arrived.

Physical evidence at the scene contradicted MacDonald's account and gave rise to the suspicion that MacDonald himself may have committed the crime.[2] On April 6, 1970, the Army Criminal Investigation Division (CID) advised MacDonald that he was a suspect in the case and confined him to quarters. The Army formally charged MacDonald with the three murders on May 1, 1970. In accordance with Article

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[1] A woman generally within this description was apparently seen by the military police as they rushed to answer respondent's call. During the course of this case, considerable suspicion has been focused upon Helena Stoeckley. Stoeckley was 19 at the time and a heavy user of heroin, opium, mescaline, LSD, marihuana, and other drugs; within days after the crime she began telling people that she was involved in the murder or that she at least had accompanied the murderers and watched them commit the crimes. She also wore mourning dress and displayed a funeral wreath on the day of the victims' funeral. The investigation confirmed that she had been seen returning to her apartment at 4:30 on the morning following the killings in the company of men also generally fitting the descriptions given by MacDonald. Stoeckley testified at trial that she had no memory of the night in question because she was "stoned" that night. She did, however, admit that at the time of the crime she owned and frequently wore a blond wig and a pair of white boots and that she destroyed them within a few days after the crime because they might connect her with the episode.

[2] Threads from MacDonald's pajama top, supposedly torn in the living room, were found in the master bedroom, some under his wife's body, and in the children's bedroom, but not in the living room. There were 48 puncture holes in the top, yet MacDonald had far fewer wounds. The police were able to identify the bloodstains of each victim, and their location did not support MacDonald's story. Blood matching the type of MacDonald's children was found on MacDonald's glasses and pajama top. Fragments of surgical gloves were found near the bodies of the victims; the gloves from which those fragments came were found under a sink in the house.

32 of the Uniform Code of Military Justice, 10 U. S. C. § 832, the Commanding General of MacDonald's unit appointed an officer to investigate the charges. After hearing a total of 56 witnesses, the investigating officer submitted a report recommending that the charges and specifications against MacDonald be dismissed. The Commanding General dismissed the military charges on October 23, 1970. On December 5, 1970, the Army granted MacDonald's request for an honorable discharge based on hardship.[3]

At the request of the Justice Department, however, the CID continued its investigation. In June 1972, the CID forwarded a 13-volume report to the Justice Department recommending further investigation. Additional reports were submitted during November 1972 and August 1973. Following evaluation of those reports, in August 1974, the Justice Department presented the matter to a grand jury. On January 24, 1975, the grand jury returned an indictment charging MacDonald with the three murders.

Prior to his trial in Federal District Court,[4] MacDonald moved to dismiss the indictment, in part on the grounds that the delay in bringing him to trial violated his Sixth Amendment right to a speedy trial. The District Court denied the motion, but the Court of Appeals allowed an interlocutory appeal and reversed, holding that the delay between the June 1972 submission of the CID report to the Justice Department and the August 1974 convening of the grand jury violated MacDonald's constitutional right to a speedy trial. *MacDonald* v. *United States*, 531 F. 2d 196 (CA4 1976). We granted certiorari and reversed, holding that a criminal defendant could not appeal the denial of a motion to dismiss on Speedy Trial Clause grounds until after the trial had been completed. *United States* v. *MacDonald*, 435 U. S. 850 (1978).

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[3] MacDonald's discharge barred any further military proceedings against him. *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955).

[4] The District Court had jurisdiction because the crimes were committed on military property. 18 U. S. C. §§ 7(3), 1111.

MacDonald was then tried and convicted on two counts of second-degree murder and one count of first-degree murder. He was sentenced to three consecutive terms of life imprisonment. On appeal, a divided panel of the Fourth Circuit again held that the indictment violated MacDonald's Sixth Amendment right to a speedy trial and dismissed the indictment. 632 F. 2d 258 (1980).[5] The court denied rehearing en banc by an evenly divided vote. 635 F. 2d 1115 (1980).

We granted certiorari, 451 U. S. 1016 (1981), and we reverse.[6]

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." A literal reading of the Amendment suggests that this right attaches only when a formal criminal charge is instituted and a criminal prosecution begins.

In *United States* v. *Marion*, 404 U. S. 307, 313 (1971), we held that the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused:

> "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused,

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[5] In addition to the Speedy Trial Clause issue, MacDonald raised a number of issues involving the conduct of the trial and rulings of the trial judge. He also claimed that the delay in bringing him to trial resulted in a denial of his Fifth Amendment due process rights. The Court of Appeals declined to reach those issues. Accordingly, we do not decide those issues, instead leaving them for the Court of Appeals on remand.

[6] Our analysis of the speedy trial claim is not to be influenced by consideration of the evidentiary basis of the jury verdict. The jury that heard all of the witnesses and saw the evidence unanimously decided that respondent murdered his wife and children. Respondent does not challenge the jury verdict itself.

> nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him."

In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim. *Dillingham* v. *United States*, 423 U. S. 64 (1975). Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, see *United States* v. *Lovasco*, 431 U. S. 783, 788–789 (1977), or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.

Similarly, the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause.[7]

The Court identified the interests served by the Speedy Trial Clause in *United States* v. *Marion*, *supra*, at 320:

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective

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[7] Our holding agrees with the determination made by Congress in enacting the Speedy Trial Act of 1974, 18 U. S. C. § 3161 *et seq.* The Act, intended "to give effect to the sixth amendment right to a speedy trial . . . ," S. Rep. No. 93–1021, p. 1 (1974), provides that if charges are initially dismissed and later reinstated, the period between the dismissal and the reinstatement is not to be included in computing the time within which a trial must commence. 18 U. S. C. §§ 3161(d), 3161(h)(6).

Most of the Courts of Appeals considering this issue have also reached the conclusion that the period after dismissal of initial charges is not included in determining whether the Speedy Trial Clause has been violated. See, *e. g.*, *United States* v. *Hillegas*, 578 F. 2d 453, 457–458 (CA2 1978);

> defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."

See also *Barker* v. *Wingo*, 407 U. S. 514, 532–533 (1972).

The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Once charges are dismissed, the speedy trial guarantee is no longer applicable.[8] At that point, the formerly accused is, at most, in the same position as any other subject of a crimi-

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Arnold v. *McCarthy*, 566 F. 2d 1377, 1383 (CA9 1978); *United States* v. *Martin*, 543 F. 2d 577 (CA6 1976), cert. denied, 429 U. S. 1050 (1977); *United States* v. *Bishton*, 150 U. S. App. D. C. 51, 55, 463 F. 2d. 887, 891 (1972). The Fifth Circuit reached a seemingly contrary result in *United States* v. *Avalos*, 541 F. 2d 1100 (1976), cert. denied, 430 U. S. 970 (1977). However in that case the court relied on unusual facts; the Government dismissed charges pending in one district in order to prosecute the defendants on those same charges in another district.

In none of the cases cited in the dissenting opinion, *post*, at 17–18, n. 2, from the First, Seventh, or Tenth Circuits did the Court of Appeals consider or discuss the issue before us.

[8] *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), is not to the contrary. There, under an unusual state procedure, a prosecutor was able to suspend

nal investigation. Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life. This is true whether or not charges have been filed and then dismissed. This was true in *Marion*, where the defendants had been subjected to a lengthy investigation which received considerable press attention.[9] But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, "a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *United States* v. *Marion*, 404 U. S., at 321. Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

III

The Court of Appeals held, in essence, that criminal charges were pending against MacDonald during the entire period between his military arrest and his later indictment on civilian charges.[10] We disagree. In this case, the homicide charges initiated by the Army were terminated less than a

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proceedings on an indictment indefinitely. The prosecutor could activate the charges at any time and have the case restored for trial, "without further order" of the court. *Id.*, at 214. The charges against the defendant were thus never dismissed or discharged in any real sense so the speedy trial guarantee continued to apply.

[9] The *Marion* defendants were charged with operating a fraudulent home improvement business. The Court noted that the Washington Post ran a series of articles about the ongoing investigation of the business, and reported that the local United States Attorney predicted that indictments would be forthcoming. *United States* v. *Marion*, 404 U. S., at 309.

[10] The original Court of Appeals decision concluded "that MacDonald's military arrest was the functional equivalent of a civilian arrest" for Speedy Trial Clause purposes. *United States* v. *MacDonald*, 531 F. 2d 196, 204 (CA4 1976). Judge Craven, dissenting, disagreed with that con-

year after the crimes were committed; after that, there was no criminal prosecution pending on which MacDonald could have been tried until the grand jury, in January 1975, returned the indictment on which he was tried and convicted.[11] During the intervening period, MacDonald was not under arrest, not in custody, and not subject to any "criminal prosecution." Inevitably, there were undesirable consequences flowing from the initial accusation by the Army and the continuing investigation after the Army charges were dismissed. Indeed, even had there been no charges lodged by the Army, the ongoing comprehensive investigation would have subjected MacDonald to stress and other adverse consequences. However, once the charges instituted by the Army were dismissed, MacDonald was legally and constitutionally in the same posture as though no charges had been made.[12] He was free to go about his affairs, to practice his profession, and to continue with his life.

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clusion, stating that the military proceedings were equivalent to a grand jury investigation followed by a failure to file an indictment. *Id.*, at 209. In its petition for certiorari, the Government expressly declined to raise the issue of whether the military investigation triggered MacDonald's Sixth Amendment rights; we therefore do not express any opinion on that issue.

[11] The initial Court of Appeals panel held that the prosecution by the Army and that by the Justice Department were conducted "by the government in its single sovereign capacity . . . ." *Id.*, at 204. Of course, an arrest or indictment by one sovereign would not cause the speedy trial guarantees to become engaged as to possible subsequent indictments by another sovereign.

[12] There is no allegation here that the Army acted in bad faith in dismissing the charges. This is not a case where the Government dismissed and later reinstituted charges to evade the speedy trial guarantee. The Army clearly dismissed its charges because the Commanding General of MacDonald's unit, following the recommendation of the Article 32 investigating officer, concluded that they were untrue.

There is nothing to suggest that the Justice Department acted in bad faith in not securing an indictment until January 1975. After the Army dismissed its charges, it continued its investigation at the request of the

The Court of Appeals acknowledged, and MacDonald concedes, that the delay between the civilian indictment and trial was caused primarily by MacDonald's own legal manuevers and, in any event, was not sufficient to violate the Speedy Trial Clause. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE STEVENS, concurring in the judgment.

For the reasons stated by JUSTICE MARSHALL in Part II of his opinion, I also conclude that MacDonald's constitutional right to a speedy trial was not suspended during the period between the Army's dismissal of its charges in 1970 and the return of the civilian indictment in 1975. JUSTICE MARSHALL also is clearly correct in stating that the question whether the delay was constitutionally unacceptable is "close." *Post*, at 21. Since his opinion fairly identifies the countervailing factors, I need only state that the interest in allowing the Government to proceed cautiously and deliberately before making a final decision to prosecute for such a serious offense is of decisive importance for me in this case. I therefore concur in the Court's judgment.

Justice Department; the Army's initial 13-volume report was not submitted to the Justice Department until June 1972, and supplemental reports were filed as late as August 1973. Within a year, the Justice Department completed its review of the massive evidence thus accumulated and submitted the evidence to a grand jury. The grand jury returned the indictment five months later.

Plainly the indictment of an accused—perhaps even more so the indictment of a physician—for the heinous and brutal murder of his pregnant wife and two small children is not a matter to be hastily arrived at either by the prosecution authorities or by a grand jury. The devastating consequences to an accused person from the very fact of such an indictment is a matter which responsible prosecutors must weigh carefully. The care obviously given the matter by the Justice Department is certainly not any indication of bad faith or deliberate delay.

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

On February 17, 1970, in the early morning, Dr. Jeffrey R. MacDonald called military police and requested help. When police arrived at the family quarters, they found him unconscious and suffering from multiple stab wounds, including one that threatened his life. His wife and two young children had been murdered. On May 1, 1970, the Army formally charged him with the murders. The Army dropped those charges on October 23, 1970, but reopened the investigation at the request of the Justice Department and handed over a comprehensive report in June 1972. The Justice Department did not convene a grand jury until August 1974, more than two years later. The Court of Appeals charged this delay to Government "indifference, negligence, or ineptitude." *United States* v. *MacDonald*, 531 F. 2d 196, 207 (CA4 1976) *(MacDonald I)*. On January 24, 1975, MacDonald was indicted by a civilian grand jury on three counts of murder, the same charges that the military authorities had dropped. Trial commenced in the summer of 1979.

Confronted with these facts, the majority reaches the facile conclusion that the speedy trial right is not implicated at all when the same sovereign initiates, drops, and then reinitiates criminal charges. That conclusion is not justified by the language of the Speedy Trial Clause or the teachings of our cases, and it is hopelessly at odds with any sensible understanding of speedy trial policies. I must dissent.

I

Because the majority scants the relevant facts in this case, I review them in somewhat more detail. The initial investigation of the murders in this case was conducted by the Army's Criminal Investigation Division (CID) and the Federal Bureau of Investigation, as well as the local police. On May 1, 1970, the Army formally charged MacDonald with three specifications of murder, in violation of Article 118 of

the Uniform Code of Military Justice, 10 U. S. C. § 918. The Army conducted a lengthy hearing during which 56 witnesses testified. MacDonald himself testified and was extensively cross-examined. At the conclusion of the hearing, the investigating officer filed an exhaustive report recommending that the charges against MacDonald be dismissed "because the matters set forth in all charges and specifications are not true." See *MacDonald I*, *supra*, at 200. He also recommended that the civilian authorities investigate Helena Stoeckley, who had told several persons that she was involved in the crime. On October 23, 1970, the Commanding General of MacDonald's unit accepted the recommendation and dismissed the charges. In December, MacDonald received an honorable discharge.

The prosecution did not, however, terminate on that date. Within a month of MacDonald's discharge, at the specific request of the Justice Department, the CID continued its investigation. The renewed investigation was extensive and wide-ranging. The CID conducted 699 interviews and, at the request of the Department, sent the weapons and the victims' clothing to the FBI laboratory in July 1971. In December 1971, the CID completed its investigation, and in June 1972, the CID submitted a 13-volume report to the Justice Department. Although supplemental reports were transmitted in November 1972 and August 1973, the Court of Appeals found that "no significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later." *MacDonald I*, *supra*, at 206. Indeed, the United States Attorney for the Eastern District of North Carolina recommended that the matter be submitted to a grand jury within six months of June 1972, and in 1973, the CID suggested the convening of a grand jury before it conducted further investigation.

MacDonald was fully aware of these investigations. After his honorable discharge, MacDonald moved to California and resumed the practice of medicine. In 1971, the CID again in-

terviewed him. From January 1972 to January 1974, he repeatedly requested the Government to complete its investigation, and offered to submit to further interviews. The Justice Department declined to question him or to advise him when the investigation would terminate. In January 1974, the Department wrote that "this case is under active investigation and will remain under consideration for the foreseeable future." *MacDonald I*, *supra*, at 201, n. 6. There was no further correspondence.

The Government did not present the case to a civilian grand jury until August 1974. MacDonald waived his right to remain silent and testified before the grand jury for a total of more than five days. Numerous other witnesses testified, the bodies of the victims were exhumed, and the FBI reinvestigated certain aspects of the crime. An indictment was returned on January 24, 1975. The indictment charged MacDonald with three counts of first-degree murder.

The Government offered no legitimate reason—not even docket congestion—for the delay between the submission of the June 1972 report and the presentation to the grand jury in August 1974. The Court of Appeals explained:

> "The leisurely pace from June 1972 until the indictment was returned in January 1975 appears to have been primarily for the government's convenience. The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment of the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in 1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy 'because of government bureaucracy.'" *MacDonald I*, *supra*, at 206 (footnotes omitted).

The FBI's failure to complete its analysis until 1974 is the only Government justification for the delay that the District

Court mentioned in its initial decision denying MacDonald's motion to dismiss on speedy trial grounds. 1 App. for Appellant in No. 79–5253 (CA4), p. 46. In its post-trial decision, the District Court again denied the motion, but stated its belief that "the case could have been put before the grand jury at a much earlier date than it was." 485 F. Supp. 1087, 1089 (EDNC 1979).

II

The majority's analysis is simple: the Speedy Trial Clause offers absolutely no protection to a criminal defendant during the period that a charge is not technically pending. But simplicity has its price. The price, in this case, is disrespect for the language of the Clause, important precedents of this Court, and speedy trial policies.

"In all criminal prosecutions," the Sixth Amendment recites, "the accused shall enjoy the right to a speedy and public trial." On its face, the Sixth Amendment would seem to apply to one who has been publicly accused, has obtained dismissal of those charges, and has then been charged once again with the *same* crime by the *same* sovereign. Nothing in the language suggests that a defendant must be continuously under indictment in order to obtain the benefits of the speedy trial right. Rather, a natural reading of the language is that the Speedy Trial Clause continues to protect one who has been accused of a crime until the government has completed its attempts to try him for that crime.

Our cases, to the extent they address the issue, contradict the majority's view. In *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), the prosecutor entered a "*nolle prosequi* with leave" after the first trial ended in a mistrial. Under that procedure, the defendant was discharged from custody and subject to no obligation to report to the court, but the prosecutor could reinstate the indictment at any time upon application to the court. This Court held that the indefinite postponement of the prosecution, over the defendant's objection, "clearly" denied the defendant the right to a speedy

trial. *Id.*, at 222. The Court reasoned that the defendant "may be denied an opportunity to exonerate himself in the discretion of the solicitor and held subject to trial, over his objection, throughout the unlimited period in which the solicitor may restore the case to the calendar. During that period, there is no means by which he can obtain a dismissal or have the case restored to the calendar for trial." *Id.*, at 216. In that case, of course, the indictment technically had not been dismissed when the defendant was discharged from custody. However, the prosecutor was required to take affirmative steps to reinstate the prosecution; no charges were actively pending against Klopfer. The Court nevertheless held that the speedy trial right applied.

Klopfer teaches that the anxiety suffered by an accused person, even after the initial prosecution has terminated and after he has been discharged from custody, warrants application of the speedy trial protection. The analysis in *United States* v. *Marion*, 404 U. S. 307 (1971), relied on by the majority, is entirely consistent with this teaching. The Court in *Marion* held that the Speedy Trial Clause does not apply to the period before a defendant is first indicted, arrested, or otherwise officially accused. However, the Court hardly suggested that after the first official accusation has been made, the dropping of charges prior to a *second* official accusation wipes the slate clean.

The Court explained its holding by stating that "the indictment was the *first official act* designating appellees as accused individuals." *Id.*, at 324 (emphasis added). Sixth Amendment provisions "would seem to afford no protection to those *not yet accused*, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time." *Id.*, at 313 (emphasis added). Prior to the time of arrest or indictment, an accused may suffer anxiety, but he does not suffer the special form of anxiety engendered by public accusation. "Arrest is a public act that may seriously interfere with the defendant's liberty,

whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Id.*, at 320. The Court did not address the question whether, after a public accusation has been made but charges have technically been dropped, the defendant is in precisely the same constitutional situation as if no accusation had ever been made.

Marion also adverts to a serious procedural impediment to extending the speedy trial right prior to a first arrest or indictment: inquiry into when the police could have made an arrest or when the prosecutor could have brought charges would raise difficult problems of proof. *Id.*, at 321, n. 13; see *id.*, at 313. But in a case of successive prosecutions on the same charge, these difficulties do not exist: the speedy trial right should attach from the date of the initial accusation, a date which is simple to determine.[1] In short, the majority's decision to suspend application of the speedy trial right is not required by, and may be inconsistent with, our prior cases.[2]

The majority also plainly ignores fundamental speedy trial policies. The special anxiety that a defendant suffers because of a public accusation does not disappear simply because the initial charges are temporarily dismissed. Especially when the defendant and the public are aware of an ongoing government investigation of the same charges, the defendant's interest in final resolution of the charges remains acute. After all, the government has revealed the seriousness of its threat of prosecution by initially bringing charges. The majority thus paints an entirely unrealistic portrait when

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[1] *Marion* also notes that the statute of limitations will serve as protection in cases of pre-indictment delay. But no such protection exists here, since there is no statute of limitations for murder.

[2] Contrary to the majority's suggestion, most of the Courts of Appeals considering the issue have concluded that the period after dismissal of initial charges *is* included for speedy trial purposes. The First, Fifth, Seventh, and Tenth Circuits have all reached this conclusion. See *United*

it suggests that such a defendant "is, at most, in the same position as any other subject of a criminal investigation." *Ante*, at 8–9.

MacDonald was painfully aware of the ongoing Army and Justice Department investigations. He was interviewed again by military authorities soon after his honorable discharge. He repeatedly inquired about the progress of the investigations. He even proposed to submit to further interviews in order to speed final resolution of his case. MacDonald "realized that the favorable conclusion of the [military] proceedings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his

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States v. *Cabral*, 475 F. 2d 715 (CA1 1973); *United States* v. *Nixon*, 634 F. 2d 306, 308–309 (CA5), cert. denied, 454 U. S. 828 (1981); *United States* v. *Avalos*, 541 F. 2d 1100, 1108, n. 13 (CA5 1976); *United States* v. *McKim*, 509 F. 2d 769, 773 (CA5 1975); *Jones* v. *Morris*, 590 F. 2d 684 (CA7) *(per curiam)*, cert. denied, 440 U. S. 965 (1979); *United States* v. *DeTienne*, 468 F. 2d 151, 155 (CA7 1972), cert. denied, 410 U. S. 911 (1973); *United States* v. *Merrick*, 464 F. 2d 1087, 1090 (CA10), cert. denied, 409 U. S. 1023 (1972). See also *United States* v. *Small*, 345 F. Supp. 1246, 1248–1250 (ED Pa. 1972) (holding that right attaches from initial military arrest through civilian trial, although in fact civilian indictment immediately followed dismissal of military charges). But see *United States* v. *Davis*, 487 F. 2d 112, 116 (CA5 1973), cert. denied, 415 U. S. 981 (1974).

Even the Circuits whose opinions the majority cites as support have issued somewhat contradictory signals on this question. See *United States* v. *Lai Ming Tanu*, 589 F. 2d 82, 88–89 (CA2 1978) (leaving open question whether speedy trial right may ever apply continuously to successive state and federal prosecutions for the same transaction); *United States* v. *Roberts*, 548 F. 2d 665 (CA6), cert. denied *sub nom. Williams* v. *United States*, 431 U. S. 920 (1977) (considering time between dismissal and indictment for speedy trial purposes without discussing contrary opinion in *United States* v. *Martin*, 543 F. 2d 577 (CA6 1976), cert. denied, 429 U. S. 1050 (1977)); *United States* v. *Henry*, 615 F. 2d 1223, 1233, n. 13 (CA9 1980) (leaving question open, and limiting *Arnold* v. *McCarthy*, 566 F. 2d 1377 (CA9 1978), to the case of a dismissal following a mistrial); *United States* v. *Lara*, 172 U. S. App. D. C. 60, 63–65, 520 F. 2d 460, 463–465 (1975) (considering tactical Government delay between dismissal and indictment for speedy trial purposes).

own expense for his continuing defense. He remained under suspicion and was subjected to the anxiety of the threat of another prosecution." *MacDonald I*, 531 F. 2d, at 204 (footnote omitted). It is simply absurd to suggest that he has suffered no greater anxiety, disruption of employment, financial strain, or public obloquy than if the military charges had never been brought.

The majority's insistence that the dismissal of an indictment eliminates speedy trial protections is not only inconsistent with the language and policies of the Speedy Trial Clause and with this Court's decisions. It is also senseless. Any legitimate government reason for delay during the period between prosecutions can, indeed must, be weighed when a court determines whether the defendant's speedy trial right has been violated. No purpose is served by simply ignoring that period for speedy trial purposes.[3] In *Barker* v. *Wingo*, 407 U. S. 514 (1972), this Court rejected an inflexible approach to the right to a speedy trial in favor of "a difficult and sensitive balancing process." *Id.*, at 533 (footnote omitted). Lower court opinions indicate that this responsibility can be faithfully discharged in the special circumstances of successive prosecutions.[4]

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[3] The Government argues that considering the time between dismissal and reinstitution of charges for speedy trial purposes will have untoward consequences: it will discourage prosecutors from dismissing charges that were obtained improperly or prematurely, or that appear unwarranted in light of new evidence, and it will dissuade prosecutors from reopening dismissed charges in light of changed circumstances. The argument is specious, since a court will consider the Government's reasons for delay in ruling on the speedy trial issue. If the Government has dismissed charges in good faith and reopens the case based on material new evidence, then the delay should not count against the Government. In this case, the Court of Appeals sensitively evaluated the Government's reasons for delay and only counted a portion of that time against the Government. See n. 7, *infra*.

[4] See, *e. g.*, *United States* v. *Henry*, *supra* (assuming that time between indictments is considered in speedy trial calculus but finding no violation, where part of one-year delay was due to renewed investigation, part was due to negligence, and prejudice was not shown); *United States* v. *Roberts*,

It is no answer that the Due Process Clause protects against purposeful or tactical delay that causes the accused actual prejudice at trial. The due process constraint is limited, and does not protect against delay which is not for a tactical reason but which serves no legitimate prosecutorial purpose.[5] See *United States* v. *Lovasco*, 431 U. S. 783 (1977). According only limited protection is appropriate prior to the first arrest or indictment because the state has a substantial interest in conducting a relatively unrestricted pre-accusation investigation, see *id.*, at 790–795, and because a person not yet accused has a lesser interest in a speedy prosecution. But when a government has already investigated and accused a defendant, it is in a much better position, and properly shoulders a greater responsibility, to reinvestigate and reprosecute the defendant with reasonable promptness. Moreover, as explained above, delay between public accusation, dismissal of charges, and renewed indictment causes peculiar anxiety to the accused, as well as the other consequences of arrest described in *Marion*. Thus, the government must affirmatively demonstrate a legitimate reason, other than neglect or indifference, for such a delay.

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supra (considering time between dismissal of initial charges and return of indictment but finding no violation, where two of codefendants were involved in other court proceedings, evidence was complex, witnesses changed their stories, prosecution needed to judge whether to use confidential informants, and defendant showed no actual prejudice); *Jones* v. *Morris*, *supra* (considering time between dismissal of first indictment and reinstitution of proceedings but finding no violation, where defendant did not assert speedy trial right until after second indictment was brought, on the eve of trial; where delay, although unexplained, was not in bad faith; and where defendant proved no special anxiety or actual prejudice); *United States* v. *McKim*, *supra* (considering time between first indictment and trial on *third* indictment but finding no violation, where delay was only one year and defendant did not prove actual prejudice).

[5] Whether the delay in this case falls within that category is unclear. The Court of Appeals did not reach the due process issue, and this Court therefore properly leaves it open on remand.

The majority's approach denigrates speedy trial policies and presents a serious potential for abuse. Under that approach, the government could indefinitely delay a second prosecution for no reason, or even in bad faith,[6] if the defendant is unable to show actual prejudice at trial. The Court of Appeals in this very case suggested that the Government may have proceeded on the assumption that pre-indictment delay would be of no speedy trial consequence. *MacDonald I*, *supra*, at 206, n. 17. I fear that, as a consequence of today's decision, unreasonable and unjustifiable delay between prosecutions may become commonplace.

III

I conclude that application of the speedy trial right was not suspended during the period between the Army's dismissal of murder charges against MacDonald in October 1970 and the return of a civilian indictment on the same charges in January 1975. The question remains whether the delay violated his speedy trial right. I find the question close. However, after examining the four speedy trial right factors enunciated in *Barker* v. *Wingo*, *supra*—length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant—I agree with the Court of Appeals that MacDonald's speedy trial rights were violated.

The proper focus for this analysis is the 26-month period between June 1972 and the convening of a grand jury in August 1974.[7] Neither the District Court nor the Court of Ap-

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[6] The majority's statement that the delay in this case was not in bad faith, *ante*, at 10–11, n. 12, is puzzling. Under the majority's constricted view of the Sixth Amendment, the good or bad faith of the government in the period between successive prosecutions is entirely irrelevant to whether the defendant's speedy trial right has been violated, since the defendant is not continually under formal accusation during that period.

[7] Although the total period of delay between initial prosecution and trial is more than nine years, the period prior to dismissal of military charges is not chargeable to the Government because those charges were promptly resolved. The Court of Appeals properly also gave little weight to the pe-

peals found any legitimate reason for this delay. As the Court of Appeals' second panel concluded: "The primary reason for the two-year delay was either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government bureaucracy (the contention of the involved Assistant U. S. Attorney)." 632 F. 2d 258, 262 (CA4 1980) *(MacDonald II)*. Although the FBI did conduct further tests and investigation after the grand jury was convened, the Government has not demonstrated that it could not have pursued those leads earlier.

MacDonald undeniably asserted his right to a speedy trial vigorously and often, beginning in January 1972. Although the Government's delay in pressing formal civilian charges prevented MacDonald from filing a formal motion to dismiss on speedy trial grounds, he invoked his right in the only meaningful way open to him. Indeed, the strength of his efforts is a powerful indication that he has suffered serious personal prejudice. See *Barker* v. *Wingo*, 407 U. S., at 531.

The last speedy trial factor, and the most difficult to evaluate on this record, is prejudice to the accused. Proof of actual prejudice to the defense at trial is not, of course, necessary to demonstrate a speedy trial violation. *Moore* v. *Arizona*, 414 U. S. 25 (1973) *(per curiam)*. In *Moore*, this Court held that a defendant's speedy trial claim should not have been dismissed without further hearing, where the defendant was tried three years after he was first charged and 28 months after he demanded a speedy trial. In this case, the period of unjustified delay is at least two years, and MacDonald demanded an early disposition prior to that period. Because of this delay, a speedy trial violation could be found in this case, even without proof of actual prejudice at trial.

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riod between the CID's initial reinvestigation and the submission of its report to the Justice Department in June 1972, since the prior dismissal for insufficient evidence warranted a more extensive investigation. The period subsequent to the civilian indictment was mainly consumed by judicial proceedings to evaluate MacDonald's speedy trial claims.

The record is clear that the delay caused MacDonald to suffer other forms of substantial prejudice, including continuing anxiety, intrusive publicity, legal expense, and disruption of a new civilian career.

The proof of actual prejudice at trial in this case, although somewhat speculative, does buttress MacDonald's speedy trial claim. It is possible that Stoeckley's trial testimony would have been less confused and more helpful to MacDonald at an earlier date. This testimony was critical to MacDonald, whose principal defense was that she was one of a group of intruders who committed the murders. Although Stoeckley was hardly a reliable witness, she did testify at trial that she had no memory of the events that night, in contradiction to some of her earlier out-of-court statements. See *MacDonald II*, 632 F. 2d, at 264–265. Her claim of loss of memory obviously became more credible with the passage of time. It is likewise possible that the inevitable "coaching" of Government witnesses prior to their testimony would have had lesser adverse impact on the defense, and could have been minimized more effectively by cross-examination, had the trial occurred earlier.[8] See *id.*, at 263–264. The unusual facts of this case, recited by the majority, suggest that slight differences in trial testimony may well have influenced the verdict.[9]

Balancing these factors, I conclude that the Court of Appeals was correct in finding a speedy trial right violation. The Government undoubtedly has an interest in renewing the investigation of a charge that has been dismissed, in evaluat-

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[8] For example, a babysitter who had testified in 1970 that she had not seen an ice pick in MacDonald's home had changed her story by the time of trial. Cross-examination by the defense did not cause her to reaffirm her earlier story. Tr. 3559–3560, 3567–3572.

[9] I therefore disagree with the majority that the speedy trial analysis should not be influenced by the evidentiary basis for the jury verdict. *Ante*, at 6, n. 6. Moreover it is obvious that respondent "does not challenge the jury verdict itself," *ibid.*, only because that issue is not directly presented on this petition.

ing carefully whether a second prosecution should be brought, and in avoiding undue haste, especially when the charge is murder. By the same token, when such a serious charge has already been brought, and when the defendant is suffering the consequences of that public charge and of a renewed investigation, the Government must not delay its decision for reasons of indifference or neglect. The Government's interest in reaching an informed decision whether to prosecute is certainly legitimate; but vague, unexplained references to internal disagreement about prosecution cannot justify more than two years of indecision. Because the record in this case reveals no legitimate reason for a substantial period of pretrial delay, and because MacDonald may have suffered prejudice at trial and clearly suffered other forms of prejudice, I would affirm the Court of Appeals' ruling that his speedy trial right was violated.

IV

The majority's opinion in this case is a disappointing exercise in strained logic and judicial illusion. Suspending application of the speedy trial right in the period between successive prosecutions ignores the real impact of the initial charge on a criminal defendant and serves absolutely no governmental interest. This Court has warned before against "allowing doctrinaire concepts . . . to submerge the practical demands of the constitutional right to a speedy trial." *Smith* v. *Hooey*, 393 U. S. 374, 381 (1969). The majority fails to heed that advice.

For the foregoing reasons, I dissent.

WEINBERGER, SECRETARY OF DEFENSE, ET AL. v. ROSSI ET AL.

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

No. 80–1924. Argued February 22, 1982—Decided March 31, 1982

In 1968, the President entered into an agreement with the Republic of the Philippines providing for the preferential employment of Filipino citizens at United States military bases in the Philippines. In 1971, Congress enacted § 106 of Pub. L. 92–129, which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty." Thereafter, respondent United States citizens residing in the Philippines were notified that their jobs at a naval base there were being converted into local national positions in accordance with the 1968 agreement. After unsuccessfully pursuing an administrative remedy, respondents then filed suit in Federal District Court, alleging that the preferential employment provisions of the agreement violated § 106. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed.

Held: The word "treaty" as used in § 106 includes executive agreements, such as the one involved here, and is not limited to those international agreements concluded by the President with the advice and consent of the Senate pursuant to Art. II, § 2, cl. 2, of the Constitution. Pp. 28–36.

(a) In view of the fact that Congress has not been consistent in various other Acts in distinguishing between Art. II treaties and other forms of international agreements, it is not dispositive that Congress in § 106 used the term "treaty" without specifically including international agreements that are not Art. II treaties. But in the case of a statute such as § 106 that touches upon the United States' foreign policy, there is a particularly justifiable reason to construe Congress' use of "treaty" to include international agreements as well as Art. II treaties. Cf. *B. Altman & Co.* v. *United States*, 224 U. S. 583. To construe § 106 otherwise would mean that Congress intended to repudiate 13 existing executive agreements, including the one in this case, providing for preferential hiring of local nationals. Pp. 28–32.

(b) The legislative history of § 106 provides no support for attributing such an intent to Congress, but rather discloses that Congress was primarily concerned with the financial hardship to American servicemen

that resulted from employment discrimination against American citizens at overseas bases. Pp. 32–36.

206 U. S. App. D. C. 148, 642 F. 2d 553, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous court.

Barbara E. Etkind argued the cause for petitioners. With her on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *William G. Kanter*, and *Freddi Lipstein*.

Randy M. Mott argued the cause for respondents. With him on the brief were *Raymond J. Rasenberger*, *Charles J. Simpson, Jr.*, *J. Stanley Pottinger*, *Warren L. Dennis*, and *Carolyn Dye*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Section 106 of Pub. L. 92–129, 85 Stat. 355, note following 5 U. S. C. § 7201 (1976 ed., Supp. IV), prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty." The question in this case is whether "treaty" includes executive agreements concluded by the President with the host country, or whether the term is limited to those international agreements entered into by the President with the advice and consent of the Senate pursuant to Art. II, § 2, cl. 2, of the United States Constitution. This issue is solely one of statutory interpretation.

I

In 1944, Congress authorized the President, "by such means as he finds appropriate," to acquire, after negotiation with the President of the Philippines, military bases "he may deem necessary for the mutual protection of the Philippine Islands and of the United States." 58 Stat. 626, 22 U. S. C. § 1392. Pursuant to this statute, the United States and the

*Briefs of *amici curiae* urging affirmance were filed by *Mark D. Roth* for the American Federation of Government Employees, AFL–CIO, et al.; and by *Cornelius B. Kennedy* for Congressman William V. Chappel, Jr., et al.

Republic of the Philippines in 1947 entered into a 99-year Military Bases Agreement (MBA), Mar. 14, 1947, 61 Stat. 4019, T. I. A. S. No. 1775.[1] The MBA grants the United States the use of various military facilities in the Philippines. It does not, however, contain any provisions regarding the employment of local nationals on the base. In 1968, the two nations negotiated a Base Labor Agreement (BLA), May 27, 1968, [1968] 19 U. S. T. 5892, T. I. A. S. No. 6542, as a supplement to the MBA. The BLA, *inter alia*, provides for the preferential employment of Filipino citizens at United States military facilities in the Philippines.[2]

In 1971, Congress enacted § 106 of Pub. L. 92–129, the employment discrimination statute at issue in this case.[3] At the time § 106 was enacted, 12 agreements in addition to the BLA were in effect providing for preferential hiring of local nationals on United States military bases overseas. Since § 106 was enacted, four more such agreements have been concluded.[4] None of these agreements were submitted to the Senate for its advice and consent pursuant to Art. II, § 2, cl. 2, of the Constitution.

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[1] This agreement has been amended periodically, most recently on January 7, 1979. [1978–1979] 30 U. S. T. 863, T. I. A. S. No. 9224.

[2] In relevant part, Article I of the BLA provides:

"1. *Preferential Employment.*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. . . ."

[3] Section 106 provides in pertinent part:

"*Unless prohibited by treaty*, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States." 85 Stat. 355, note following 5 U. S. C. § 7201 (1976 ed., Supp. IV) (emphasis added).

[4] Brief for Petitioners 5–6, and nn. 3–4.

In 1978, respondents, all United States citizens residing in the Philippines, were notified that their jobs at the United States Naval Facility at Subic Bay were being converted into local national positions in accordance with the BLA, and that they would be discharged from their employment with the Navy. After unsuccessfully pursuing an administrative remedy, respondents filed suit in the United States District Court for the District of Columbia, alleging that the preferential employment provisions of the BLA violated, *inter alia*, § 106. The District Court granted summary judgment for petitioners, *Rossi* v. *Brown*, 467 F. Supp. 960 (1979), but the Court of Appeals reversed. *Rossi* v. *Brown*, 206 U. S. App. D. C. 148, 642 F. 2d 553 (1980). We in turn reverse the Court of Appeals.

II

Simply because the question presented is entirely one of statutory construction does not mean that the question necessarily admits of an easy answer. Chief Justice Marshall long ago observed that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). More recently, the Court has stated:

> "Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique." *United States* v. *Universal Corp.*, 344 U. S. 218, 221 (1952) (citations omitted).

We naturally begin with the language of § 106, which provides in relevant part as follows:

> "*Unless prohibited by treaty*, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country be-

cause such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States." 85 Stat. 355, note following 5 U. S. C. § 7201 (1976 ed., Supp. IV) (emphasis added).

The statute is awkwardly worded in the form of a double negative, and we agree with the Court of Appeals that "[r]eplacing the phrase '[u]nless prohibited by' with either the words 'unless permitted by' or 'unless provided by' would convey more precisely the meaning of the statute, but we do not think that this awkward phrasing bears on congressional intent in selecting the word 'treaty.'" 206 U. S. App. D. C., at 153, n. 21, 642 F. 2d, at 558, n. 21. Discrimination in employment against United States citizens at military facilities overseas is prohibited by § 106, unless such discrimination is permitted by a "treaty" between the United States and the host country. Our task is to determine the meaning of the word "treaty" as Congress used it in this statute. Congress did not separately define the word, as it has done in other enactments. *Infra*, at 30. We must therefore ascertain as best we can whether Congress intended the word "treaty" to refer solely to Art. II, § 2, cl. 2, "Treaties"—those international agreements concluded by the President with the advice and consent of the Senate—or whether Congress intended "treaty" to also include executive agreements such as the BLA.

The word "treaty" has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. 206 U. S. App. D. C., at 151, 642 F. 2d, at 556.[5] Under the United States Constitution, of course, the word "treaty" has a far more restrictive meaning. Article II, § 2,

[5] See Vienna Convention on the Law of Treaties, May 23, 1969, Art. 2, ¶ 1(a), reprinted in 63 Am. J. Int'l L. 875, 876 (1969); Restatement of Foreign Relations of the United States, Introductory Note 3, p. 74 (Tent. Draft No. 1, Apr. 1, 1980) ("[I]nternational law does not distinguish between agreements designated as 'treaties' and other agreements").

cl. 2, of that instrument provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[6]

Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements. For example, in the Case Act, 1 U. S. C. § 112b(a) (1976 ed., Supp. IV), Congress required the Secretary of State to "transmit to the Congress the text of any international agreement, . . . other than a treaty, to which the United States is a party" no later than 60 days after "such agreement has entered into force."[7] Similarly, Congress has explicitly referred to Art. II treaties in the Fishery Conservation and Management Act of 1976, 16 U. S. C. § 1801 *et seq.* (1976 ed. and Supp. IV),[8] and the Arms Control and Disarmament Act, 22 U. S. C. § 2551 *et seq.* (1976 ed. and Supp. IV).[9] On the other hand, Congress has used "treaty" to re-

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[6] We have recognized, however, that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution, even when the agreement compromises commercial claims between United States citizens and a foreign power. See, *e. g.*, *Dames & Moore* v. *Regan*, 453 U. S. 654 (1981); *United States* v. *Pink*, 315 U. S. 203 (1942); *United States* v. *Belmont*, 301 U. S. 324 (1937). Even though such agreements are not treaties under the Treaty Clause of the Constitution, they may in appropriate circumstances have an effect similar to treaties in some areas of domestic law.

[7] In this context, it is entirely logical that Congress should distinguish between Art. II treaties and other international agreements. Submission of Art. II treaties to the Senate for ratification is already required by the Constitution.

[8] Congress defined "treaty" to mean "any international fishery agreement which is a treaty within the meaning of section 2 of article II of the Constitution." 16 U. S. C. § 1802(23).

[9] "[N]o action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States." 22 U. S. C. § 2573.

fer only to international agreements other than Art. II treaties. In 39 U. S. C. § 407(a), for example, Congress authorized the Postal Service, with the consent of the President, to "negotiate and conclude postal treaties or conventions." A "treaty" which requires only the consent of the President is not an Art. II treaty. Thus it is not dispositive that Congress in § 106 used the term "treaty" without specifically including international agreements that are not Art. II treaties.

The fact that Congress has imparted no precise meaning to the word "treaty" as that term is used in its various legislative Acts was recognized by this Court in *B. Altman & Co.* v. *United States*, 224 U. S. 583 (1912). There this Court construed "treaty" in § 5 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, to include international agreements concluded by the President under congressional authorization. 224 U. S., at 601. The Court held that the word "treaty" in the jurisdictional statute extended to such an agreement, saying: "If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act . . . ." *Ibid.*

The statute involved in the *Altman* case in no way affected the foreign policy of the United States, since it dealt only with the jurisdiction of this Court. In the case of a statute such as § 106, that does touch upon the United States' foreign policy, there is even more reason to construe Congress' use of "treaty" to include international agreements as well as Art. II treaties. At the time § 106 was enacted, 13 executive agreements provided for preferential hiring of local nationals. *Supra*, at 27. Thus, if Congress intended to limit the "treaty exception" in § 106 to Art. II treaties, it must have intended to repudiate these executive agreements that affect the hiring practices of the United States only at its military bases overseas. One would expect that Congress would be aware

that executive agreements may represent a *quid pro quo:* the host country grants the United States base rights in exchange, *inter alia,* for preferential hiring of local nationals. See n. 17, *infra.*

It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy,* 2 Cranch 64, 118 (1804), that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10, 20–21 (1963), this principle was applied to avoid construing the National Labor Relations Act in a manner contrary to State Department regulations, for such a construction would have had foreign policy implications. The *McCulloch* Court also relied on the fact that the proposed construction would have been contrary to a "well-established rule of international law." *Id.,* at 21. While these considerations apply with less force to a statute which by its terms is designed to affect conditions on United States enclaves outside of the territorial limits of this country than they do to the construction of statutes couched in general language which are sought to be applied in an extraterritorial way, they are nonetheless not without force in either case.

At the time § 106 was enacted, there were in force 12 agreements in addition to the BLA providing for preferential hiring of local nationals on United States military bases overseas. Since the time of the enactment of § 106, four more such agreements have been concluded, and none of these were submitted to the Senate for its advice and consent. *Supra,* at 27. We think that some affirmative expression of congressional intent to abrogate the United States' international obligations is required in order to construe the word "treaty" in § 106 as meaning only Art. II treaties. We therefore turn to what legislative history is available in order to ascertain whether such an intent may fairly be attributed to Congress.

The legislative history seems to us to indicate that Congress was principally concerned with the financial hardship to

American servicemen which resulted from discrimination against American citizens at overseas bases. As the Conference Committee Report explains:

> "The purpose of [§ 106] is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose dependents are effectively prevented from obtaining employment." H. R. Conf. Rep. No. 92–433, p. 31 (1971).

The Conference Report, however, is entirely silent as to the scope of the "treaty" exception. Similarly, there is no mention of the 13 agreements that provided for preferential hiring of local nationals. Thus, the Conference Report provides no support whatsoever for the conclusion that Congress intended in some way to limit the President's use of international agreements that may discriminate against American citizens who seek employment at United States military bases overseas.

On the contrary, the brief congressional debates on this provision indicate that Congress was not concerned with limiting the authority of the President to enter into executive agreements with the host country, but with the ad hoc decisionmaking of military commanders overseas. In early 1971, Brig. Gen. Charles H. Phipps, Commanding General of the European Exchange System, issued a memorandum encouraging the recruitment and hiring of local nationals instead of United States citizens at the system's stores. The hiring of local nationals, General Phipps reasoned, would result in lower wage costs and turnover rates.[10] Senator Schweiker, a sponsor of § 106, complained of General Phipps' policy.[11]

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[10] See 117 Cong. Rec. 14395 (1971) (remarks of Sen. Schweiker).

[11] "I have never heard of anything so ridiculous in my life. We actually send our GI's to Europe at poverty wages. We do not pay to send the wives there. They have to beg or borrow that money. They get over

Both the Conference Report and the debates [12] indicate that Congress was concerned primarily about the economic hardships American servicemen endured in Europe, particularly Germany. In this regard, it must be noted that of the 13 executive agreements in existence at the time § 106 was enacted, only one involved an agreement with a European country—Iceland.[13] The Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, [1953] 4 U. S. T. 1792, T. I. A. S. No. 2846,[14] merely provides that local law governs the terms and conditions of the employment of local nationals. It does not provide for preferential treatment for local nationals. Thus, those servicemen whose interests Congress expressly sought to further in § 106 were not subject to the type of agreement at issue in this case.

The Court of Appeals relied heavily on a statement by Senator Hughes, a sponsor of § 106, that dependents of enlisted personnel "are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located, and are forced to live in poverty." 117 Cong. Rec. 16126 (1971). Taken out of context, this remark is certainly supportive of respondents' position. In context, however, it is not altogether clear to which "agreements" Sena-

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there, and if they do bring their wives at their own expense, the wives cannot even go to the Army Exchange Service and get a job, because a general has sent out a memorandum that says we are going to give those jobs to the nationals of the countries involved." *Ibid.*

At another point, Senator Schweiker commented: "Here is an American general saying that when the GI's go to their canteen or service post exchange and spend their money, they do not even have the right to have their wives working there because we should give those jobs to German nationals." *Id.*, at 16128.

[12] See, *e. g.*, *id.*, at 14395 (remarks of Sen. Schweiker); *id.*, at 16126 (remarks of Sen. Cook); *ibid.* (remarks of Sen. Hughes).

[13] Agreement Concerning the Status of United States Personnel and Property (Annex), May 8, 1951, United States-Iceland, [1951] 2 U. S. T. 1533, T. I. A. S. No. 2295.

[14] This NATO agreement is an Art. II treaty.

tor Hughes was referring. Immediately prior to this remark, Senator Cook explained that dependents of American servicemen were unable to obtain anything but tourist visas, thus precluding them from working in the local economy:

> "On my inquiry of the Defense Department, it was my understanding that there was an agreement, through the NATO organization, that those young wives, because they were there on tourists visas, could not get a work permit under any circumstances." *Ibid.*

As we indicated above, the NATO agreements do not contain any provision for preferential hiring of local nationals. *Supra*, at 34. Senator Hughes could well have been referring to agreements that in effect precluded dependents from working in the local economy. Be that as it may, it suffices to say that one isolated remark by a single Senator, ambiguous in meaning when examined in context, is insufficient to establish the kind of affirmative congressional expression necessary to evidence an intent to abrogate provisions in 13 international agreements.[15]

Finally, respondents rely on postenactment legislative history that "firmly reiterate[s] the Congressional policy against preferential hiring of local nationals." Brief for Respondents 23. In particular, respondents offer two examples of congressional Committees urging the Department of Defense to renegotiate those agreements containing local-national preferential hiring provisions.[16] Such *post hoc* statements of a congressional Committee are not entitled to much weight. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 118, and n. 13 (1980). If anything, these postenactment statements cut *against* respondents' argu-

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[15] The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 118 (1980); *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 311 (1979).

[16] See H. R. Rep. No. 95–68, p. 25 (1977); H. R. Conf. Rep. No. 97–410, p. 54 (1981).

ment that Congress sought in § 106 to eliminate discrimination owing to executive agreements. By urging the Department of Defense to renegotiate these agreements, the Committees assume the validity of those very international agreements respondents contend were abrogated by Congress in § 106.[17]

While the question is not free from doubt, we conclude that the "treaty" exception contained in § 106 extends to executive agreements as well as to Art. II treaties. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.[18]

It is so ordered.

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[17] Although we do not ascribe it much weight, we note that a Conference Committee recently deleted a provision that would have prohibited the hiring of foreign nationals at military bases overseas when qualified United States citizens are available. *Ibid.* In urging this provision's deletion, Senator Percy explained that the provision would place the United States in violation of its obligations, *inter alia*, under the BLA with the Philippines. 127 Cong. Rec. S14110 (Nov. 30, 1981). He argued:

"Some host nations might view enactment of 777 as a material breach of our agreements, thus entitling them to open negotiations on terminating, redefining or further restricting U. S. basing and use rights. Nations could, for example, retaliate by suspending or reducing our current rights to engage in routine military operations such as aircraft transits." *Ibid.*

[18] In view of its construction of § 106, the Court of Appeals found it unnecessary to determine whether the BLA in the instant case violated Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV). *Rossi* v. *Brown*, 206 U. S. App. D. C. 148, 156, n. 36, 642 F. 2d 553, 561, n. 36 (1980). Because this question was neither raised in the petition for certiorari nor reached by the Court of Appeals, we do not consider it.

UPHAM ET AL. *v.* SEAMON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

No. 81–1724. Decided April 1, 1982

After the increase in Texas' congressional delegation resulting from the 1980 census, the Texas Legislature enacted a reapportionment plan (SB1) that was submitted to the Attorney General for preclearance under the Voting Rights Act of 1965. Suit was then filed in Federal District Court challenging SB1's constitutionality and its validity under the Act. The three-judge court delayed the proceedings pending action by the Attorney General, who ultimately objected to the lines drawn for two contiguous districts in south Texas (Districts 15 and 27) but concluded that the State had otherwise satisfied its burden of demonstrating that SB1 was nondiscriminatory in purpose and effect. The court then formulated a plan which resolved the Attorney General's objection to Districts 15 and 27 and retained all other districts from SB1 except for those in Dallas County, for which the court devised its own districts. One judge concluded that the SB1 plan for Dallas County was unconstitutional, while another concluded that since SB1 was a nullity because of the Attorney General's action, the entire plan had to be a court-ordered plan that was subject to stricter standards than a legislative plan and thus required the different districts for Dallas County. Only that part of the District Court's judgment relating to Dallas County was appealed.

Held:

1. In the absence of any objection to the Dallas County districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, the District Court—in effecting an interim apportionment plan—must defer to the Texas Legislature's judgment reflected in SB1's districts for Dallas County. Cf. *White* v. *Weiser*, 412 U. S. 783; *Whitcomb* v. *Chavis*, 403 U. S. 124.

2. The District Court in the first instance should determine whether to modify its judgment and reschedule forthcoming congressional primary elections for Dallas County or, in spite of its erroneous refusal to adopt the SB1 districts for Dallas County, to allow the elections to proceed under its interim plan and present schedule.

536 F. Supp. 931, vacated and remanded.

PER CURIAM.

After the 1980 census, Texas' congressional delegation increased from 24 to 27 members. A reapportionment plan, Senate Bill No. 1 (SB1), was enacted on August 14, 1981, and then submitted to the Attorney General for preclearance. While it was pending before him, suit was filed in the Federal District Court for the Eastern District of Texas challenging the constitutionality of SB1 and its validity under § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973. A three-judge court was empaneled, held a hearing, and delayed any further action until after the Attorney General acted. On January 29, 1982, the Attorney General entered an objection to SB1. Specifically, he objected to the lines drawn for two contiguous districts in south Texas, Districts 15 and 27.[1] He stated that the State "has satisfied its burden of demonstrating that the submitted plan is nondiscriminatory in purpose and effect" with respect to the other 25 districts. In the face of this objection, which made SB1 unenforceable, and the obvious unconstitutionality of the prior apportionment plan,[2] the court ordered the parties to provide written submissions along with maps, plats, and other data to aid the court in reaching a court-ordered reapportionment plan. A hearing was held on February 9. The court then proceeded to resolve the Attorney General's objection to Districts 15 and 27. 536 F. Supp. 931. All other districts of the court's plan, except for those in Dallas County, were identical to those of SB1. The court devised its own districts for Dallas County, and it is that part of the District Court's judgment that is on appeal here. A stay and expedited consideration are requested.

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[1] His objection, however, went to the entire plan, and on February 23, he refused the State's request that the objection be severed and addressed to only a portion of SB1 (but see n. 7, *infra*).

[2] The existing apportionment plan created only 24, not 27 districts, and the changes in population over the past 10 years had created extreme numerical variations between the districts, which were unconstitutional under the one-man, one-vote rule.

Judge Sam Johnson and Judge Justice wrote separately, but agreed that SB1's plan for Dallas County could not be implemented.[3] Judge Justice alone determined that the SB1 plan for Dallas County was unconstitutional. In Judge Johnson's view, since SB1 was a nullity, the entire plan had to be a court-ordered plan which must conform to § 5, 42 U. S. C. § 1973c, standards, including the "no retrogression rule" of *Beer* v. *United States*, 425 U. S. 130 (1976). However, he thought that in two respects the standards applicable to court-ordered plans were stricter than those that must be observed by a legislature: population equality and racial fairness. Judicial application of the no retrogression standard, in his view, is limited to consideration of purely numerical factors; unlike a legislature, a court cannot consider the "innumerable political factors that may affect a minority group's access to the political process." 536 F. Supp., at 948. Although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans.

SB1's treatment of Dallas County failed to meet the test of racial fairness for a court-ordered plan. Under SB1, minority strength in District 5, in Dallas County, would have gone from 29.1 percent to 12.1 percent. Apparently, the minority votes had been shifted to District 24, which increased in minority population from 37.4 percent to 63.8 percent. Judge Johnson reasoned that this change would reduce minority effectiveness in District 5 substantially and would not guarantee a "safe" seat in District 24. This "would result in a severe retrogression in the Dallas County area." *Id.*, at 957, n. 39. He specifically recognized that SB1's plans for Dallas County had been formulated in response to the interests expressed by minority voters in creating a "safe" seat. He did not hold this legislative response to be unconstitutional, nor did he

[3] Judge Parker dissented from the relevant part of the court order—he would have followed SB1 in Dallas County.

criticize it as inconsistent with § 5 as it applied to legislative redistricting. A court, however, could not, in his view, consider the same factors as a legislature.[4] The court, therefore, redrew the boundaries of Districts 5 and 24, and the two adjoining Districts, 3 and 26. Under the court-ordered plan, District 5 would have a minority population of 31.87 percent and District 24 would have 45.7 percent.

Appellants, who are Republican Party officials in Texas, contend that the District Court simply substituted its own reapportionment preferences for those of the state legislature and that this is inconsistent with *Wise* v. *Lipscomb*, 437 U. S. 535 (1978); *McDaniel* v. *Sanchez*, 452 U. S. 130 (1981); and *White* v. *Weiser*, 412 U. S. 783 (1973).[5] They argue that in the absence of any objection to the Dallas County districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the

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[4] The relevant passage of Judge Johnson's opinion reads as follows:

"This Court recognizes that certain minority group members expressed a desire for a 'safe' minority district in Dallas County. After consideration of numerous political factors, and substantial legislative battling, the Texas Legislature decided on the configurations in S.B.1 . . . . The legislature was at liberty to engage in such considerations. This Court, in fashioning a nonretrogressive apportionment plan does not have that privilege. It must evaluate the new plan without access to questions regarding the ability of separate minority groups to form coalitions or other political concerns. . . . It is not before this Court to determine whether considerations valid in the legislative context justify simply increasing swing-vote influence in one district at the expense of the influence previously enjoyed in a neighboring district. This Court determines, however, that, in the context of a court-ordered apportionment plan, such a trade-off would result in a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 536 F. Supp., at 957, n. 9.

[5] Appellants are supported in this appeal by the State of Texas. While Texas agrees with them on the merits of this case and supports a summary reversal of the District Court decision, it asks that this Court delay any remedial action until after the 1982 elections. In other words, Texas chal-

plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan.[6] We agree and, therefore, summarily reverse.

The relevant principles that govern federal district courts in reapportionment cases are well established:

> "From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment. . . . Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task

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lenges the merits of the District Court decision, but contends that it would be too disruptive and expensive to attempt to alter the 1982 elections at this point.

[6] Appellants propose two other arguments. First, under Texas law an invalid statutory provision is severable. Therefore, the fact that the Attorney General objected to the validity of SB1's district lines for 2 districts did not invalidate the plans for the other 25 districts. Second, the "stricter standards" applicable to court-ordered plans apply only to the use of multimember districts and population variations beyond a *de minimis* amount. In particular, this "stricter standard" does not apply to plans that have already been precleared by the Attorney General. In light of our disposition of the case, we need not reach either of these arguments.

nor 'intrude upon state policy any more than necessary.'" *White* v. *Weiser*, 412 U. S., at 794–795 (citations omitted).

Weiser itself presents a good example of when such an intrusion is not necessary. We held there that the District Court erred when, in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state-proposed plan. The only limits on judicial deference to state apportionment policy, we held, were the substantive constitutional and statutory standards to which such state plans are subject. *Id.*, at 797.

We reached a similar conclusion in *Whitcomb* v. *Chavis*, 403 U. S. 124, 160–161 (1971), in which we held that the District Court erred in fashioning a court-ordered plan that rejected state policy choices more than was necessary to meet the specific constitutional violations involved. Indeed, our decision in *Whitcomb* directly conflicts with the lower court's order in this case. Specifically, we indicated that the District Court should not have rejected all multimember districts in the State, absent a finding that those multimember districts were unconstitutional. *Ibid.* We reached this conclusion despite the fact that we had previously held that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multimember districts as a general matter." *Connor* v. *Johnson*, 402 U. S. 690, 692 (1971). See also *Chapman* v. *Meier*, 420 U. S. 1, 19 (1975) (indicating that court-ordered plans should, in some circumstances, defer to, or respect, a state policy of multimember districting).

It is true that this Court has held that court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature. *Wise* v. *Lipscomb*, *supra*, at 540; *Connor* v. *Finch*, 431 U. S. 407, 414 (1977). This stricter standard applies, however, only to remedies required by the nature and scope of the violation: "The remedial powers of an equity court must be adequate to the task, but they are not unlimited."

Whitcomb v. *Chavis*, *supra*, at 161. We have never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General.[7] There may be reasons for rejecting other parts of the State's proposal, but those reasons must be something other than the limits on the court's remedial actions. Those limits do not come into play until and unless a remedy is required; whether a remedy is required must be determined on the basis of the substantive legal standards applicable to the State's submission.

Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." *Connor* v. *Finch*, *supra*, at 414. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

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[7] The Attorney General took the same position in declining to grant preclearance to that portion of SB1 that he did not find objectionable:

"Since the federal district courts will be acting in the stead of the Legislature we believe that the courts should attempt to effectuate the legislative judgment to the extent possible and modify the Legislature's plans only as necessary to meet the concerns raised in the objection letters. In other words, we believe the court should make such modifications to the plans as would normally be made by the Legislature if it were in session." App. to Juris. Statement F–3 (letter of Wm. Bradford Reynolds, Assistant Attorney General, to Texas Secretary of State).

In this Court, the Solicitor General takes a slightly different position. He contends that the question of what weight a district court should give to a legislative plan that is partially objected to by the Attorney General is substantial and, therefore, merits plenary consideration by this Court.

Although the District Court erred, it does not necessarily follow that its plan should not serve as an interim plan governing the forthcoming congressional elections. The filing date for candidates, which was initially postponed by the District Court, has now come and gone. The District Court has also adjusted other dates so that the primary elections scheduled for May 1 may be held. The State of Texas, although it disagrees with the judgment of the District Court with respect to Dallas County, urges that the election process should not now be interrupted and a new schedule adopted, even for Dallas County. It is urged that because the District Court's plan is only an interim plan and is subject to replacement by the legislature in 1983, the injury to appellants, if any, will not be irreparable.

It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. See, *e. g.*, *Bullock* v. *Weiser*, 404 U. S. 1065 (1972); *Whitcomb* v. *Chavis*, 396 U. S. 1055 (1970). Necessity has been the motivating factor in these situations.

Because we are not now as familiar as the District Court with the Texas election laws and the legal and practical factors that may bear on whether the primary elections should be rescheduled, we vacate the District Court judgment and remand the case to that court for further proceedings. See *Connor* v. *Waller*, 421 U. S. 656 (1975); *Wesberry* v. *Sanders*, 376 U. S. 1, 4 (1964). Having indicated the legal error of the District Court, we leave it to that court in the first instance to determine whether to modify its judgment and reschedule the primary elections for Dallas County or, in spite of its erroneous refusal to adopt the SB1 districts for Dallas County, to allow the election to go forward in accordance with the present schedule.

The judgment of the Court shall issue forthwith.

So ordered.

BROWN *v.* HARTLAGE

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 80–1285. Argued January 20, 1982—Decided April 5, 1982

Petitioner, the challenger, in a general election, for respondent's office as a Commissioner of Jefferson County, Ky., committed himself, at a televised press conference, to lowering Commissioners' salaries if elected. Upon learning that such commitment arguably violated a provision of the Kentucky Corrupt Practices Act (§ 121.055), petitioner retracted his pledge. On its face, § 121.055 prohibits a candidate from offering material benefits to voters in consideration for their votes. After petitioner won the election, respondent filed suit in a Kentucky state court, alleging that petitioner had violated § 121.055 and seeking to have the election declared void. Although finding that, under the reasoning of an earlier decision of the Kentucky Court of Appeals construing § 121.055, petitioner had violated the statute by promising to reduce his salary to less than that "fixed by law," the trial court concluded that petitioner had been "fairly elected" and refused to order a new election. The Kentucky Court of Appeals reversed.

Held: Section 121.055 was applied in this case to limit speech in violation of the First Amendment. Pp. 52–62.

(a) Although the States have a legitimate interest in preserving the integrity of their electoral processes, when a State seeks to restrict directly a candidate's offer of ideas to the voters, the First Amendment requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression. Pp. 52–54.

(b) The application of § 121.055 in this case cannot be justified as a prohibition on buying votes. Petitioner's statements, which were made openly and were subject to the criticism of his political opponent and to the scrutiny of the voters, were very different in character from corrupting private agreements and solicitations historically recognized as unprotected by the First Amendment. There is no constitutional basis upon which his pledge to reduce his salary may be equated with a candidate's promise to pay voters privately for their support from his own pocketbook. A candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection. Pp. 54–59.

(c) If § 121.055 was designed to further the State's interest in ensuring that the willingness of some persons to serve in public office without remuneration does not make gratuitous service the *sine qua non* of plausible candidacy—resulting in persons of independent wealth but less ability being chosen over those who, though better qualified, cannot afford to serve at a reduced salary—it chose a means unacceptable under the First Amendment. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is not the government's function to select which issues are worth discussing in the course of a political campaign. Pp. 59–60.

(d) Nor can application of § 121.055 here be justified on the basis of the State's interests and prerogatives with respect to factual misstatements, on the asserted ground that the statute bars promises to serve at a reduced salary only when the salary of the official has been "fixed by law" and the promise cannot, therefore, be delivered. Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the "breathing space" that they need to survive. Nullifying petitioner's election victory would be inconsistent with the atmosphere of robust political debate required by the First Amendment. There was no showing that he made the disputed statement other than in good faith and without knowledge of its falsity, or with reckless disregard of whether it was false or not. Moreover, he retracted the statement promptly after determining that it might have been false. Pp. 60–62.

618 S. W. 2d 603, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., concurred in the judgment. REHNQUIST, J., filed an opinion concurring in the result, *post*, p. 62.

Fred M. Goldberg argued the cause for petitioner. With him on the briefs was *Jonathan D. Goldberg*.

L. Stanley Chauvin, Jr., by invitation of the Court, 454 U. S. 936, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether the First Amendment, as applied to the States through the Fourteenth Amendment,

prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law."

I

This case involves a challenge to an application of the Kentucky Corrupt Practices Act. The parties were opposing candidates in the 1979 general election for the office of Jefferson County Commissioner, "C" District. Petitioner, Carl Brown, was the challenger; respondent, Earl Hartlage, was the incumbent.[1] On August 15, 1979, in the course of the campaign, Brown held a televised press conference together with Bill Creech, the "B" District candidate on the same party ticket. Brown charged his opponent with complicity in a form of fiscal abuse:

> "There are . . . three part-time county commissioners. With state law limiting their authority and responsibility to legislation . . . , it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that the part-time commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time county judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify those payments. . . . At a fiscal court meeting in 1976, Hartlage led a surprise move to . . . more than double the salaries of the county commissioners! His actions demonstrated his unmistakable disrespect for the office of the chief executive of this county and his utter disdain for the spirit of laws that govern our county system. . . . [U]sing the gray fringes of the law for his

[1] Although respondent filed a brief in opposition to the petition for writ of certiorari, he did not file a brief on the merits. At the invitation of the Court, L. Stanley Chauvin, Jr., Esq., submitted a brief and argued in support of the judgment below as *amicus curiae*.

own personal gain, Hartlage led the move to funnel county tax dollars into commissioners' pockets." App. 1–2.

On behalf of himself and his running mate, Creech pledged the taxpayers some relief:

> "We abhor the commissioners' outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each year." *Id.*, at 2.[2]

Shortly after the press conference, Brown and Creech learned that their commitment to lower their salaries arguably violated the Kentucky Corrupt Practices Act. On August 19, 1979, they issued a joint statement retracting their earlier pledge:

> "We are men enough to admit when we've made a mistake.
>
> "We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.
>
> . . . . .
>
> ". . . [W]e do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected and in-

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[2] Brown echoed his running mate's call for fiscal restraint:

". . . These two proposals—cutting our own salaries and reorganizing the commissioner's office staff, will save the taxpayers over $172,000 during our term of office.

"We make these statements fully aware that the office we intend to occupy should set the tone for the type of public officials we intend to be.

"Under our guidance, extravagance of public expense will be a thing of the past, and responsibility and integrity will be our watchwords, Progress through Cooperation our theme." App 3.

stead pledge to seek corrective legislation in the next session of the General Assembly, to correct this silly provision of State Law." *Id.*, at 4–5.

In the November 6, 1979, election, Brown defeated Hartlage by 10,151 votes.[3] Creech was defeated.

Hartlage then filed this action in the Jefferson Circuit Court, alleging that Brown had violated the Corrupt Practices Act and seeking to have the election declared void and the office of Jefferson County Commissioner, "C" District, vacated by Brown. Section 121.055, upon which Hartlage based his claim, provides:

> "Candidates prohibited from making expenditure, loan, promise, agreement, or contract as to action when elected, in consideration for vote.—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract." Ky. Rev. Stat. § 121.055 (1982).[4]

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[3] Hartlage received a total of 83,675 votes; Brown received 93,826 votes. Certificate of Election, *id.*, at 7.

[4] In 1980, the provision was amended to replace the word "demand" in the last clause with the word "require." 1980 Ky. Acts, ch. 292, § 3.

Under Kentucky law, an equity action to contest an election may be maintained by any candidate who received more than 25% of the number of votes that were cast for the successful candidate. Ky. Rev. Stat. §§ 120.155, 120.165 (1982). The Kentucky Corrupt Practices Act identifies a violation of § 121.055 as a proper basis for such a contest, and provides

In *Sparks* v. *Boggs*, 339 S.W. 2d 480 (1960), the Kentucky Court of Appeals held that candidates' promises to serve at yearly salaries of $1, and to vote to distribute the salary savings to specified charitable organizations, violated the Corrupt Practices Act where the salaries had been "fixed by law." In the instant case, the trial court found that Brown's prospective salary had been fixed by law and that, under the reasoning of *Sparks*, Brown's promise violated the Act. Nevertheless, the court concluded that in light of Brown's retraction, the defeat of his running mate, who had joined in the pledge, and the presumption that the will of the people had been revealed through the election process, Brown had been "fairly elected." App. 25. It thus declined to order a new election. *Id.*, at 26.

The Kentucky Court of Appeals reversed. 618 S. W. 2d 603. That court agreed with the Circuit Court that the salary of County Commissioners was fixed by law,[5] and that Brown's statement was proscribed by § 121.055 as construed in *Sparks* v. *Boggs*, *supra*.[6] The Court of Appeals also held, however, that the trial court had erred in failing to order a new election. App. 34–35. It held that retraction of the of-

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that "[i]f no such violation [of the Corrupt Practices Act] by the contestant, or by others in his behalf with his knowledge, appears, and it appears that such provisions have been violated by the contestee or by others in his behalf with his knowledge, the nomination or election of the contestee shall be declared void." Ky. Rev. Stat. § 120.015 (1982).

[5] The Court of Appeals noted that under Kentucky law, "salaries for county officers elected by popular vote shall be set by the fiscal court 'not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term. . . .' Brown promised to do an act that he could not legally do." App. 32–33 (quoting Ky. Rev. Stat. § 64.530(4) (1980)). See Ky. Const. §§ 161, 246.

[6] The court quoted the following extract from *Sparks*, describing the rationale underlying the statute's application to statements such as Brown's: "'"An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The under-

fending statement was "of no consequence under the law of this state," *id.*, at 35, and that the trial court was mistaken in believing that it possessed the discretionary authority to balance the gravity of the violation against the disenfranchisement of the electorate that would result from declaring the election void, *ibid.* With respect to Brown's First Amendment claims, the court was of the view that "[t]o hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression." *Id.*, at 36. The court quoted approvingly the maxims that "[a] state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace," and that "[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.*, at 36–37, quoting 16A Am. Jur. 2d, Constitutional Law §§ 409, 507 (1979). The court then concluded that Brown's "statement was not constitutionally protected." App. 37.

In an opinion denying petitioner's motion for rehearing, the court more pointedly addressed petitioner's First Amendment arguments. The court found that the State's interest in the fairness and integrity of its elections was compelling,

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lying principle . . . is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each individual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain" [quoting 43 Am. Jur., Public Officers § 374, p. 159 (1942)].

"'It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.'" App. 33.

and that the State could insist that elections be conducted free of corruption and bribery. *Id.*, at 39. The court restated its view that under the laws of the State a promise such as Brown's was considered an attempt to buy votes or to bribe the voters. *Ibid.* Finally, the court rejected petitioner's argument that § 121.055, as construed by *Sparks*, *supra*, was "unconstitutionally broad." Although the court found some appeal in Brown's argument that "[i]f carried to its logical extreme . . . any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes," the court was of the view that *Sparks* controlled its disposition and suggested to petitioner that he seek reconsideration of that decision in the Supreme Court of Kentucky. App. 39–40. The Supreme Court of Kentucky denied review. *Id.*, at 41. We granted the petition for certiorari. 450 U. S. 1029 (1981).

II

We begin our analysis of § 121.055 by acknowledging that the States have a legitimate interest in preserving the integrity of their electoral processes. Just as a State may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated.

At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed. As we noted in *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966):

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.

> This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."

The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign. "[I]f it be conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 271–272 (1971) (citation omitted). The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary:

> "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country 'public discussion is a political duty,' *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (concurring opinion), applies with special force to candidates for public office." *Buckley* v. *Valeo*, 424 U. S. 1, 52–53 (1976) *(per curiam)*.

When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not

only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.

III

On its face, § 121.055 prohibits a candidate from offering material benefits to voters in consideration for their votes, and, conversely, prohibits candidates from accepting payments in consideration for the manner in which they serve their public function. *Sparks* v. *Boggs*, 339 S. W. 2d 480 (1960), placed a not entirely obvious gloss on that provision with respect to candidate utterances concerning the salaries of the office for which they were running, by barring the candidate from promising to reduce his salary when that salary was already "fixed by law." We thus consider the constitutionality of § 121.055 with respect to the proscription evident on the face of the statute, and in light of the more particularized concerns suggested by the *Sparks* gloss. We discern three bases upon which the application of the statute to Brown's promise might conceivably be justified: first, as a prohibition on buying votes; second, as facilitating the candidacy of persons lacking independent wealth; and third, as an application of the State's interests and prerogatives with respect to factual misstatements. We consider these possible justifications in turn.

A

The first sentence of § 121.055 prohibits a political candidate from giving, or promising to give, anything of value to a voter in exchange for his vote or support. In many of its possible applications, this provision would appear to present little constitutional difficulty, for a State may surely prohibit a candidate from buying votes. No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter. And as a State may prohibit the giving of money or other things of value to a voter in exchange for his support, it may also declare unlawful an agree-

ment embodying the intention to make such an exchange. Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. Finally, while a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited. See *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 496 (1982); *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).

It is thus plain that *some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty. But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed "indispensable to decisionmaking in a democracy," *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978); and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect

of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.[7] So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.

It remains to determine the standards by which we might distinguish between those "private arrangements" that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system. We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment. But acknowledging the difficulty of rendering a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border.

It is clear that the statements of petitioner Brown in the course of the August 15 press conference were very different

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[7] See The Federalist No. 10. The Madisonian democratic tradition extolled a system of political pluralism in which "the private interest of every individual may be a sentinel over the public rights." The Federalist No. 51, p. 324 (H. Lodge ed. 1888). But it was also contemplated within that tradition that the individual may perceive his interest as according with the public good: "In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." *Id.*, at 327.

in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment. Notably, Brown's commitment to serve at a reduced salary was made openly, subject to the comment and criticism of his political opponent and to the scrutiny of the voters. We think the fact that the statement was made in full view of the electorate offers a strong indication that the statement contained nothing fundamentally at odds with our shared political ethic.

The Kentucky Court of Appeals analogized Brown's promise to a bribe. But however persuasive that analogy might be as a matter of state law, there is no *constitutional* basis upon which Brown's pledge to reduce his salary might be equated with a candidate's promise to pay voters for their support from his own pocketbook. Although upon election Brown would undoubtedly have had a valid claim to the salary that had been "fixed by law," Brown did not offer the voters a payment from his personal funds. His was a declaration of intention to exercise the fiscal powers of government office within what he believed (albeit erroneously) to be the recognized framework of office. At least to outward appearances, the commitment was fully in accord with our basic understanding of legitimate activity by a government body. Before any implicit monetary benefit to the individual taxpayer might have been realized, public officials—among them, of course, Brown himself—would have had to approve that benefit in accordance with the good faith exercise of their public duties. Although Brown may have been incorrect in suggesting that his salary could have been lawfully reduced, this cannot, in itself, transform his promise into an invitation to engage in a private and politically corrupting arrangement.

In addition, despite the Kentucky courts' characterization of the promise to serve at a reduced salary as an offer "to reduce pro tanto the amount of taxes each individual taxpayer must pay, and thus . . . an offer to the voter of pecuniary gain," App. 33, it is impossible to discern in Brown's general-

ized commitment any invitation to enter into an agreement that might place the statement outside the realm of unequivocal protection that the Constitution affords to political speech. Not only was the source of the promised benefit the public fisc, but that benefit was to extend beyond those voters who cast their ballots for Brown, to all taxpayers and citizens. Even if Brown's commitment could in some sense have been deemed an "offer," it scarcely contemplated a particularized acceptance or a *quid pro quo* arrangement. It was to be honored, "if elected"; it was conditioned not on any particular vote or votes, but entirely on the *majority's* vote.

In sum, Brown did not offer some private payment or donation in exchange for voter support; Brown's statement can only be construed as an expression of his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens. If Brown's expressed intention had an individualized appeal to some taxpayers who felt themselves the likely beneficiaries of his form of fiscal restraint, that fact is of little constitutional significance. The benefits of most public policy changes accrue not only to the undifferentiated "public," but more directly to particular individuals or groups. Like a promise to lower taxes, to increase efficiency in government, or indeed to increase taxes in order to provide some group with a desired public benefit or public service, Brown's promise to reduce his salary cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding. See *Buckley* v. *Valeo*, 424 U. S., at 27.

A State may insist that candidates seeking the approval of the electorate work within the framework of our democratic institutions, and base their appeal on assertions of fitness for office and statements respecting the means by which they intend to further the public welfare. But a candidate's promise to confer some ultimate benefit on the voter, *qua* tax-

payer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection.

B

Sparks v. *Boggs*, 339 S. W. 2d 480 (1960), relied in part on the interest a State may have in ensuring that the willingness of some persons to serve in public office without remuneration does not make gratuitous service the *sine qua non* of plausible candidacy.[8] The State might legitimately fear that such emphasis on free public service might result in persons of independent wealth but less ability being chosen over those who, though better qualified, could not afford to serve

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[8] As explained by the Kentucky Court of Appeals:

"To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state." 339 S. W. 2d, at 484.

Other courts have expressed similar views. For example, *Sparks* quoted with approval the following passage from the opinion of Justice Brewer of the Supreme Court of Kansas, later Justice Brewer of this Court, in *State ex rel. Bill* v. *Elting*, 29 Kan. 397, 402 (1883):

"'The theory of popular government is that the most worthy should hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions—is the single test which the law will recognize. That which throws other considerations into the scale, and to that extent tends to weaken the power to personal fitness, should not be tolerated. It tends to turn away the thought of the voter from the one question which should be paramount in his mind when he deposits his ballot. It is in spirit at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter.'" 339 S. W. 2d., at 483–484.

See also *State ex rel. Clements* v. *Humphreys*, 74 Tex. 466, 12 S. W. 99 (1889).

at a reduced salary. But if § 121.055 was designed to further this interest, it chooses a means unacceptable under the First Amendment.[9] In barring certain public statements with respect to this issue, the State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to "select which issues are worth discussing or debating," *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972), in the course of a political campaign.

C

Amicus points out that § 121.055, as applied through *Sparks* v. *Boggs*, *supra*, bars promises to serve at a reduced salary only when the salary of the official has been "fixed by law," and where the promise cannot, therefore, be delivered. Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974). But "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" *New York Times Co.* v. *Sullivan*, 376 U. S. 254,

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[9] A State could address this concern by prohibiting the reduction of a public official's salary during his term of office, as Kentucky has done here. See n. 5, *supra*. Such a prohibition does not offend the First Amendment. We note, only in passing, that along with the 10 proposed Articles that upon ratification became the first 10 Amendments to the Constitution, were 2 others, proposed Articles I and II, which were not ratified. Article II provided: "No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened."

271–272 (1964), quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Section 121.055, as applied in this case, has not afforded the requisite "breathing space."

The Commonwealth of Kentucky has provided that a candidate for public office forfeits his electoral victory if he errs in announcing that he will, if elected, serve at a reduced salary. As the Kentucky courts have made clear in this case, a candidate's liability under § 121.055 for such an error is absolute: His election victory must be voided even if the offending statement was made in good faith and was quickly repudiated. The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. See *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U. S. 295 (1971). Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, *supra*, at 339–340. In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced silence," *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring), thus has special force. Cf. *Gertz* v. *Robert Welch, Inc.*, *supra*, at 344. There has been no showing in this case that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not. Moreover, petitioner re-

tracted the statement promptly after discovering that it might have been false. Under these circumstances, nullifying petitioner's election victory was inconsistent with the atmosphere of robust political debate protected by the First Amendment.

IV

Because we conclude that § 121.055 has been applied in this case to limit speech in violation of the First Amendment, we reverse the judgment of the Kentucky Court of Appeals and remand for proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE REHNQUIST, concurring in the result.

I agree that the provision of the Kentucky Corrupt Practices Act discussed by the Court in its opinion impermissibly limits freedom of speech on the part of political candidates in violation of the First and Fourteenth Amendments to the United States Constitution. Because on different facts I think I would give more weight to the State's interest in preventing corruption in elections, I am unable to join the Court's analogy between such laws and state defamation laws. I think *Mills* v. *Alabama*, 384 U. S. 214 (1966), affords ample basis for reaching the result at which the Court arrives, and I see no need to rely on other precedents which do not involve state efforts to regulate the electoral process.

AMERICAN TOBACCO CO. ET AL. *v.* PATTERSON ET AL.

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

No. 80-1199. Argued January 19, 1982—Decided April 5, 1982

Section 703(h) of the Civil Rights Act of 1964 provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." Actions were brought in Federal District Court by black employees of petitioner employer and by the Equal Employment Opportunity Commission, charging that certain lines of progression for job advancement established by the employer in agreement with petitioner labor union after the effective date of the Act constituted a racially discriminatory seniority system in violation of Title VII of the Act. The actions were consolidated for trial and injunctive relief was initially granted, but ultimately the Court of Appeals, without deciding whether the lines of progression were part of a seniority system, held that even if they were, § 703(h) does not apply to seniority systems adopted after the effective date of the Act.

Held: Section 703(h) is not limited to seniority systems adopted before the effective date of the Act. To construe it as so limited is contrary to § 703(h)'s plain language, inconsistent with this Court's prior cases, and counter to the national labor policy. And there is nothing in the legislative history to indicate that § 703(h) does not protect post-Act adoption of a bona fide seniority system or that Congress intended to distinguish between adoption and application of such a system. Pp. 68–77.

634 F. 2d 744, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 77. STEVENS, J., filed a dissenting opinion, *post*, p. 86.

Henry T. Wickham argued the cause for petitioners American Tobacco Co. et al. With him on the briefs were *Stephen A. Northup*, *Paul G. Pennoyer, Jr.*, and *Bernard W.*

McCarthy. *Ronald Rosenberg* argued the cause for petitioners Bakery, Confectionery, and Tobacco Workers International Union et al. With him on the briefs were *Henry Kaiser*, *Michael H. Gottesman*, *Jay J. Levit*, and *Laurence Gold*.

Henry L. Marsh III argued the cause for respondents Patterson et al. With him on the brief were *Jack Greenberg*, *James M. Nabritt III*, *Patrick O. Patterson*, *Barry L. Goldstein*, *John W. Scott, Jr.*, and *Randall G. Johnson*. *David A. Strauss* argued the cause *pro hac vice* for respondent Equal Employment Opportunity Commission. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Constance L. Dupre*, *Philip B. Sklover*, and *Vella M. Fink*.*

JUSTICE WHITE delivered the opinion of the Court.

Under *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), a prima facie violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), "may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters* v. *United States*, 431 U. S. 324, 349 (1977). A seniority system "would seem to fall under the *Griggs* rationale" if it were not for § 703(h) of the Civil Rights Act. *Ibid.* That section, as set forth in 42 U. S. C. § 2000e–2(h), provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit

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**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae*.

> system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. . . ."

Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved. The Court of Appeals in this case, however, held that § 703(h) does not apply to seniority systems adopted after the effective date of the Civil Rights Act.[1] We granted the petition for certiorari to address the validity of this construction of the section. 452 U. S. 937 (1982).

I

Petitioner American Tobacco Co. operates two plants in Richmond, Va., one which manufactures cigarettes and one which manufactures pipe tobacco. Each plant is divided into a prefabrication department, which blends and prepares tobacco for further processing, and a fabrication department, which manufactures the final product. Petitioner Bakery, Confectionery & Tobacco Workers' International Union and its affiliate Local 182 are the exclusive collective-bargaining agents for hourly paid production workers at both plants.

It is uncontested that prior to 1963 the company and the union engaged in overt race discrimination. The union maintained two segregated locals, and black employees were assigned to jobs in the lower paying prefabrication departments. Higher paying jobs in the fabrication departments

[1] Title VII became effective July 2, 1965, one year after its enactment.

were largely reserved for white employees. An employee could transfer from one of the predominately black prefabrication departments to one of the predominately white fabrication departments only by forfeiting his seniority.

In 1963, under pressure from Government procurement agencies enforcing the antidiscrimination obligations of Government contractors, the company abolished departmental seniority in favor of plantwide seniority and the black union local was merged into the white local. However, promotions were no longer based solely on seniority but rather on seniority plus certain qualifications, and employees lost accumulated seniority in the event of a transfer between plants. Between 1963 and 1968, when this promotions policy was in force, virtually all vacancies in the fabrication departments were filled by white employees due to the discretion vested in supervisors to determine who was qualified.

In November 1968, the company proposed the establishment of nine lines of progression, six of which are at issue in this case. The union accepted and ratified the lines of progression in 1969. Each line of progression generally consisted of two jobs. An employee was not eligible for the top job in the line until he had worked in a bottom job. Four of the six lines of progression at issue here consisted of nearly all-white top jobs from the fabrication departments linked with nearly all-white bottom jobs from the fabrication departments; the other two consisted of all-black top jobs from the prefabrication departments linked with all-black bottom jobs from the prefabrication departments. The top jobs in the white lines of progression were among the best paying jobs in the plants.

On January 3, 1969, respondent Patterson and two other black employees filed charges with the Equal Employment Opportunity Commission alleging that petitioners had discriminated against them on the basis of race. The EEOC found reasonable cause to believe that petitioners' seniority, wage, and job classification practices violated Title VII.

After conciliation efforts failed, the employees filed a class action in District Court in 1973 charging petitioners with racial discrimination in violation of Title VII and 42 U. S. C. § 1981. Their suit was consolidated for trial with a subsequent Title VII action filed by the EEOC alleging both race and sex discrimination. Following trial, the District Court held that petitioners' seniority, promotion, and job classification practices violated Title VII. The court found that six of the nine lines of progression were not justified by business necessity and "perpetuated past discrimination on the basis of sex and race." App. 32. The court enjoined the company and the union from further use of the six lines of progression. The Court of Appeals for the Fourth Circuit affirmed and remanded for further proceedings with respect to remedy, *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257 (1976), and we denied a petition for certiorari. 429 U. S. 920 (1976).

On remand petitioners moved to vacate the District Court's 1974 orders and to dismiss the complaints on the basis of this Court's decision in *Teamsters* v. *United States*, 431 U. S. 324 (1977), which held that § 703(h) insulates bona fide seniority systems from attack even though they may have discriminatory impact on minorities. The District Court denied the motions, holding that petitioners' seniority system "is not a bona fide system under *Teamsters* . . . because this system operated right up to the day of trial in a discriminatory manner." App. 110. A divided panel of the Court of Appeals agreed that "*Teamsters* requires no modification of the relief we approved with regard to . . . lines of progression . . . ," because they were not part of a seniority system within the meaning of § 703(h). 586 F. 2d 300, 303 (1978).

The Court of Appeals reheard the case en banc. It did not decide whether the lines of progression were part of a seniority system. Instead, it held that even if the lines of progression were considered part of a seniority system, "Congress intended the immunity accorded seniority systems by

§ 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems." 634 F. 2d 744, 749 (1980).[2] We reverse.

II

Petitioners argue that the plain language of § 703(h) applies to post-Act as well as pre-Act seniority systems. The respondent employees claim that the provision "provides a narrow exemption [from the ordinary discriminatory impact test] which was specifically designed to protect bona fide seniority systems which were in existence before the effective date of Title VII." Brief for Respondent Patterson et al. 29. Respondent EEOC supports the judgment below, but urges us to interpret § 703(h) so as to protect the post-Act *application* of a bona fide seniority system but not the post-Act *adoption* of a seniority system or an aspect of a seniority system.

As in all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U. S. 1, 9 (1962). Thus "[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). The plain language of § 703(h) is particularly cogent in light of the circumstances of its drafting. It was part of the Dirksen-Mansfield compromise bill which represented "not merely weeks, but months of labor." 110 Cong. Rec. 11935 (1964) (remarks of Sen. Dirksen). As Senator

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[2] The en banc court remanded the case to the District Court for additional proceedings to determine whether the plantwide seniority system in effect since 1963 is a bona fide seniority system within the contemplation of § 703(h). See 634 F. 2d, at 750. This issue is not before the Court.

Dirksen explained: "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase." *Ibid.*

On its face § 703(h) makes no distinction between pre- and post-Act seniority systems, just as it does not distinguish between pre- and post-Act merit systems or pre- and post-Act ability tests. The section does not take the form of a saving clause or a grandfather clause designed to exclude existing practices from the operation of a new rule. Other sections of Title VII enacted by the same Congress contain grandfather clauses, see § 701(b), 78 Stat. 253, as amended, 42 U. S. C. § 2000e–(b), a difference which increases our reluctance to transform a provision that we have previously described as "defining what is and what is not an illegal discriminatory practice . . . ," *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 761 (1976), from a definitional clause into a grandfather clause.

The EEOC's position, which is urged by JUSTICE BRENNAN's dissent, is no more supportable. In permitting an employer to "apply" different terms of employment pursuant to a seniority system, § 703(h) does not distinguish between seniority systems adopted before and those adopted after the effective date of the Act. That distinction would require reading § 703(h) as though the reference to a seniority system were followed by the words "adopted prior to the effective date of this section." But the section contains no such limitation. To be cognizable, a claim that a seniority system has a discriminatory impact must be accompanied by proof of a discriminatory purpose.

Furthermore, for the purpose of construing § 703(h), the proposed distinction between application and adoption on its face makes little sense. The adoption of a seniority system which has not been applied would not give rise to a cause of action. A discriminatory effect would arise only when the system is put into operation and the employer "applies" the

system. Such application is not infirm under § 703(h) unless it is accompanied by a discriminatory purpose. An adequate remedy for adopting a discriminatory seniority system would very likely include an injunction against the future application of the system and backpay awards for those harmed by its application. Such an injunction, however, would lie only if the requirement of § 703(h)—that such application be intentionally discriminatory—were satisfied.

Under the EEOC's interpretation of the statute, plaintiffs who file a timely challenge to the adoption of a seniority system arguably would prevail in a Title VII action if they could prove that the system would have a discriminatory impact even if it was not purposefully discriminatory. *Post*, at 86. See *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). On the other hand, employees who seek redress under Title VII more than 180[3] days after the adoption of a seniority system—for example, all persons whose employment begins more than 180 days after an employer adopts a seniority system—would have to prove the system was intentionally discriminatory.[4] Yet employees who prevailed by showing that a bona fide seniority system had a discriminatory impact although not adopted with discriminatory intent would not be entitled to an injunction forbidding the application of the system: § 703(h) plainly allows the application of such a seniority system.

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[3] Prior to 1972, Title VII generally required charges to be filed within 90 days of an alleged discriminatory practice. Section 706(e), 78 Stat. 260, was amended in 1972. It now requires aggrieved persons to file a charge "within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ." 42 U. S. C. § 2000e–5(e).

[4] The facts of this case give rise to just such an anomaly under the EEOC theory. The respondent employees filed race discrimination charges within 90 days of the adoption of the lines of progression but sex discrimination charges were filed more than 90 days after the adoption. Under the EEOC theory, the lines of progression would be analyzed under two different tests: the *Griggs* impact test and the § 703(h) intentional discrimination test.

A further result of the EEOC's theory would be to discourage unions and employers from modifying pre-Act seniority systems or post-Act systems whose adoption was not timely challenged. Any modification, if timely challenged, would be subject to the *Griggs* standard—even if it benefited persons covered by Title VII—thereby creating an incentive to retain existing systems which enjoy the protection of § 703(h).[5]

Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible. The EEOC's reading of § 703(h) would make it illegal to adopt, and in practice to apply, seniority systems that fall within the class of systems protected by the provision. We must, therefore, reject such a reading.

III

Although the plain language of § 703(h) makes no distinction between pre-Act and post-Act seniority systems, the court below found support for its distinction between the two in the legislative history. Such an intepretation misreads the legislative history.

We have not been informed of and have not found a single statement anywhere in the legislative history saying that § 703(h) does not protect seniority systems adopted or modified after the effective date of Title VII. Nor does the legislative history reveal that Congress intended to distinguish between adoption and application of a bona fide seniority system. The most which can be said for the legislative history of § 703(h) is that it is inconclusive with respect to the issue presented in this case.[6]

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[5] "Significant freedom must be afforded employers and unions to create differing seniority systems." *California Brewers Assn.* v. *Bryant*, 444 U. S. 598, 608 (1980). Respondents' interpretation of § 703(h) would impinge on that freedom by discouraging modification of existing seniority systems or adoption of new systems.

[6] JUSTICE BRENNAN's dissent admits that the legislative history "does not contain any explicit reference to the distinction between adoption and

As we have previously described, see *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 759–761, the initial bill[7] passed by the House of Representatives on February 10, 1964, did not contain § 703(h) and neither the bill nor the majority Judiciary Committee Report[8] even mentioned seniority. However, the House Minority Report warned that the bill, if enacted, would destroy seniority. H. R. Rep. No. 914, 88th Cong., 1st Sess., 64–65 (1963). Following a 17-day debate over whether the bill should be referred to committee, the Senate voted to reject the motion to refer it to committee and began to formally consider the merits of the bill on March 30, 1964. Meanwhile, a bipartisan group led by Senators Dirksen, Mansfield, Humphrey, and Kuchel worked to reach agreement on amendments to the House bill which would ensure its passage. Vaas, Title VII: Legislative History, 7 B. C. Ind. & Com. L. Rev. 431, 445 (1966). The Mansfield-Dirksen compromise, which contained § 703(h), was introduced on the Senate floor in the form of a substitute bill on May 26, 1964.[9] Prior to the introduction of the Mansfield-Dirksen substitute, supporters of the House bill responded to charges that it would destroy existing seniority rights.[10] On April 8, 1964, Senator Clark made a speech in

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application." *Post*, at 83. Nor is there explicit basis for the proposition that § 703(h) applies only to those plans "adopted" prior to the effective date of the Act. It is nevertheless claimed that the legislative history supports reading this distinction into the statute. *Post*, at 83, n. 8. Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history. It did not do so, however, and it is not this Court's function "to sit as a super-legislature," *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965), and create statutory distinctions where none were intended.

[7] H. R. 7152, 88th Cong., 1st Sess. (1963).

[8] H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

[9] 110 Cong. Rec. 11926 (1964).

[10] For examples of charges that the bill would destroy existing seniority rights see, *e. g.*, H. R. Rep. No. 914, *supra*, at 64–66 (Minority Report); 110 Cong. Rec. 486–489 (1964) (remarks of Sen. Hill); *id.*, at 11471 (remarks of Sen. Javits discussing charges made by Governor Wallace).

which he stated that "it is clear that the bill would not affect seniority at all." 110 Cong. Rec. 7207 (1964). In support of his conclusion, he inserted three documents into the Congressional Record which this Court has characterized as "authoritative indicators" of the purpose of § 703(h),[11] *Teamsters* v. *United States*, 431 U. S., at 352, and which the court below relied upon for its conclusion that post-Act seniority systems were not intended to be protected by § 703(h). See 634 F. 2d, at 749–750, n. 5.

The first document was a Justice Department memorandum which stated, in part, that "Title VII would have no effect on seniority rights existing at the time it takes effect."[12] The second document was an interpretive memorandum which had been prepared by Senator Clark and Senator Case, and it also said Title VII would "have no effect on established seniority rights."[13] Senator Clark also introduced written answers to questions propounded by Senator Dirksen which included the statement, "Seniority rights are in no way affected by the bill."[14]

On the basis of the statements that Title VII would not affect "existing" and "established" seniority rights, respondents infer that Title VII would affect seniority rights which were not "established" or "existing" when the Act became ef-

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[11] Senator Humphrey, one of the drafters of the Mansfield-Dirksen substitute, explained that § 703(h) did not alter the meaning of Title VII but "merely clarifie[d] its present intent and effect." *Id.*, at 12723. Therefore statements made prior to the introduction of § 703(h) by proponents of Title VII are evidence of the meaning of § 703(h).

[12] *Id.*, at 7207. The full text of the statement with respect to seniority may be found in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 760, n. 16 (1976).

[13] 110 Cong. Rec. 7213 (1964). The full text of the statement with respect to seniority may be found in *Franks* v. *Bowman Transportation Co.*, *supra*, at 759, n. 15.

[14] 110 Cong. Rec. 7217 (1964). The questions and answers with respect to seniority may be found in *Franks* v. *Bowman Transportation Co.*, *supra*, at 760–761, n. 16.

fective. Such an inference is unjustified. While the materials which Senator Clark inserted into the Congressional Record did speak in terms of Title VII not affecting "vested," "existing," or "established" seniority rights, they did so because they were responding to a specific charge made by the bill's opponents, namely, that the bill would destroy existing seniority rights. Had Senator Clark intended that the bill not protect post-Act seniority systems, it is highly unlikely he would have stated on the floor of the Senate that "the bill would not affect seniority at all,"[15] 110 Cong. Rec. 7207 (1964), or introduced a written response to a question posed by Senator Dirksen which said:

> "Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' so long as it is done because of his status as 'last hired' and not because of his race." *Id.*, at 7217.

Respondents' argument also ignores numerous other references to seniority by proponents of Title VII which were couched in terms of "seniority" rather than "existing seniority rights." See, *e. g.*, *id.*, at 5423 (remarks of Sen. Humphrey); *id.*, at 6564 (remarks of Sen. Kuchel); *id.*, at 6565–6566 (memorandum prepared by House Republican sponsors); *id.*, at 11768 (remarks of Sen. McGovern). In addition, the few references to seniority after § 703(h) was added to the bill are to the effect that "the Senate substitute bill expressly protects valid seniority systems." *Id.*, at 14329 (letter from Sen. Dirksen to Sen. Williams). See also *id.*, at 14331 (remarks of Sen. Williams).

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[15] Strictly speaking, Senator Clark's statement that Title VII would not affect seniority is incorrect. Title VII does affect seniority rights, for *Franks* v. *Bowman Transportation Co.*, *supra*, allows awards of retroactive seniority to victims of unlawful discrimination. However, Senator Clark's technical error does not alter our conclusion that he and other key proponents of the bill intended that it have minimal impact on seniority systems.

Going behind the plain language of a statute in search of a possibly contrary congressional intent is "a step to be taken cautiously" even under the best of circumstances. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 26 (1977). "[I]n light of its unusual legislative history and the absence of the usual legislative materials," *Franks* v. *Bowman Construction Co.*, 424 U. S., at 761, we would in any event hesitate to give dispositive weight to the legislative history of § 703(h). More importantly, however, the history of § 703(h) does not support the far-reaching limitation on the terms of § 703(h) announced by the court below and urged by respondents. The fragments of legislative history cited by respondents, regardless of how liberally they are construed, do not amount to a clearly expressed legislative intent contrary to the plain language of the statute. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S., at 108.

IV

Our prior decisions have emphasized that "seniority systems are afforded special treatment under Title VII itself," *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 81 (1977), and have refused to narrow § 703(h) by reading into it limitations not contained in the statutory language. In *Teamsters* v. *United States, supra*, we held that § 703(h) exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices. Similarly, by holding that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed," *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 558 (1977), the Court interpreted § 703(h) to immunize seniority systems which perpetuate post-Act discrimination. Thus taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that "[s]ection 703(h) on its face immunizes *all* bona fide seniority systems, and does not distin-

guish between the perpetuation of pre- and post-Act" discriminatory impact. *Teamsters*, 431 U. S., at 348, n. 30 (emphasis added).[16] Section 703(h) makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date. Consistent with our prior decisions, we decline respondents' invitation to read such a distinction into the statute.

Seniority provisions are of "overriding importance" in collective bargaining, *Humphrey* v. *Moore*, 375 U. S. 335, 346 (1964), and they "are universally included in these contracts." *Trans World Airlines, Inc.* v. *Hardison*, *supra*, at 79. See also Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). The collective-bargaining process "lies at the core of our national labor policy . . . ." *Trans World Airlines, Inc.* v. *Hardison*, *supra*, at 79. See, *e. g.*, 29 U. S. C. § 151. Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal

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[16] Nowhere in *Teamsters* v. *United States* does the Court indicate when the seniority system at issue there was adopted, and examination of the record illustrates the difficulty of fixing an adoption date. Article V of the National Motor Freight Agreement of 1964 contains a seniority provision subject to modification by area agreements and local union riders. See Brief for Petitioner Teamsters, O. T. 1976, No. 75–636, pp. 24–25. However, National Motor Freight Agreements are of 3-year duration, and the 1970 Agreement was in effect when the complaint was filed. If a seniority system ceases to exist when the collective-bargaining agreement which creates it lapses, then the seniority system in *Teamsters* was adopted post-Title VII. On the other hand, if in practice the seniority system was continuously in effect from 1964, it can be argued that its adoption predates Title VII. However, *Teamsters* places no importance on the date the seniority system was adopted, and we follow *Teamsters* by refusing to distinguish among seniority systems based on date of adoption. Given the difficulty of determining when one seniority system ends and another begins and the lack of legislative guidance, we think it highly unlikely Congress intended for courts to distinguish between pre-Act and post-Act seniority systems.

supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements. *California Brewers Assn.* v. *Bryant*, 444 U. S. 598, 608 (1980). Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance.[17]

Because a construction of § 703(h) limiting its application to seniority systems in place prior to the effective date of the statute would be contrary to its plain language, inconsistent with our prior cases, and would run counter to the national labor policy, we vacate the judgment below and remand for further proceedings consistent with this opinion.[18]

So ordered.

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

Purporting to construe the plain language of § 703(h) of Title VII, the Court today holds that seniority plans adopted after Title VII became effective are not subject to challenge under the disparate-impact standard of *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). In failing to distinguish for purposes of § 703(h) between suits challenging the *adoption* of a seniority plan and those challenging its subsequent *application*—a distinction urged by the Equal Employment Opportunity Commission (EEOC)—the Court turns a blind eye to both the language and legislative history of the statu-

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[17] JUSTICE BRENNAN's dissent makes no mention of the importance which Congress and this Court have accorded to seniority systems and collective bargaining. It reads the legislative history as showing that Congress' basic purpose in enacting § 703(h) was to protect employee expectations. *Post*, at 81–84. In doing so, it ignores the policy favoring minimal governmental intervention in collective bargaining.

[18] All parties agree that on remand the court should decide whether the lines of progression are part of a seniority system, and if so, whether they are bona fide within the meaning of § 703(h). We decline to reach those issues because, as the court below noted, their resolution requires additional factual development. See 634 F. 2d, at 749, n. 3.

tory provision. Section 703(h) is by its very terms of relevance only where the *application* of a seniority plan is challenged. The provision reflects Congress' desire to protect vested seniority rights; Congress did not seek to ensure the vesting of new rights that are the byproduct of discrimination. Because the Court ignores this fundamental distinction between challenges to the adoption, and challenges to the application, of seniority plans, I dissent.

I

Up until 1963, the American Tobacco Co. and the union serving as collective-bargaining agent for the hourly paid production workers at the company's two Richmond plants openly discriminated on the basis of race with respect to every aspect of employment at the two plants—"job assignments, cafeterias, restrooms, lockers, and plant entrances." *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 263 (CA4 1976). White employees were generally assigned to jobs in the fabrication departments; black employees were assigned to lower paying jobs in the prefabrication departments. See *ibid.*; App. 33–34. In 1963, under Government pressure, the company and union altered somewhat the manner of computing seniority and determining promotions. Nevertheless, for the next five years virtually all of the vacancies in the fabrication departments were filled by white employees. Thus, as of 1968, the fabrication departments were still staffed almost entirely by white employees; the prefabrication departments remained predominantly composed of black employees. See 535 F. 2d, at 263.

In 1968, with the assent of the union, the company established nine lines of job progression. Each line generally consisted of two jobs, and one could assume the "top" job only after having worked at least one day in a "bottom" job. Of the six lines of progression at issue here, four consisted of historically white "top" jobs from the fabrication departments linked with historically white "bottom" jobs from the fabrication departments. The remaining two lines involved

"top" jobs from the prefabrication departments linked with historically black "bottom" jobs from the prefabrication departments. Not surprisingly, the District Court determined—and the Court of Appeals agreed—that the six lines of progression were unlawful under *Griggs* v. *Duke Power Co.*, *supra*, because they perpetuated past discrimination on the basis of race and were unsupported by any business justification. See App. 32; 535 F. 2d, at 264. But today this Court, relying on § 703(h) of Title VII, holds that in the event these lines are determined on remand to be part of a seniority system,[1] they must be sustained unless respondents can prove that petitioners acted with discriminatory intent in formulating them.[2]

II

The Court properly treats this case as one of statutory construction. The language of § 703(h) is as follows:

> "[I]t shall not be an unlawful employment practice for an employer to *apply* different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 78 Stat. 257, as amended, 42 U. S. C. § 2000e–2(h) (emphasis added).

Despite this language, the Court construes § 703(h) to embrace challenges to the *adoption* of seniority systems as well as to their *application*. But § 703(h) describes its own ambit

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[1] The Court of Appeals assumed, but did not hold, that the lines of progression were part of a "seniority . . . system" within the meaning of § 703(h). See 634 F. 2d 744, 749, and n. 3 (1980).

[2] The District Court, applying *Teamsters* v. *United States*, 431 U. S. 324, 346, n. 28 (1977), apparently made such a finding of discriminatory intent after the petitioners moved to vacate, in light of *Teamsters*, the decree that the court had entered earlier. See App. 110. The Court of Appeals, sitting en banc, did not review this finding, but held instead that § 703(h) is inapplicable to seniority systems adopted after Title VII became effective.

solely in terms of application: The provision declares it not unlawful "for an employer *to apply* different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system." Even if one were able to enlarge the definition of "apply" to include "adopt," it would require a much greater feat of legerdemain to explain how a decision to *adopt* a seniority system can be made "pursuant to" the same seniority system.

It is also significant that § 703(h) refers only to *employers'* practices. Although the *application* of a seniority system is ordinarily the responsibility of the employer alone, the decision to *adopt* a particular plan is made by the employer and the union, both of whom may be liable for employment discrimination under Title VII. See 42 U. S. C. §§ 2000e–2(a), (c). If Congress had intended § 703(h) to shield the *adoption* of a new seniority system, agreed upon by both the employer and union after Title VII became effective, Congress would have referred to unions as well as employers in the exempting provision.[3]

III

The Court's construction of § 703(h) might be understandable if the legislative history clearly indicated that Congress did not intend to distinguish the adoption of a seniority plan from its subsequent application. But the Court finds no such indication: "The most which can be said for the legislative history of § 703(h) is that it is inconclusive with respect to the issue . . . ." *Ante*, at 71. Viewed in the full context of Title VII, the Court's rejection of a narrow construction of the § 703(h) exemption is truly remarkable.

Through Title VII Congress sought in the broadest terms to prohibit and remedy discrimination. See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763 (1976);

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[3] It is true, of course, that despite this lack of reference, § 703(h) may in practice afford unions some protection. Section 703(c)(3) of Title VII makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 78 Stat. 256, 42 U. S. C. § 2000e–2(c)(3). To the extent that an employer's practice

Alexander v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974). In order to give this congressional intent its full and proper meaning, Title VII must "be given a liberal interpretation . . . [and] exemptions from its sweep . . . be narrowed and limited to effect the remedy intended." *Piedmont & Northern R. Co.* v. *ICC*, 286 U. S. 299, 311–312 (1932). See also *Spokane & Inland R. Co.* v. *United States*, 241 U. S. 344, 350 (1916); *United States* v. *Dickson*, 15 Pet. 141, 165 (1841). Accordingly, § 703(h) should not be construed to further objectives beyond those which Congress expressly wished to serve. As demonstrated by the legislative history that follows, Congress' basic purpose in adding the provision was to protect the *expectations* that employees acquire through the continued operation of a seniority system. A timely challenge to the *adoption* of a seniority plan may forestall discrimination *before* such legitimate employee expectations have arisen.[4]

Section 703(h) was not included in the early legislative versions of Title VII. It was added only after fears were expressed concerning the possible impact of Title VII on seniority rights and existing seniority systems. See *Franks* v. *Bowman Transportation Co.*, *supra*, at 759.[5] The oppo-

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does not violate Title VII by virtue of § 703(h), the union's involvement in that practice would not likely be viewed as giving rise to liability under § 703(c)(3).

[4] Currently, a charge of discrimination in violation of Title VII must generally "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U. S. C. § 2000e–5(e). At the time the present action arose, charges had to be filed within 90 days of the occurrence of the unlawful employment practice. § 706(d), 78 Stat. 260.

Expectations may arise, of course, before a timely charge is filed, but such expectations are hardly substantial. And the notice provided by the filing of charges serves to reduce the likelihood of employees acquiring unjustified expectations concerning seniority rights during any ensuing investigation and litigation of the charges.

[5] As the Court correctly notes, because § 703(h) was merely intended to clarify, not alter, the effect of Title VII, the "statements made prior to the introduction of § 703(h) by proponents of Title VII are evidence of the meaning of § 703(h)." *Ante*, at 73, n. 11.

nents of Title VII charged that the Act would "seriously impair . . . [t]he seniority rights of employees in corporate and other employment . . . ." H. R. Rep. No. 914, 88th Cong., 1st Sess., 64–65 (1963) (Minority Report). These opponents apparently believed that if Title VII were adopted, the "benefits which organized labor ha[d] attained through the years would no longer be matters of 'right' . . . ." 110 Cong. Rec. 486 (1964) (statement of Sen. Hill).

The defenders of Title VII responded in strong terms to the charge that "[T]itle VII would undermine the vested rights of seniority." *Id.*, at 7206 (statement of Sen. Clark, quoting Sen. Hill). According to the Act's proponents, this charge was a "cruel hoax . . . generat[ing] unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence." *Id.*, at 9113 (statement of Sen. Keating). The Act's supporters replied that it was simply untrue that under Title VII "seniority systems would be abrogated and . . . white men's jobs would be taken and turned over to Negroes." *Id.*, at 11471 (statement of Sen. Javits).[6] Thus, with some exaggeration, the proponents of Title VII suggested that Title VII would not affect employees' expectations that arose from the operation of seniority systems.[7]

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[6] See also 110 Cong. Rec. 1518 (1964) (statement of Rep. Celler) ("It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and employer. This again is wrong"); *id.*, at 6549 (statement of Sen. Humphrey) ("The full rights and privileges of union membership . . . will in no way be impaired"); *id.*, at 11486 (newsletter from Sen. Humphrey) ("The bill does not permit the Federal Government to destroy the job seniority rights of either union or nonunion employees").

[7] In at least two situations, employee expectations are clearly subject to adjustment and perhaps impairment. First, a violation of Title VII may merit an award of retroactive seniority relief although "such relief diminishes the expectations of other, arguably innocent, employees . . . ." *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 774 (1976). Second, where a seniority system is not bona fide within the meaning of § 703(h), both the adoption and application of the system can be challenged.

The interpretive memorandum introduced during the Senate debate by Senator Clark, to which the Court makes reference, *ante*, at 73, only reinforces my view that Congress saw § 703(h) as focusing on the protection of employee *expectations* that develop during the pendency of a seniority plan. The memorandum stated: "Title VII would have no effect on established seniority rights. *Its effect is prospective and not retrospective.*" 110 Cong. Rec. 7213 (1964) (emphasis added).[8] The other two memoranda submitted by Senator Clark, also quoted by the Court, *ante*, at 73, speak in similar terms of protecting vested seniority rights.[9]

While this legislative history does not contain any explicit reference to the distinction between adoption and application urged by the EEOC, it surely contains no suggestion that Congress intended to treat the decision *to adopt* a seniority plan any differently from the decision *to adopt* a discrimina-

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[8] In quoting the interpretive memorandum, the Court omits the italicized sentence, for obvious reasons. The statement that the effect of Title VII on seniority rights would be "prospective and not retrospective" can be read in two different ways: (1) that, unlike seniority systems adopted prior to the effective date of Title VII, those created after Title VII became effective would be open to challenge on the same grounds as all other employment practices, or (2) that before substantial expectations have arisen through the application of a seniority system, the adoption of the system can be challenged. Both of these readings are inconsistent with the Court's holding in the instant case. Because the language of § 703(h) does not expressly distinguish between seniority systems adopted prior to the effective date, and those adopted after, I am inclined to reject the first interpretation, as is the Court. The second interpretation, however, is consistent with both the language and purposes of § 703(h).

[9] The Justice Department memorandum stated:

"First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect." 110 Cong. Rec. 7207 (1964).

The memorandum containing Senator Clark's response to Senator Dirksen's memorandum noted:

"Seniority rights are in no way affected by the bill. . . . The bill is not retroactive, and it will not require an employer to change existing seniority lists." *Id.*, at 7217.

tory employment practice unrelated to seniority. Rather, the legislative history indicates that Congress was concerned *only* about protecting the good-faith expectations of employees who rely on the continued *application* of established, bona fide seniority systems.[10]

IV

The Court ultimately rejects the EEOC's interpretation of § 703(h) because, in the Court's view, that interpretation is "untenable" and will bring about "unreasonable results." *Ante*, at 71. The reasons underlying the Court's view, unrelated to the language and legislative history of § 703(h), are to my mind without force.

First, the Court suggests that a challenge concerning a seniority system cannot be brought before the application of that system, because "[a] discriminatory effect would arise only when the system is put into operation and the employer 'applies' the system." *Ante*, at 69–70. This reasoning is superficial at best. The Court has recently rejected such reasoning in determining when Title VII's statute of limitations begins to run: "'The proper focus is upon the . . . *discriminatory acts*, not upon the time at which the *consequences* of the act [become] painful.'" *Delaware State College* v. *Ricks*, 449 U. S. 250, 258 (1980), quoting *Abramson* v. *University of Hawaii*, 594 F. 2d 202, 209 (CA9 1979). See also *Chardon* v. *Fernandez*, 454 U. S. 6, 8 (1981).[11] In any event, the Court's analysis overlooks the *immediate* impact resulting from the

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[10] In *Franks* v. *Bowman Transportation Co.*, *supra*, the Court reviewed this same legislative history, and similarly concluded that "the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act *operation* of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." 424 U. S., at 761 (emphasis added).

[11] It is therefore not surprising that lower courts have held that active employees may challenge a discriminatory retirement plan. See, *e. g.*, *Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d 1186, 1188 (CA7 1971).

adoption of a particular seniority system in a collective-bargaining agreement: The employees in the bargaining unit are bound by the agreement. See generally *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U. S. 50 (1975).

The Court also notes that "[a]n adequate remedy for adopting a discriminatory seniority system would very likely include an injunction against the future application of the system and backpay awards for those harmed by its application." *Ante,* at 70. From this premise the Court concludes that § 703(h) must necessarily cover the adoption of seniority systems. The apparent basis for the Court's leap from this premise to its conclusion is the assumption that "[s]uch an injunction . . . would lie only if the requirement[s] of § 703(h) . . . were satisfied." *Ante,* at 70. But the Court's assumption is undercut by *Franks* v. *Bowman Transportation Co.* In that case the Court rejected the theory that § 703(h) served "to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g), 42 U. S. C. § 2000e–5(g)." 424 U. S., at 758. Section 703(h) merely "delineates which employment practices are illegal and thereby prohibited and which are not." *Ibid.* Ignoring the difference between violation and remedy, the Court today adopts the very theory rejected in *Bowman;* it holds that § 703(h) bars a challenge to the adoption of a seniority system because the remedy for a successful challenge to such adoption might resemble the remedy for a challenge to the application of a seniority system.

Finally, the Court offers a policy reason for not distinguishing between adoption and application: that if adoption were not covered by § 703(h), unions and employers would be reluctant to modify "pre-Act seniority systems or post-Act systems whose adoption was not timely challenged." *Ante,* at 71. The Court's foray into the field of policy seems to me to stand as an excellent example of the propriety of deference to agency expertise. For it is obvious that while the modifi-

cation of a pre-existing seniority plan would permit a challenge under the *Griggs* standard to the *modified provision*, the other provisions of the seniority system would continue to receive the protection of § 703(h). Furthermore, to the extent that a pre-existing seniority system is modified to allow protected minorities to overcome prior discrimination, the protection of § 703(h) would not even be necessary; under *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), such affirmative steps taken to assist minorities do not run afoul of any provision of Title VII. And with respect to those modifications not protected under *Weber*, yet violating the *Griggs* standard, adoption should surely be discouraged—not encouraged.

V

In sum, I find no basis in either the language or legislative history of § 703(h) for protecting the decision to adopt a particular seniority system from timely challenge under *Griggs*. In the instant case, respondents have successfully demonstrated, to the satisfaction of the District Court and Court of Appeals, that the six lines of progression under challenge violate the *Griggs* standard. Because there is some question as to whether the respondent employees timely filed their charges,[12] I would remand the case for further proceedings consistent with this opinion.

JUSTICE STEVENS, dissenting.

Section 703(h) provides an affirmative defense for an employer whose administration of a bona fide seniority or merit system has produced consequences that appear to discrimi-

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[12] The majority opinion for the Court of Appeals stated that the lines of progression were instituted in January 1968, 634 F. 2d, at 749, some one year before the charges of racial discrimination were filed with the EEOC. But as the opinion for this Court indicates, the facts in the record suggest that the lines of progression were not even proposed until November 1968. *Ante*, at 66. Because it was immaterial to the Court of Appeals whether the lines were adopted in either January 1968 or sometime after November 1968, the court should be given the opportunity to redetermine when they

nate against a member of a particular race, religion, or sex.[1] Thus, for example, if an employee proves that he was denied a promotion to a particular job and that the job was filled by a member of another race or another sex, the employer may defend on the ground that he was implementing a bona fide seniority or merit system. This affirmative defense is available, however, only if the merit or seniority system is "bona fide," regardless of the date on which it was adopted.

It is clear to me that a seniority system that is unlawful at the time it is adopted cannot be "bona fide" within the meaning of § 703(h).[2] Thus, a post-Act seniority system cannot be

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were adopted. Contrary to the suggestion of the Court, *ante*, at 76, n. 16, such a determination is not difficult; courts routinely determine, for purposes of Title VII's time limitations, when a discriminatory practice was adopted.

[1] The full text of that section provides:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29." 42 U. S. C. § 2000e–2(h).

[2] Of course, for a merit or seniority system to be "bona fide" it also must be an otherwise neutral, rational system. *Teamsters* v. *United States*, 431 U. S. 324, 353; see also *id.*, at 355–356. In *Teamsters*, the Court held that "an otherwise neutral, *legitimate* seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.*, at 353–354 (emphasis added). If a seniority system is not "legitimate," it is not "bona fide" within the meaning of the Act.

bona fide if it was adopted in violation of Title VII; such a system would not provide an employer with a defense under § 703(h). Section 703(h) itself does not address the question of how to determine whether the adoption of a post-Act merit or seniority system is unlawful.[3] Since the adoption of a seniority system is in my opinion an employment practice subject to the requirements of Title VII, it is reasonable to infer that the same standard that applies to hiring, promotion, discharge, and compensation practices also applies to the adoption of a merit or seniority system.[4]

This inference is confirmed by the fact that § 703(h) does not merely provide an affirmative defense for seniority systems; it also provides a similar defense for merit systems and professionally developed ability tests. Indeed, the basic standard of Title VII liability was enunciated in a case in which § 703(h) provided a limited affirmative defense. In *Griggs* v. *Duke Power Co.*, 401 U. S. 424, a case involving employer reliance on a "professionally developed ability test," the Court held:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*, at 431.

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[3] The section simply provides that "[n]otwithstanding any other provision of this subchapter," certain employment practices shall *not* be unlawful. See n. 1, *supra*.

[4] Section 703(a)(2) of the Act provides that it shall be an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(2). The adoption of a seniority system establishes a set of rules that classifies employees in ways that could deprive or tend to deprive an individual of employment opportunities.

The Court in *Griggs* did not suggest that this standard derived from the scope of the affirmative defense afforded to ability tests by § 703(h); rather, the Court concluded that the standard reflected the central "objective of Congress . . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.*, at 429–430.

The Court in this case, however, reads the "specific intent" proviso of § 703(h) as though it were intended to define the proper standard for measuring any challenge to a merit or seniority system.[5] This reading of the proviso is entirely unwarranted. The proviso is a limitation on the scope of the affirmative defense. It addresses the problem created by pre-Act seniority systems, which of course were "lawful" because adopted before the Act became effective and therefore presumptively "bona fide" within the meaning of § 703(h). As the legislative history makes clear, Congress sought to protect seniority rights that had accrued before the effective date of the Act, but it did not want to extend that protection to benefits under seniority systems that were the product of deliberate racial discrimination. The obvious purpose of the proviso was to place a limit on the protection given to pre-Act seniority systems. The Court's broad reading of the proviso ignores both its context in § 703(h) and the historical context in which it was enacted.

The Court's strained reading of the statute may be based on an assumption that if the *Griggs* standard were applied to the adoption of a post-Act seniority system, most post-Act systems would be unlawful since it is virtually impossible to establish a seniority system whose classification of employees will not have a disparate impact on members of some race or sex. Under *Griggs*, however, illegality does not follow auto-

[5] "To be cognizable, a claim that a seniority system has a discriminatory impact must be accompanied by proof of a discriminatory purpose." *Ante*, at 69.

matically from a disparate impact. If the initiation of a new seniority system—or the modification of an existing system—is substantially related to a valid business purpose, the system is lawful. "The touchstone is business necessity." *Griggs, supra,* at 431; cf. *New York Transit Authority* v. *Beazer,* 440 U. S. 568, 587. A reasoned application of *Griggs* would leave ample room for bona fide systems; the adoption of a seniority system often may be justified by the need to induce experienced employees to remain, to establish fair rules for advancement, or to reward continuous, effective service. I can find no provision of Title VII, however, that grants a blanket exemption to the initiation of every seniority system that has not been conceived with a deliberate purpose to discriminate because of race or sex.

In this case, although I disagree with the reasoning of the Court of Appeals, I would affirm its judgment. That court has held that the six lines of progression at issue violated Title VII because they had a demonstrated disparate impact on protected employees that was not justified by any legitimate business purpose.[6] Although I do not question the applicability of § 703(h) to *bona fide* post-Act seniority systems, that section is not available as a defense in this case because the lines of progression—even if a seniority system—were adopted in violation of Title VII and therefore are not "bona fide."[7]

Accordingly, I respectfully dissent.

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[6] See *Patterson* v. *American Tobacco Co.,* 535 F. 2d 257, 264–265 (CA4 1976), cert. denied, 429 U. S. 920.

[7] Unlike JUSTICE BRENNAN, I believe that it is unnecessary to remand this case for a determination of whether a challenge to the adoption of the lines of progression was filed timely. See *ante,* at 86 (BRENNAN, J., dissenting). Since in my opinion a seniority system that was adopted in violation of Title VII cannot be "bona fide," such a system is never entitled to the affirmative defense of § 703(h).

MILLS *v.* HABLUETZEL

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, THIRTEENTH SUPREME JUDICIAL DISTRICT

No. 80–6298. Argued January 12, 1982—Decided April 5, 1982

A Texas statute (§ 13.01) provides that a paternity suit to identify the natural father of an illegitimate child for purposes of obtaining support must be brought before the child is one year old, or the suit is barred. Appellant mother of an illegitimate child and the Texas Department of Human Resources brought suit in a Texas court on behalf of the child to establish that appellee was his natural father. The trial court dismissed the suit under § 13.01 because the child was one year and seven months old when the suit was filed. The Texas Court of Civil Appeals affirmed, holding that the one-year limitation was not tolled during minority and did not violate the Equal Protection Clause of the Fourteenth Amendment.

Held: The one-year period for establishing paternity denies illegitimate children in Texas the equal protection of law. Pp. 97–101.

(a) A State that grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children, *Gomez* v. *Perez*, 409 U. S. 535, and this latter opportunity must be more than illusory, although it need not be coterminous with the procedures accorded legitimate children. Pp. 97–98.

(b) The period for obtaining support granted by Texas to illegitimate children must be of sufficient duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. And the time limitation on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. Section 13.01 fails to meet either of these requirements and thus denies equal protection. Pp. 98–101.

Reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined, and in Part I of which POWELL, J., joined, *post*, p. 102. POWELL, J., filed a statement concurring in the judgment, *post*, p. 106.

Michael E. Mankins argued the cause and filed a brief for appellant.

Lola L. Bonner argued the cause for appellee. With her on the brief was *John H. Flinn.*

JUSTICE REHNQUIST delivered the opinion of the Court.

This Court has held that once a State posits a judicially enforceable right of children to support from their natural fathers, the Equal Protection Clause of the Fourteenth Amendment prohibits the State from denying that same right to illegitimate children. *Gomez* v. *Perez*, 409 U. S. 535 (1973). In this case we are required to determine the extent to which the right of illegitimate children recognized in *Gomez* may be circumscribed by a State's interest in avoiding the prosecution of stale or fraudulent claims. The Texas Court of Civil Appeals, Thirteenth Supreme Judicial District, upheld against federal constitutional challenges the State's one-year statute of limitation for suits to identify the natural fathers of illegitimate children. We noted probable jurisdiction. 451 U. S. 936. We begin by reviewing the history of the statute challenged by appellant.

I

Like all States, Texas imposes upon parents the primary responsibility for support of their legitimate children. See Tex. Fam. Code Ann. (Code) §§ 4.02, 12.04(3) (1975 and Supp. 1982). That duty extends beyond the dissolution of marriage, Code § 14.05, regardless of whether the parent has custody of the child, *Hooten* v. *Hooten*, 15 S. W. 2d 141 (Tex. Civ. App. 1929), and may be enforced on the child's behalf in civil proceedings. Code § 14.05(a). Prior to our decision in *Gomez*, Texas recognized no enforceable duty on the part of a natural father to support his illegitimate children. See *Home of the Holy Infancy* v. *Kaska*, 397 S. W. 2d 208 (Tex. 1965); *Lane* v. *Phillips*, 69 Tex. 240, 6 S. W. 610 (1887); *Bjorgo* v. *Bjorgo*, 391 S. W. 2d 528 (Tex. Civ. App. 1965). A natural father could even assert illegitimacy as a defense to

prosecution for criminal nonsupport. See *Curtin* v. *State*, 155 Tex. Crim. 625, 238 S. W. 2d 187 (1950).

Reviewing the Texas law in *Gomez*, we held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. "[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers," we stated, "there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Ibid.* Although we recognized that "the lurking problems with respect to proof of paternity . . . are not to be lightly brushed aside," we concluded that they did not justify "an impenetrable barrier that works to shield otherwise invidious discrimination." *Ibid.* Accordingly, we held Texas' denial of support rights to illegitimate children to be a denial of equal protection of law.

In response to our decision in *Gomez*, the Texas Legislature considered legislation that would have provided illegitimate children with a cause of action to establish the paternity of their natural fathers and would have imposed upon those fathers the same duty of support owed to legitimate children. The legislature did not enact that legislation, however, choosing instead to establish a procedure by which natural fathers voluntarily could legitimate their illegitimate children and thereby take upon themselves the obligation of supporting those children. *Texas Dept. of Human Resources* v. *Hernandez*, 595 S. W. 2d 189, 191 (Tex. Civ. App. 1980). No provision was made for illegitimate children to seek support from fathers who fail to support them.

Not suprisingly, this legislation was found by Texas courts to be an inadequate response to *Gomez*. A panel of the Texas Court of Civil Appeals held that, because of *Gomez*, "[w]hen the Legislature later provided judicial relief against the father on behalf of a legitimate child for support, it neces-

sarily provided the same relief on behalf of an illegitimate child." *In re R—— V—— M——*, 530 S. W. 2d 921, 922–923 (1975). Only after this judicial recognition of a right to support did the Texas Legislature establish procedures for a paternity and support action on behalf of illegitimate children. *Texas Dept. of Human Resources* v. *Hernandez*, *supra*, at 191.

The rights of illegitimate children to obtain support from their biological fathers are now governed by Chapter 13 of Title 2 of the Code § 13.01 *et seq*. The Code recognizes that establishment of paternity is the necessary first step in all suits by illegitimate children for support from their natural fathers. See *In re Miller*, 605 S. W. 2d 332, 334 (Tex. Civ. App. 1980); *Texas Dept. of Human Resources* v. *Delley*, 581 S. W. 2d 519, 522 (Tex. Civ. App. 1979). Accordingly, Chapter 13 establishes procedures to be followed in judicial determinations of paternity and works in conjunction with other provisions of the Code to establish the duty of fathers to support their illegitimate children. See Code §§ 12.04, 14.05. Once paternity has been determined, Chapter 13 authorizes the court to order the defendant father "to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age," Code § 14.05(a). See Code § 13.42(b).

Although it granted illegitimate children the opportunity to obtain support by establishing paternity, Texas was less than generous. It significantly truncated that opportunity by the statutory provision at issue in this case, § 13.01:

> "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

Texas views this provision as part of the substantive right accorded illegitimate children, not simply as a procedural limi-

tation on that right. *Texas Dept. of Human Resources* v. *Hernandez*, *supra*, at 192–193. Moreover, Texas courts have applied § 13.01 literally to mean that failure to bring suit on behalf of illegitimate children within the first year of their life "results in [their] being forever barred from the right to sue their natural father for child support, a limitation their legitimate counterparts do not share." *In re Miller*, *supra*, at 334. Thus, in response to the constitutional requirements of *Gomez*, Texas has created a one-year window in its previously "impenetrable barrier," through which an illegitimate child may establish paternity and obtain paternal support.[1]

II

Appellant in this case is the mother of a child born out of wedlock in early 1977. In October 1978, she and the Texas Department of Human Resources, to which appellant had as-

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[1] Since the Court of Civil Appeals' decision in this case, the Texas Legislature has amended § 13.01 to increase to four years the period for asserting paternity claims. 1981 Tex. Gen. Laws, ch. 674, § 2, Tex. Fam. Code Ann. § 13.01 (Supp. 1982). Appellee argues that this amendment renders appellant's claim moot, or at least requires a remand so that the Texas courts can determine whether the amendment is retroactive. We disagree.

The case is not moot because § 13.01, as applied by the courts below, continues to stand as a bar to appellant's assertion of a paternity claim against appellee. At the filing of appellant's claim the child was more than one year old, and on September 1, 1981, the effective date of the amendment, the child was more than four years old.

It seems probable that the amendment would not be applied retroactively by Texas courts. "It is well established law in Texas that after a cause of action has become barred by a statute of limitation, the defendant has a vested right to rely on the statute as a defense, and the state legislature cannot divest the defendant of this right by thereafter lifting the bar of limitation which had accrued in favor of the defendant. Any statute that had such an effect would be considered a retroactive law violative of Article 1, sec. 16 of the Constitution of the State of Texas." *Penry* v. *Wm. Barr, Inc.*, 415 F. Supp. 126, 128 (ED Tex. 1976) (citations omitted). See also *Mellinger* v. *City of Houston*, 68 Tex. 37, 3 S. W. 249 (1887); *Brant-*

signed the child's support rights,[2] brought suit on behalf of the child to establish that appellee was his natural father. Appellee answered by asserting that the action was barred by § 13.01 because the child was one year and seven months old when the suit was filed. The trial court agreed with appellee and dismissed the suit.

The dismissal was affirmed on appeal by the Texas Court of Civil Appeals, and discretionary review was denied by the Texas Supreme Court upon a finding of no reversible error.[3] The Court of Civil Appeals, relying upon its decision in *Texas Dept. of Human Resources* v. *Hernandez*, 595 S. W. 2d 189 (1980), held that the one-year limitation was not tolled during minority and did not violate the Equal Protection Clause of the Fourteenth Amendment. The *Hernandez* decision in turn relied upon the constitutional analysis in *Texas Dept. of Human Resources* v. *Chapman*, 570 S. W. 2d 46 (Tex. Civ. App. 1978), where another division of the Court of Civil Appeals had found that "the legitimate state interest in precluding the litigation of stale or fraudulent claims" was rationally related to the one-year bar and therefore did not deny illegitimate children equal protection of the law. *Id.*, at 49.

Appellant argues that the § 13.01 bar imposes a burden on illegitimate children that is not shared by legitimate children, and that the burden is not justified by the State's interest in avoiding the prosecution of stale or fraudulent claims. In

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ley v. *Phoenix Insurance Co.*, 536 S. W. 2d 72, 74 (Tex. Civ. App. 1976); *Southern Pacific Transportation Co.* v. *State*, 380 S. W. 2d 123, 127 (Tex. Civ. App. 1964).

[2] Prior to filing this support suit against appellee, appellant sought financial assistance under the Aid to Families with Dependent Children program. As conditions to eligibility for such assistance, appellant was required "to assign the State any rights to support" held by the child, 42 U. S. C. § 602(a)(26)(A), and "to cooperate with the State . . . in establishing the paternity of [the] child born out of wedlock with respect to whom aid [was] claimed." 42 U. S. C. § 602(a)(26)(B)(i).

[3] The decisions of the Texas Court of Civil Appeals and the Texas Supreme Court are not officially reported.

addition, appellant argues that § 13.01 deprives illegitimate children of their right to support without due process of law. Because we agree with appellant's first argument, we need not consider her second.

III

Our decision in *Gomez* held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. Specifically, we held that a State which grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children. If *Gomez* and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock. It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an "impenetrable barrier" to support, only to replace it with an opportunity so truncated that few could utilize it effectively.

The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court. *Parham* v. *Hughes*, 441

U. S. 347, 357, 361 (1979); *Lalli* v. *Lalli*, 439 U. S. 259, 269 (1978); *Trimble* v. *Gordon*, 430 U. S. 762, 772 (1977); *Gomez* v. *Perez*, 409 U. S., at 538.[4]

Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent

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[4] Appellant contends that time limitations on the right of illegitimate children to prove paternity would never be justified by the State's desire to avoid litigation of stale or fraudulent claims because "[t]he interests of the state, and those of the alleged father, to prevent incorrect claims of paternity are . . . protected by the recent advance in blood and genetic testing." Brief for Appellant 29. We previously have recognized that blood tests are highly probative in proving paternity, *Little* v. *Streater*, 452 U. S. 1, 6–8 (1981), but disagree with appellant's contention that their existence negates the State's interest in avoiding the prosecution of stale or fraudulent claims.

Traditional blood tests do not prove paternity. They prove nonpaternity, excluding from the class of possible fathers a high percentage of the general male population. H. Krause, Illegitimacy: Law and Social Policy 123–136 (1971). Thus, the fact that a certain male is not excluded by these tests does not prove that he is the child's natural father, only that he is a member of the limited class of possible fathers. More recent developments in the field of blood testing have sought not only to "prove nonpaternity" but also to predict paternity with a high degree of probability. See Terasaki, Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing, 16 J. Fam. L. 543 (1978). The proper evidentiary weight to be given to these techniques is still a matter of academic dispute. See, *e. g.*, Jaffee, Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: Response to Terasaki, 17 J. Fam. L. 457 (1979). Whatever evidentiary rule the courts of a particular State choose to follow, if the blood test evidence does not exclude a certain male, he must thereafter turn to more conventional forms of proof—evidence of lack of access to the mother, his own testimony, the testimony of others—to prove that, although not excluded by the blood test, he is not in fact the child's father. As to this latter form of proof, the State clearly has an interest in litigating claims while the evidence is relatively fresh.

This interest is particularly real under Texas procedures. Texas law requires that putative fathers submit to blood tests. Code § 13.02. Refusal to submit to the tests may result in a citation for contempt, Code § 13.02(b), and may be introduced to the jury as evidence that the putative

claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. See *Lalli* v. *Lalli*, *supra*, at 265; *Trimble* v. *Gordon*, *supra*, at 767; *Mathews* v. *Lucas*, 427 U. S. 495, 510 (1976).[5] The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims.

The equal protection analysis in this case, therefore, focuses on two related requirements. First, the period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to

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father has not been biologically excluded from the class of possible fathers. Code § 13.06(d). The results of the blood tests are introduced at a pretrial conference held for the purpose of dismissing the complaint if the father has been excluded by the tests from the class of possible fathers. Code §§ 13.04, 13.05(a). Thus, the only paternity cases which actually go to trial in Texas are those in which the putative father has refused to submit to blood tests or has not been excluded by their results, cases in which conventional types of evidence are of paramount importance.

[5] *Lalli* v. *Lalli* and *Trimble* v. *Gordon* involved the right of illegitimate children to inherit from their natural fathers, while *Mathews* v. *Lucas* involved the right of illegitimate children to receive social security benefits. There is no reason to think that the factual differences between those cases and the present case call for a variation of the general principle which those cases have laid down. In *Lucas* the Court expressly relied on *Gomez* v. *Perez* in reaching its result. 427 U. S., at 507. And in *Lalli* the requirement imposed by New York law for an illegitimate child to inherit from its natural father was that the paternity of the father be declared in a judicial proceeding sometime before his death. 439 U. S., at 263. Thus, even those of our cases which have dealt with entitlement to government benefits, or with the intestate distribution of a natural father's property, have frequently involved support orders or adjudications of paternity as a means for establishing the entitlement or the right there sought.

the State's interest in avoiding the litigation of stale or fraudulent claims. Applying these two requirements to the one-year right granted by Texas, we find a denial of equal protection.

By granting illegitimate children only one year in which to establish paternity, Texas has failed to provide them with an adequate opportunity to obtain support. Paternity suits in Texas "may be brought by any person with an interest in the child," Code § 11.03, but during the child's early years will often be brought by the mother. It requires little experience to appreciate the obstacles to such suits that confront unwed mothers during the child's first year. Financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth. Even if the mother seeks public financial assistance and assigns the child's support claim to the State, it is not improbable that 12 months would elapse without the filing of a claim. Several months could pass before a mother finds the need to seek such assistance, takes steps to obtain it, and is willing to join the State in litigation against the natural father.[6] A sense of the inadequacy of this one-year period is accentuated by a realization that failure to file within 12 months "results in illegitimates being forever barred from the right to sue their natural father for child support," *In re Miller*, 605 S. W. 2d, at 334, while legitimate children may seek such support at any time until the age of 18.[7]

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[6] See n. 2, *supra*.

[7] The Texas Family Code imposes no period of limitation on the right of a legitimate child to obtain support from its father, a right which lasts until the child is 18 years old. § 14.05(a). Although Texas law includes a 4-year limitations period applicable to "[e]very action . . . for which no limitation is otherwise prescribed," Tex. Rev. Civ. Stat. Ann., Art., 5529

Moreover, this unrealistically short time limitation is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims. In *Gomez* we recognized that the problems of proof in paternity suits "are not to be lightly brushed aside," but held that such problems do not justify a complete denial of support rights to illegitimate children. 409 U. S., at 538. Neither do they justify a period of limitation which so restricts those rights as effectively to extinguish them. We can conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of 12 months will appreciably increase the likelihood of fraudulent claims.[8]

Accordingly, we conclude that the one-year period for establishing paternity denies illegitimate children in Texas the equal protection of law.[9] The judgment of the Texas

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(Vernon 1982), the running of that period is tolled during minority. Art. 5535. See also *In re Miller*, 605 S. W. 2d, at 334.

[8] Appellee contends that the one-year limitation of § 13.01 also is justified by the State's "interest in the continuation of the institutions of family and marriage" and the avoidance of any state actions that would "discourage either institution or . . . encourage persons to have children out of wedlock." Brief for Appellee 21. Important as such a state interest might be, we have repeatedly held that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972). See also *Lalli* v. *Lalli*, 439 U. S., at 265; *Trimble* v. *Gordon*, 430 U. S., at 769–770; *Mathews* v. *Lucas*, 427 U. S., at 505.

[9] The restrictions imposed by States to control problems of proof, like the restriction imposed by Texas in this case, often take the form of statutes of limitation. "Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945). Because such statutes "are by definition arbitrary," *ibid.*, they are best left to legislative determination and control. Normally, therefore, States are free to set periods of limitation without fear of violating some provision of the Constitution. In

Court of Civil Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE BLACKMUN join, and with whom JUSTICE POWELL joins as to Part I, concurring.

Today, this Court holds that a Texas statute prescribing a one-year statute of limitation for paternity suits violates the Equal Protection Clause of the Fourteenth Amendment. Although I agree with the Court's analysis and result, I write separately because I fear that the opinion may be misinterpreted as approving the 4-year statute of limitation now used in Texas. See Tex. Fam. Code Ann. § 13.01 (Supp. 1982).

I

As the Court notes, the response of the Texas Legislature to our opinion in *Gomez* v. *Perez*, 409 U. S. 535 (1973), was "less than generous." *Ante*, at 94. The one-year statute of limitation for paternity suits, enacted following our decision in *Gomez*, severely restricted the opportunity for illegitimate children to obtain financial support from their natural fathers, an opportunity not denied legitimate children. Although the need for proof of paternity distinguishes legitimate from illegitimate children in their claims for child support, the State's asserted justification is neither sufficiently weighty nor substantially related to the limitation to uphold the statute under the Fourteenth Amendment.

The appellee has set forth a number of "state interests" to justify the one-year statute of limitation, but the Court accepts only one of these as permissible—the interest in preventing the prosecution of stale or fraudulent claims. The Court holds today that this interest will justify only those

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this case, however, the limitation period enacted by the Texas Legislature has the unusual effect of emasculating a right which the Equal Protection Clause requires the State to provide to illegitimate children.

statutes of limitation that "are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims." *Ante*, at 99. The Court elaborates:

> "It requires little experience to appreciate the obstacles to such suits that confront unwed mothers during the child's first year. Financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth." *Ante*, at 100.

Certainly, these circumstances demonstrate that the one-year period of limitation once provided by § 13.01 is not sufficiently long to permit either the child or the mother to assert a claim for child support; moreover, there is nothing to indicate that the period is substantially related to the asserted interest in preventing the prosecution of stale or fraudulent claims. However, it is not only birth-related circumstances that compel the conclusion that the statutory distinction in this case between legitimate and illegitimate children is unconstitutional. To begin with, the strength of the asserted state interest is undercut by the countervailing state interest in ensuring that genuine claims for child support are satisfied. The State's interest stems not only from a desire to see that "justice is done," but also from a desire to reduce the number of individuals forced to enter the welfare rolls.[1] By making it difficult for unwed mothers to obtain child support

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[1] In holding that the general 4-year statute of limitation, which governed paternity suits for children born before enactment of § 13.01, would be tolled during the plaintiff's minority, the Texas Court of Civil Appeals wrote:

"We agree with the Washington Supreme Court which held that '[t]he state has a compelling interest in assuring that the primary obligation for support of illegitimate children falls on both natural parents rather than on

payments from the natural fathers of their illegitimate children, the one-year statute of limitation could only increase the burden on the state welfare system. Thus, while the State surely has an interest in preventing the prosecution of stale and fraudulent claims, at the same time it has a strong interest, peculiar to the State itself, in ensuring that genuine claims for child support are not denied.[2]

It is also significant to the result today that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff.[3] Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment. When this observation is coupled with the Texas Legislature's efforts to deny illegitimate children any significant opportunity to prove paternity and thus obtain child

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the taxpayers of this state.' *State* v. *Wood*, 89 Wash. 2d 97, 569 P. 2d 1148, 1151 (1977)." *Texas Dept. of Human Resources* v. *Delley*, 581 S. W. 2d 519, 522 (1979).

[2] The State's concern about stale and fraudulent claims is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father. In *Little* v. *Streater*, 452 U. S. 1 (1981), this Court discussed a report by the American Bar Association and the American Medical Association indicating that a series of blood tests could provide over a 90% probability of negating a finding of paternity for erroneously accused men. See Miale, Jennings, Rettberg, Sell, & Krause, Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L. Q. 247, 258 (1976). The Court concluded that the "effectiveness of the [tests] attests the probative value of blood test evidence in paternity cases." 452 U. S., at 8. See also Terasaki, Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing, 16 J. Family L. 543 (1978).

[3] Most statutes of limitation in Texas are governed by Tex. Rev. Civ. Stat. Ann., Art. 5535 (Vernon 1982), which provides:

"If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues either a minor, a married person under twenty-one years of age, a person imprisoned or a person of unsound mind, the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such

support, it is fair to question whether the burden placed on illegitimates is designed to advance permissible state interests.

Finally, the practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child. For example, if, because of the continuing relationship between the natural father and the mother, the father has provided the child with financial support for several years, the mother understandably would be unlikely or even unwilling[4] to jeopardize her relationship with the child's father by filing a paternity suit in order to protect her child's right to financial support at some indeterminate future date. Alternatively, the child may have lived with the father alone or his relatives for a number of

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person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title."

See *Simpson* v. *City of Abilene*, 388 S. W. 2d 760 (Tex. Civ. App. 1965) (holding the 2-year statute of limitation for bringing a negligence action tolled during the plaintiff's minority).

In *Texas Dept. of Human Resources* v. *Hernandez*, 595 S. W. 2d 189, 192 (Tex. Civ. App. 1980), the Texas Court of Civil Appeals expressly held that Tex. Fam. Code Ann. § 13.01 (Supp. 1982) is not tolled on account of the plaintiff's minority on the ground that tolling the statute of limitation "would but constitute a disingenuous way of holding Section 13.01 unconstitutional." Moreover, according to the court, by incorporating the time limitation into the statute creating the substantive right, the "limitation qualifies the right so that it becomes a part of the substantive law rather than the procedural law." 595 S. W. 2d, at 193. Thus, as a matter of state law, the tolling provision in Tex. Rev. Civ. Stat. Ann., Art. 5535 (Vernon 1982) does not apply to § 13.01.

[4] The unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or, as the Court points out, from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born. The problem may be exacerbated if, as often happens, the mother herself is a minor. The possibility of this unwillingness to file suit underscores that the mother's and child's interests are not congruent, and illustrates the unreasonableness of the Texas statute of limitation.

years, a situation that leaves the child obviously unable to sue his father to establish paternity. The risk that the child will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of his life.

II

A review of the factors used in deciding that the one-year statute of limitation cannot withstand an equal protection challenge indicates that longer periods of limitation for paternity suits also may be unconstitutional. In short, there is nothing special about the first year following birth that compels the decision in this case. Because I do not read the Court's decision as prejudging the constitutionality of longer periods of limitation, I join it.

JUSTICE POWELL, concurring in the judgment.

I join Part I of JUSTICE O'CONNOR's concurring opinion, but do not join the Court's opinion. I am concerned, for the reasons persuasively stated by JUSTICE O'CONNOR, that the Court's opinion may be read as prejudging the constitutionality of longer periods of limitation. As she observes, it is significant "that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff." *Ante*, at 104.

ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC

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

No. 80-1430. Argued December 8, 1981—Decided April 5, 1982*

These cases present the question whether respondents, who were convicted after separate trials on unrelated charges in Ohio state courts, and who failed to comply with Ohio Rule of Criminal Procedure 30 mandating contemporaneous objections to jury instructions, may challenge the constitutionality of those instructions in federal habeas corpus proceedings under 28 U. S. C. § 2254. A provision of Ohio's Criminal Code (§ 2901.05(A)), effective January 1, 1974, placed the burden of proving guilt beyond a reasonable doubt upon the prosecution and provided that "[t]he burden of going forward with the evidence of an affirmative defense is upon the accused." Until 1976, most Ohio courts assumed that the statute did not change Ohio's traditional rule requiring defendants to carry the burden of proving the affirmative defense of self-defense by a preponderance of the evidence. In 1976, however, the Ohio Supreme Court, in *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88, held that the statute placed only the burden of production, not persuasion, on the defendant and that once the defendant produced some evidence of self-defense, the prosecutor had to disprove self-defense beyond a reasonable doubt. Respondents' trials occurred after § 2901.05(A)'s effective date, but before the decision in *Robinson*, and none of the respondents objected to the trial court's jury instruction that the respondent bore the burden of proving self-defense by a preponderance of the evidence. The appropriate Ohio Courts of Appeal affirmed the homicide convictions of respondents Hughes and Bell before the decision in *Robinson*, and the Ohio Supreme Court declined to review their convictions. Neither of these respondents challenged the self-defense instruction in their appeals. On respondent Isaac's appeal of his assault conviction to the intermediate appellate court, he relied upon the intervening decision in *Robinson* to challenge the self-defense instruction given at his trial. The court rejected the challenge as having been waived by Isaac's failure to comply with Ohio Rule of Criminal Procedure 30, and the Ohio Su-

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*Together with *Perini, Correctional Superintendent* v. *Bell*, and *Engle, Correctional Superintendent* v. *Hughes*, also on certiorari to the same court (see this Court's Rule 19.4).

preme Court dismissed his appeal. Each respondent unsuccessfully sought a writ of habeas corpus from a Federal District Court, but the Court of Appeals reversed all three District Court orders.

Held:

1. Insofar as respondents simply challenged the correctness of the self-defense instructions under Ohio law, they alleged no deprivation of federal rights and were entitled to no federal habeas relief under 28 U. S. C. § 2254. Respondents' habeas petitions raised only one colorable constitutional claim. Pp. 119–123.

(a) There is no merit to respondents' claim that § 2901.05(A) implicitly designated absence of self-defense an element of the crimes charged against them and thus due process required the prosecution to prove such element beyond a reasonable doubt. Merely because a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt does not mean that it has defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an "element" of the crime for one purpose, it must do so for all purposes. Pp. 119–121.

(b) A colorable constitutional claim is stated by respondents' argument that since self-defense negates the elements of the crimes charged against them of voluntary, unlawful, and purposeful or knowing behavior, once the defendant raises the possibility of self-defense, the Due Process Clause requires that the State disprove that defense as part of its task of establishing voluntariness, unlawfulness, and guilty *mens rea*. The controversy among lower courts as to the viability of this type of claim suggests that respondents' argument states at least a plausible constitutional claim. Pp. 121–123.

2. Respondents are barred from asserting, in federal habeas corpus proceedings, their constitutional claim, which was forfeited before the state courts because of respondents' failure to comply with Ohio Rule of Criminal Procedure 30. Pp. 124–135.

(a) While the writ of habeas corpus is a bulwark against convictions that violate "fundamental fairness," it undermines the usual principles of finality of litigation. Liberal allowance of the writ also degrades the prominence of the trial and costs society the right to punish admitted offenders. Moreover, the writ imposes special costs on the federal system, frustrating both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. These costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts, and thus, as held in *Wainwright* v. *Sykes*, 433 U. S. 72, a state prisoner,

barred by procedural default from raising a constitutional claim on direct appeal, may not litigate that claim in a § 2254 habeas corpus proceeding without showing cause for and actual prejudice from the default. The principles of *Sykes* are not limited to cases in which the constitutional error did not affect the truthfinding function of the trial. Pp. 126–129.

(b) Cause for respondents' defaults cannot be based on the asserted ground that any objection to Ohio's self-defense instruction would have been futile since Ohio had long required criminal defendants to bear the burden of proving such affirmative defense. If a defendant perceives a viable constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Nor can cause for respondents' defaults be based on the asserted ground that they could not have known at the time of their trials that the Due Process Clause addresses the burden of proving affirmative defenses. *In re Winship*, 397 U. S. 358, decided four and one-half years before the first of respondents' trials, laid the basis for their constitutional claim. During the five years following that decision, numerous defendants relied upon *Winship* to argue that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses, and several lower courts sustained this claim. In light of this activity, it cannot be said that respondents lacked the tools to construct their constitutional claim. Pp. 130–134.

(c) There is no merit to respondents' contention that the cause-and-prejudice standard of *Sykes* should be replaced by a plain-error inquiry. While federal courts apply a plain-error rule for direct review of federal convictions, federal habeas challenges to state convictions entail greater finality problems and special comity concerns. Moreover, a plain-error standard is unnecessary to correct miscarriages of justice. Victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard. Pp. 134–135.

646 F. 2d 1129, 635 F. 2d 575, and 642 F. 2d 451, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., concurred in the result. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 136. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 137.

Simon B. Karas, Assistant Attorney General of Ohio, argued the cause for petitioners. With him on the briefs were *William J. Brown*, Attorney General, and *Richard David Drake*, Assistant Attorney General.

James R. Kingsley, by appointment of the Court, 453 U. S. 911, argued the cause and filed a brief for respondent Isaac. *Richard L. Aynes* argued the cause for respondents Bell and Hughes. With him on the brief for respondent Bell were *Kathleen S. Aynes* and *J. Dean Carro*. Messrs. Aynes and Carro filed a brief for respondent Hughes.†

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), we held that a state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, could not litigate that claim in a § 2254 habeas corpus[1] proceeding without showing cause for and actual prejudice from the default. Applying the principle of *Sykes* to these cases, we conclude that respondents, who failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions, may not challenge the constitutionality of those instructions in a federal habeas proceeding.

I

Respondents' claims rest in part on recent changes in Ohio criminal law. For over a century, the Ohio courts required criminal defendants to carry the burden of proving self-defense by a preponderance of the evidence. See *State* v. *Seliskar*, 35 Ohio St. 2d 95, 298 N. E. 2d 582 (1973); *Szalkai* v. *State*, 96 Ohio St. 36, 117 N. E. 12 (1917); *Silvus* v. *State*, 22 Ohio St. 90 (1872). A new criminal code, effective Janu-

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†Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree*, *Assistant Attorney General Jensen*, and *Deputy Solicitor General Frey* for the United States; and by *J. Stanley Needles* for the Ohio Prosecuting Attorneys Association.

Briefs of *amici curiae* urging affirmance were filed by *Gregory L. Ayers* for the Ohio Criminal Defense Lawyers Association; and by *John B. Midgley* for the Institutional Legal Services Project.

[1] Title 28 U. S. C. § 2254(a) empowers "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in viola-

ary 1, 1974, subjected all affirmative defenses to the following rule:

> "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." Ohio Rev. Code Ann. § 2901.05(A) (1975).

For more than two years after its enactment, most Ohio courts assumed that this section worked no change in Ohio's traditional burden-of-proof rules.[2] In 1976, however, the Ohio Supreme Court construed the statute to place only the burden of production, not the burden of persuasion, on the defendant. Once the defendant produces some evidence of self-defense, the state court ruled, the prosecutor must disprove self-defense beyond a reasonable doubt. *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (syllabus by the court).[3] The present actions arose because Ohio tried and convicted respondents after the effective date of

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tion of the Constitution or laws or treaties of the United States." This statutory remedy may not be identical in all respects to the common-law writ of habeas corpus. See *Wainwright* v. *Sykes*, 433 U. S., at 78.

[2] See, *e. g.*, *State* v. *Rogers*, 43 Ohio St. 2d 28, 30, 330 N. E. 2d 674, 676 (1975) (noting that "self-defense is an affirmative defense, which must be established by a preponderance of the evidence"), cert. denied, 423 U. S. 1061 (1976). But see *State* v. *Matthews*, No. 74AP–428, p. 9 (Ct. App. Franklin County, Ohio, Dec. 24, 1974) (§ 2901.05(A) "evinces a legislative intent to change the burden of the defendant with respect to affirmative defenses"); 1 O. Schroeder & L. Katz, Ohio Criminal Law and Practice § 2901.05, p. 14 (1974) ("The provisions of 2901.05(A) follow the modern statutory trend in this area, requiring the accused to raise the affirmative defense, but leaving the burden of persuasion upon the prosecution"); Student Symposium: The Proposed Ohio Criminal Code—Reform and Regression, 33 Ohio St. L. J. 351, 420 (1972) (suggesting that legislators intended to change traditional rule).

[3] In Ohio, the court's syllabus contains the controlling law. See *Haas* v. *State*, 103 Ohio St. 1, 7–8, 132 N. E. 158, 159–160 (1921).

§ 2901.05(A), but before the Ohio Supreme Court's interpretation of that statute in *Robinson*.[4]

On December 16, 1974, an Ohio grand jury indicted respondent Hughes for aggravated murder.[5] At trial the State showed that, in the presence of seven witnesses, Hughes shot and killed a man who was keeping company with his former girlfriend. Prosecution witnesses testified that the victim was unarmed and had just attempted to shake hands with Hughes. Hughes, however, claimed that he acted in self-defense. His testimony suggested that he feared the victim, a larger man, because he had touched his pocket while approaching Hughes. The trial court instructed the jury that Hughes bore the burden of proving this defense by a preponderance of the evidence. Counsel for Hughes did not specifically object to this instruction.[6]

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[4] Two years after *Robinson*, the Ohio Legislature once again amended Ohio's burden-of-proof law. The new § 2901.05(A), effective November 1, 1978, provides:

"Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, *and the burden of proof, by a preponderance of the evidence*, for an affirmative defense, is upon the accused." Ohio Rev. Code Ann. § 2901.05(A) (Supp. 1980) (emphasis added).

This amendment has no effect on the litigation before us. Thoughout this opinion, citations to § 2901.05(A) refer to the statute in effect between January 1, 1974, and October 31, 1978.

[5] See Ohio Rev. Code Ann. § 2903.01 (1975):

"(A) No person shall purposely, and with prior calculation and design, cause the death of another.

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

"(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code."

[6] Hughes' counsel did register a general objection "to the entire Charge in its entirety" because "[w]e are operating now under a new code in which

On January 24, 1975, the jury convicted Hughes of voluntary manslaughter, a lesser included offense of aggravated murder.[7] On September 24, 1975, the Summit County Court of Appeals affirmed the conviction, and on March 19, 1976, the Supreme Court of Ohio dismissed Hughes' appeal, finding no substantial constitutional question.[8] Neither of these appeals challenged the jury instruction on self-defense.

Ohio tried respondent Bell for aggravated murder in April 1975. Evidence at trial showed that Bell was one of a group of bartenders who had agreed to help one another if trouble developed at any of their bars. On the evening of the murder, one of the bartenders called Bell and told him that he feared trouble from five men who had entered his bar. When Bell arrived at the bar, the bartender informed him that the men had left. Bell pursued them and gunned one of the men down in the street.

Bell defended on the ground that he had acted in self-defense. He testified that as he approached two of the men, the bartender shouted: "He's got a gun" or "Watch out, he's got a gun." At this warning, Bell started shooting. As in Hughes' case, the trial court instructed the jury that Bell had the burden of proving self-defense by a preponderance of the evidence. Bell did not object to this instruction and the jury

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many things are uncertain." App. 48. Counsel's subsequent remarks, however, demonstrated that his objection concerned only the proposed definitions of "Aggravated Murder, Murder and Voluntary Manslaughter." *Id.*, at 48, 50.

[7] Voluntary manslaughter is "knowingly caus[ing] the death of another" while under "extreme emotional stress brought on by serious provocation reasonably sufficient to incite [the defendant] into using deadly force." Ohio Rev. Code Ann. § 2903.03 (A) (1975).

Hughes was sentenced to 6–25 years in prison. The State's petition for certiorari indicated that Hughes has been "granted final releas[e] as a matter of parole." Pet. for Cert. 6. This release does not moot the controversy between Hughes and the State. See *Humphrey* v. *Cady*, 405 U. S. 504, 506–507, n. 2 (1972); *Carafas* v. *LaVallee*, 391 U. S. 234, 237–240 (1968).

[8] See *State* v. *Hughes*, C. A. No. 7717 (Ct. App. Summit County, Ohio, Sept. 24, 1975); *State* v. *Hughes*, No. 75–1026 (Ohio, Mar. 19, 1976).

convicted him of murder, a lesser included offense of the charged crime.[9]

Bell appealed to the Cuyahoga County Court of Appeals, but failed to challenge the instruction assigning him the burden of proving self-defense. The Court of Appeals affirmed Bell's conviction on April 8, 1976.[10] Bell appealed further to the Ohio Supreme Court, again neglecting to challenge the self-defense instruction. That court overruled his motion for leave to appeal on September 17, 1976,[11] two months after it construed § 2901.05(A) to place the burden of proving absence of self-defense on the prosecution. See *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 88.

Respondent Isaac was tried in September 1975 for felonious assault.[12] The State showed that Isaac had severely beaten his former wife's boyfriend. Isaac claimed that the boyfriend punched him first and that he acted solely in self-defense. Without objection from Isaac, the court instructed the jury that Isaac carried the burden of proving this defense by a preponderance of the evidence. The jury acquitted Isaac of felonious assault, but convicted him of the lesser included offense of aggravated assault.[13]

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[9] Ohio defines murder as "purposely caus[ing] the death of another." Ohio Rev. Code Ann. § 2903.02(A) (1975). Bell received a sentence of 15 years to life imprisonment.

[10] *State* v. *Bell*, No. 34727 (Ct. App. Cuyahoga County, Ohio, Apr. 8, 1976).

[11] *State* v. *Bell*, No. 76–573 (Ohio, Sept. 17, 1976).

[12] See Ohio Rev. Code Ann. § 2903.11 (1975):

"(A) No person shall knowingly:

"(1) Cause serious physical harm to another;

"(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

"(B) Whoever violates this section is guilty of felonious assault, a felony of the second degree."

[13] Ohio Rev. Code Ann. § 2903.12 (1975) describes aggravated assault:

"(A) No person, while under extreme emotional stress brought on by se-

Ten months after Isaac's trial, the Ohio Supreme Court decided *State* v. *Robinson*, *supra*. In his appeal to the Pickaway County Court of Appeals,[14] Isaac relied upon *Robinson* to challenge the burden-of-proof instructions given at his trial. The court rejected this challenge because Isaac had failed to object to the jury instructions during trial, as required by Ohio Rule of Criminal Procedure 30.[15] This default waived Isaac's claim. *State* v. *Glaros*, 170 Ohio St. 471, 166 N. E. 2d 379 (1960); *State* v. *Slone*, 45 Ohio App. 2d 24, 340 N. E. 2d 413 (1975).

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rious provocation reasonably sufficient to incite him into using deadly force shall knowingly:

"(1) Cause serious physical harm to another;

"(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

"(B) Whoever violates this section is guilty of aggravated assault, a felony of the fourth degree."

The judge sentenced Isaac to a term of six months' to five years' imprisonment. According to the State's petition for certiorari, Isaac has been released from jail. This controversy is not moot, however. See n. 7, *supra*.

[14] *State* v. *Isaac*, No. 346 (Ct. App. Pickaway County, Ohio, Feb. 11, 1977).

[15] At the time Hughes and Bell were tried, this Rule stated in relevant part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Shortly before Isaac's trial, Ohio amended the language of the Rule in minor respects:

"A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Both versions of the Ohio Rule closely parallel Rule 30 of the Federal Rules of Criminal Procedure.

The Supreme Court of Ohio dismissed Isaac's appeal for lack of a substantial constitutional question.[16] On the same day, that court decided *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977), and *State* v. *Williams*, 51 Ohio St. 2d 112, 364 N. E. 2d 1364 (1977), vacated in part and remanded, 438 U. S. 911 (1978). In *Humphries* the court ruled that every criminal trial held on or after January 1, 1974, "is required to be conducted in accordance with the provisions of [Ohio Rev. Code Ann. § 2901.05]." 51 Ohio St. 2d, at 95, 364 N. E. 2d, at 1355 (syllabus by the court). The court, however, refused to extend this ruling to a defendant who failed to comply with Ohio Rule of Criminal Procedure 30. *Id.*, at 102–103, 364 N. E. 2d, at 1359. In *Williams*, the court declined to consider a constitutional challenge to Ohio's traditional self-defense instruction, again because the defendant had not properly objected to the instruction at trial.

All three respondents unsuccessfully sought writs of habeas corpus from Federal District Courts. Hughes' petition alleged that the State had violated the Fifth and Fourteenth Amendments by failing to prove guilt "as to each and every essential element of the offense charged" and by failing to "so instruct" the jury. The District Judge rejected this claim, finding that Ohio law does not consider absence of self-defense an element of aggravated murder or voluntary manslaughter. Although the self-defense instructions at Hughes' trial might have violated § 2901.05(A), they did not violate the Federal Constitution. Alternatively, the District Judge held that Hughes had waived his constitutional claim by failing to comply with Ohio's contemporaneous objection rule. Since Hughes offered no explanation for his failure to object, and showed no actual prejudice, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), barred him from asserting the claim. *Hughes* v. *Engle*, Civ. Action No. C 77–156A (ND Ohio, June 26, 1979).

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[16] *State* v. *Isaac*, No. 77–412 (Ohio, July 20, 1977).

Bell's petition for habeas relief similarly alleged that the trial judge had violated due process by instructing "the jury that the accused must prove an affirmative defense by a preponderance of the evidence." The District Court acknowledged that Bell had never raised this claim in the state courts. Observing, however, that the State addressed Bell's argument on the merits, the District Court ruled that Bell's default was not a "deliberate bypass." See *Fay* v. *Noia*, 372 U. S. 391 (1963). Although the court cited our opinion in *Wainwright* v. *Sykes*, *supra*, it did not inquire whether Bell had shown cause for or prejudice from his procedural waiver. The court then ruled that Ohio could constitutionally burden Bell with proving self-defense since it had not defined absence of self-defense as an element of murder. *Bell* v. *Perini*, No. C 78–343 (ND Ohio, Dec. 26, 1978).

Bell moved for reconsideration, urging that § 2901.05(A) had in fact defined absence of self-defense as an element of murder. The District Court rejected this argument and then declared that the "real issue" was whether Bell was entitled to retroactive application of *State* v. *Robinson*. Bell failed on this claim as well since Ohio's decision to limit retroactive application of *Robinson* "substantially further[ed] the State's legitimate interest in the finality of its decisions." App. to Pet. for Cert. A59. Indeed, the District Court noted that this Court had sanctioned just this sort of limit on retroactivity. See *Hankerson* v. *North Carolina*, 432 U. S. 233, 244, n. 8 (1977). *Bell* v. *Perini*, No. C 78–343 (ND Ohio, Jan. 23, 1979).

Isaac's habeas petition was more complex than those submitted by Hughes and Bell. He urged that the Ohio Supreme Court had "refuse[d] to give relief [to him], despite its own pronouncement" that *State* v. *Robinson* would apply retroactively. In addition, he declared broadly that the Ohio court's ruling was "contrary to the Supreme Court of the United States in regard to proving self-defense." The District Court determined that Isaac had waived any constitu-

tional claims by failing to present them to the Ohio trial court. Since he further failed to show either cause for or actual prejudice from the waiver, see *Wainwright* v. *Sykes*, *supra*, he could not present his claim in a federal habeas proceeding. *Isaac* v. *Engle*, Civ. Action No. C–2–78–278 (SD Ohio, June 26, 1978).

The Court of Appeals for the Sixth Circuit reversed all three District Court orders. In *Isaac* v. *Engle*, 646 F. 2d 1129 (1980), a majority of the en banc court ruled that *Wainwright* v. *Sykes* did not preclude consideration of Isaac's constitutional claims. At the time of Isaac's trial, the court noted, Ohio had consistently required defendants to prove affirmative defenses by a preponderance of the evidence. The futility of objecting to this established practice supplied adequate cause for Isaac's waiver. Prejudice, the second prerequisite for excusing a procedural default, was "clear" since the burden of proof is a critical element of factfinding, and since Isaac had made a substantial issue of self-defense. 646 F. 2d, at 1134.

A majority of the court also believed that the instructions given at Isaac's trial violated due process. Four judges thought that § 2901.05(A) defined the absence of self-defense as an element of felonious and aggravated assault. While the State did not have to define its crimes in this manner, "due process require[d] it to meet the burden that it chose to assume." 646 F. 2d, at 1135. A fifth judge believed that, even absent § 2901.05(A), the Due Process Clause would compel the prosecution to prove absence of self-defense because that defense negates criminal intent, an essential element of aggravated and felonious assault. A sixth judge agreed that Ohio had violated Isaac's due process rights, but would have concentrated on the State's arbitrary refusal to extend the retroactive benefits of *State* v. *Robinson*, to Isaac.[17]

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[17] The latter analysis paralleled the reasoning of the panel that originally decided the case. See *Isaac* v. *Engle*, 646 F. 2d 1122 (1980).

Four members of the court dissented from the en banc opinion. Two

Relying on the en banc decision in *Isaac*, two Sixth Circuit panels ordered the District Court to release Bell and Hughes unless the State chose to retry them within a reasonable time. *Bell* v. *Perini*, 635 F. 2d 575 (1980);[18] *Hughes* v. *Engle*, judgt. order reported at 642 F. 2d 451 (1980). We granted certiorari to review all three Sixth Circuit judgments. 451 U. S. 906 (1981).

II

A state prisoner is entitled to relief under 28 U. S. C. § 2254 only if he is held "in custody in violation of the Constitution or laws or treaties of the United States." Insofar as respondents simply challenge the correctness of the self-defense instructions under Ohio law, they allege no deprivation of federal rights and may not obtain habeas relief. The lower courts, however, read respondents' habeas petitions to state at least two constitutional claims. Respondents repeat both of those claims here.

A

First, respondents argue that § 2901.05, which governs the burden of proof in all criminal trials, implicitly designated absence of self-defense an element of the crimes charged against them. Since Ohio defined its crimes in this manner, respondents contend, our opinions in *In re Winship*, 397 U. S. 358 (1970); *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975); and *Patterson* v. *New York*, 432 U. S. 197 (1977), required the prosecution to prove absence of self-defense beyond a reasonable doubt. A plurality of the en banc Sixth Circuit seemed to accept this argument in Isaac's appeal, finding that due process required the State "to meet the burden that it chose to assume." 646 F. 2d, at 1135.

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judges would have found no constitutional violation and two would have barred consideration of Isaac's claims under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

[18] One judge dissented from this decision, indicating that *Wainwright* v. *Sykes*, *supra*, barred Bell's claims.

A careful review of our prior decisions reveals that this claim is without merit.[19] Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare *Mullaney* v. *Wilbur*, *supra*, with *Patterson* v. *New York*, *supra*. These decisions, however, do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime.[20] The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an "element" of the crime for one purpose, it must do so for all purposes. The structure of Ohio's Code suggests simply that the State decided to assist defendants by requiring the prosecution to disprove certain affirmative defenses. Absent concrete evidence that the Ohio Legislature or courts understood § 2901.05(A) to go further than this, we decline to accept respondents' construction of state law. While they

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[19] The State suggests that the ineffectiveness of this claim demonstrates that respondents suffered no actual prejudice from their procedural default. We agree that the claim is insufficient to support habeas relief, but do not categorize this insufficiency as a lack of prejudice. If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable. It is unnecessary in such a situation to inquire whether the prisoner preserved his claim before the state courts.

[20] Definition of a crime's elements may have consequences under state law other than allocation of the burden of persuasion. For example, the Ohio Supreme Court interpreted § 2901.05(A) to require defendants to come forward with some evidence of affirmative defenses. *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976). Defendants do not bear the same burden with respect to the elements of a crime; the State must prove those elements beyond a reasonable doubt even when the defendant introduces no evidence. See, *e. g.*, *State* v. *Isaac*, 44 Ohio Misc. 87, 337 N. E. 2d 818 (Munic. Ct. 1975). Moreover, while Ohio requires the trial court to charge the jury on all elements of a crime, *e. g.*, *State* v.

attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law.[21]

B

Respondents also allege that, even without considering § 2901.05, Ohio could not constitutionally shift the burden of proving self-defense to them. All of the crimes charged against them require a showing of purposeful or knowing behavior. These terms, according to respondents, imply a degree of culpability that is absent when a person acts in self-defense. See Committee Comment to Ohio Rev. Code Ann. § 2901.21 (1975) ("generally, an offense is not committed unless a person . . . has a certain guilty state of mind at the time of his act or failure [to act]"); *State* v. *Clifton*, 32 Ohio App. 2d 284, 286–287, 290 N. E. 2d 921, 923 (1972) ("one who kills in self-defense does so without the *mens rea* that otherwise would render him culpable of the homicide"). In addition, Ohio punishes only actions that are voluntary, Ohio Rev. Code Ann. § 2901.21(A)(1) (1975), and unlawful, *State* v. *Simon*, No. 6262, p. 13 (Ct. App. Montgomery County, Ohio, Jan. 16, 1980), modified on reconsideration (Jan. 22, 1980). Self-defense, respondents urge, negates these elements of criminal behavior. Therefore, once the defendant raises the possibility of self-defense, respondents contend that the

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Bridgeman, 51 Ohio App. 2d 105, 366 N. E. 2d 1378 (1977), vacated in part, 55 Ohio St. 2d 261, 381 N. E. 2d 184 (1978), it does not require explicit instructions on the prosecution's duty to negate self-defense beyond a reasonable doubt. *State* v. *Abner*, 55 Ohio St. 2d 251, 379 N. E. 2d 228 (1978).

[21] We have long recognized that a "mere error of state law" is not a denial of due process. *Gryger* v. *Burke*, 334 U. S. 728, 731 (1948). If the contrary were true, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Ibid.* See also *Beck* v. *Washington*, 369 U. S. 541, 554–555 (1962); *Bishop* v. *Mazurkiewicz*, 634 F. 2d 724, 726 (CA3 1980); *United States ex rel. Burnett* v. *Illinois*, 619 F. 2d 668, 670–671 (CA7 1980).

State must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness. The Due Process Clause, according to respondents' interpretation of *Winship*, *Mullaney*, and *Patterson*, forbids the States to disavow any portion of this burden.[22]

This argument states a colorable constitutional claim. Several courts have applied our *Mullaney* and *Patterson* opinions to charge the prosecution with the constitutional duty of proving absence of self-defense.[23] Most of these decisions adopt respondents' reasoning that due process commands the prosecution to prove absence of self-defense if that defense negates an element, such as purposeful conduct, of the charged crime. While other courts have rejected this type of claim,[24] the controversy suggests that respondents' second argument states at least a plausible constitutional claim. We proceed, therefore, to determine whether re-

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[22] In further support of the claim that, § 2901.05 aside, due process requires the prosecution to prove absence of self-defense, respondent Bell maintains that the States may never constitutionally punish actions taken in self-defense. If fundamental notions of due process prohibit criminalization of actions taken in self-defense, Bell suggests, then absence of self-defense is a vital element of every crime. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1366–1379 (1979); Comment, Shifting the Burden of Proving Self-Defense—With Analysis of Related Ohio Law, 11 Akron L. Rev. 717, 758–759 (1978); Note, The Constitutionality of Affirmative Defenses After *Patterson v. New York*, 78 Colum. L. Rev. 655, 672–673 (1978); Note, Burdens of Persuasion in Criminal Proceedings: The Reasonable Doubt Standard After *Patterson v. New York*, 31 U. Fla. L. Rev. 385, 415–416 (1979).

[23] *E. g.*, *Tennon* v. *Ricketts*, 642 F. 2d 161 (CA5 1981); *Holloway* v. *McElroy*, 632 F. 2d 605 (CA5 1980), cert. denied, 451 U. S. 1028 (1981); *Wynn* v. *Mahoney*, 600 F. 2d 448 (CA4), cert. denied, 444 U. S. 950 (1979); *Commonwealth* v. *Hilbert*, 476 Pa. 288, 382 A. 2d 724 (1978). See also Comment, 11 Akron L. Rev., *supra* n. 22; Note, 78 Colum. L. Rev., *supra* n. 22.

[24] *E. g.*, *Carter* v. *Jago*, 637 F. 2d 449 (CA6 1980); *Baker* v. *Muncy*, 619 F. 2d 327 (CA4 1980). See also *Leland* v. *Oregon*, 343 U. S. 790 (1952) (rule requiring accused to prove insanity beyond a reasonable doubt does not violate due process).

spondents preserved this claim before the state courts and, if not, to inquire whether the principles articulated in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), bar consideration of the claim in a federal habeas proceeding.[25]

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[25] JUSTICE BRENNAN accuses the Court of misreading Isaac's habeas petition in order to create a procedural default and "expatiate upon" the principles of *Sykes*. *Post*, at 137–138, 142–144. It is immediately apparent that these charges of "judicial activism" and "revisionism" carry more rhetorical force than substance. Our decision addresses the claims of three respondents, and JUSTICE BRENNAN does not dispute our characterization of the petitions filed by respondents Bell and Hughes. If the Court were motivated by a desire to expound the law, rather than to adjudicate the individual claims before it, the cases of Bell and Hughes would provide ample opportunity for that task. Instead, we have attempted to decide each of the controversies presented to us.

JUSTICE BRENNAN, moreover, clearly errs when he suggests that Isaac's habeas petition "presented exactly one claim," that the "selective retroactive application of the *Robinson* rule denied him due process of law." *Post*, at 137, 139. Isaac's memorandum in support of his habeas petition did not adopt such a miserly view. Instead, Isaac relied heavily upon *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975); *Patterson* v. *New York*, 432 U. S. 197 (1977); and *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977), cases explaining that, at least in certain circumstances, the Due Process Clause requires the prosecution to disprove affirmative defenses. See App. to Brief in No. 78–3488 (CA6), pp. 26, 28–31. Nor did the District Judge construe Isaac's petition in the manner suggested by JUSTICE BRENNAN. Rather, he believed that Isaac raised "the federal constitutional question of whether, under Ohio law, placing the burden of proving the affirmative defense of self-defense upon the defendant violates the defendant's due process right to have the State prove each essential element of the crime beyond a reasonable doubt." App. to Pet. for Cert. A41. Similarly, all but one of the Sixth Circuit Judges who considered Isaac's case en banc thought that Isaac raised more claims than the one isolated by JUSTICE BRENNAN. Even the panel opinion invoked by JUSTICE BRENNAN, *post*, at 142, n. 10, rejected the notion that Isaac presented only one claim. 646 F. 2d, at 1127. Isaac's own brief to this Court, finally, recites a long list of claims. Although he alludes to the argument featured by JUSTICE BRENNAN, he also maintains that his jury was misinstructed "[a]s a matter of federal constitutional law," Brief for Respondent Isaac 15, and that *Mullaney* v. *Wilbur* and *Hankerson* v. *North Carolina* control his claims. Brief for Respondent Isaac 2, 3, 13–15. Under these circumstances, it is

III

None of the respondents challenged the constitutionality of the self-defense instruction at trial.[26] They thus violated Ohio Rule of Criminal Procedure 30, which requires contem-

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incomprehensible that JUSTICE BRENNAN construes Isaac's habeas petition to raise but a single claim.

It appears to us, moreover, that the claim touted by JUSTICE BRENNAN formed no part of Isaac's original habeas petition. While Isaac's petition and supporting memorandum referred to the Ohio Supreme Court's decision in *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977), Isaac did not discuss that decision's distinction between bench and jury trials, the distinction that JUSTICE BRENNAN finds so interesting. *Post*, at 138–139. Instead, the focus of his argument was that "[i]f a state declares disproving an affirmative defense (once raised) is an element of the state's case, then to require a defendant to prove that affirmative defense violates due process and full retroactive effect must be accorded to defendants tried under the erroneous former law." App. to Brief in No. 78–3488 (CA6), p. 30. Thus, Isaac reasoned that once *Robinson* interpreted absence of self-defense as an "element of the state's case," *Mullaney* imposed a constitutional obligation upon the State to carry that burden. If Ohio did not apply *Robinson* retroactively to all defendants "tried under the erroneous former law," Isaac concluded, it would violate *Mullaney*. Ohio's failure to apply *Robinson* retroactively to him violated due process, not because Ohio had applied that decision retroactively to other defendants, but because "[t]he instruction at his trial denied him due process under *Mullaney*." App. to Brief in No. 78–3488 (CA6), pp. 26–27. This argument parallels the ones we discuss in text.

It is, of course, possible to construe Isaac's confused petition and supporting memorandum to raise the claim described by JUSTICE BRENNAN. Many prisoners allege general deprivations of their constitutional rights and raise vague objections to various state rulings. A creative appellate judge could almost always distill from these allegations an unexhausted due process claim. If such a claim were present, *Rose* v. *Lundy*, 455 U. S. 509 (1982), would mandate dismissal of the entire petition. In this case, however, the District Judge did not identify the claim that JUSTICE BRENNAN proffers. Under these circumstances, we are reluctant to interpolate an unexhausted claim not directly presented by the petition. *Rose* v. *Lundy* does not compel such harsh treatment of habeas petitions.

[26] While respondent Bell does not deny his procedural default, he argues that we should overlook it because the State did not raise the issue in its

poraneous objections to jury instructions. Failure to comply with Rule 30 is adequate, under Ohio law, to bar appellate consideration of an objection. See, *e. g.*, *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354 (1977); *State* v. *Gordon*, 28 Ohio St. 2d 45, 276 N. E. 2d 243 (1971). The Ohio Supreme Court has enforced this bar against the very due process argument raised here. *State* v. *Williams*, 51 Ohio St. 2d 112, 364 N. E. 2d 1364 (1977), vacated in part and remanded, 438 U. S. 911 (1978).[27] We must determine, therefore, whether respondents may litigate, in a federal habeas proceeding, a constitutional claim that they forfeited before the state courts.[28]

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filings with the District Court. In some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim. *E. g.*, *Estelle* v. *Smith*, 451 U. S. 454, 468, n. 12 (1981); *Jenkins* v. *Anderson*, 447 U. S. 231, 234, n. 1 (1980). In this case, however, both the District Court and Court of Appeals evaluated Bell's default. Bell, moreover, did not make his "waiver of waiver" claim until he submitted his brief on the merits to this Court. Accordingly, we decline to consider his argument.

[27] In Isaac's own case, the Ohio Court of Appeals refused to entertain his challenge to the self-defense instruction because of his failure to comply with Rule 30. The Ohio Supreme Court subsequently dismissed Isaac's appeal for lack of a substantial constitutional question. It is unclear whether these appeals raised a constitutional, or merely statutory, attack on the self-defense instruction used at Isaac's trial. If Isaac presented his constitutional argument to the state courts, then they determined, on the very facts before us, that the claim was waived.

Relying upon *State* v. *Long*, 53 Ohio St. 2d 91, 372 N. E. 2d 804 (1978), respondents argue that the Ohio Supreme Court has recognized its power, under Ohio's plain-error rule, to excuse Rule 30 defaults. *Long*, however, does not persuade us that the Ohio courts would have excused respondents' defaults. First, the *Long* court stressed that the plain-error rule applies only in "exceptional circumstances," such as where, "but for the error, the outcome of the trial clearly would have been otherwise." *Id.*, at 96, 97, 372 N. E. 2d, at 807, 808. Second, the *Long* decision itself refused to invoke the plain-error rule for a defendant who presented a constitutional claim identical to the one pressed by respondents.

[28] As we recognized in *Sykes*, 433 U. S., at 78–79, the problem of waiver is separate from the question whether a state prisoner has exhausted state

A

The writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law,[29] it claims a place in Art. I of our Constitution.[30] Today, as in prior centuries, the writ is a bulwark against convictions that violate "fundamental fairness." *Wainwright* v. *Sykes*, 433 U. S., at 97 (STEVENS, J., concurring).

We have always recognized, however, that the Great Writ entails significant costs.[31] Collateral review of a conviction

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remedies. Section 2254(b) requires habeas applicants to exhaust those remedies "available in the courts of the State." This requirement, however, refers only to remedies still available at the time of the federal petition. See *Humphrey* v. *Cady*, 405 U. S., at 516; *Fay* v. *Noia*, 372 U. S. 391, 435 (1963). Respondents, of course, long ago completed their direct appeals. Ohio, moreover, provides only limited collateral review of convictions; prisoners may not raise claims that could have been litigated before judgment or on direct appeal. See Ohio Rev. Code Ann. § 2953.21(A) (1975); *Collins* v. *Perini*, 594 F. 2d 592 (CA6 1979); *Keener* v. *Ridenour*, 594 F. 2d 581 (CA6 1979). Since respondents could have challenged the constitutionality of Ohio's traditional self-defense instruction at trial or on direct appeal, we agree with the lower courts that state collateral relief is unavailable to respondents and, therefore, that they have exhausted their state remedies with respect to this claim.

[29] See 3 W. Blackstone, Commentaries *129–*138; *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603.

[30] Art. I, § 9, cl. 2.

[31] Judge Henry J. Friendly put the matter well when he wrote that "[t]he proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 145 (1970).

JUSTICE POWELL, elucidating a position that ultimately commanded a majority of the Court, similarly suggested:

"No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been

extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S. 1, 24–25 (1963) (dissenting opinion). See also *Hankerson* v. *North Carolina*, 432 U. S., at 247 (POWELL, J., concurring in judgment). By frustrating these interests, the writ undermines the usual principles of finality of litigation.[32]

Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Wainwright* v. *Sykes*, *supra*, at 90. Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.

We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of wit-

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imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 262 (1973) (concurring opinion) (footnote omitted).

See also *Stone* v. *Powell*, 428 U. S. 465 (1976).

[32] Judge Friendly and Professor Bator suggest that this absence of finality also frustrates deterrence and rehabilitation. Deterrence depends upon the expectation that "one violating the law will swiftly and certainly

nesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Finally, the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 263–265 (1973) (POWELL, J., concurring).[33]

In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a

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become subject to punishment, just punishment." Rehabilitation demands that the convicted defendant realize that "he is justly subject to sanction, that he stands in need of rehabilitation." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *supra* n. 31, at 146.

[33] During the last two decades, our constitutional jurisprudence has recognized numerous new rights for criminal defendants. Although some habeas writs correct violations of long-established constitutional rights, others vindicate more novel claims. State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands.

In an individual case, the significance of this frustration may pale beside the need to remedy a constitutional violation. Over the long term, however, federal intrusions may seriously undermine the morale of our state judges. As one scholar has observed, there is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness

claim in that forum.[34] The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules. These considerations supported our *Sykes* ruling that, when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.

Respondents urge that we should limit *Sykes* to cases in which the constitutional error did not affect the truthfinding function of the trial. In *Sykes* itself, for example, the prisoner alleged that the State had violated the rights guaranteed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). While this defect was serious, it did not affect the determination of guilt at trial.

We do not believe, however, that the principles of *Sykes* lend themselves to this limitation. The costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing. We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.

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which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra* n. 32, at 451. Indiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own. While this concern cannot detract from a federal court's duty to correct a "miscarriage of justice," *Sykes*, 433 U. S., at 91, it counsels some care in administering § 2254.

[34] Counsel's default may stem from simple ignorance or the pressures of trial. We noted in *Sykes*, however, that a defendant's counsel may deliberately choose to withhold a claim in order to "sandbag"—to gamble on acquittal while saving a dispositive claim in case the gamble does not pay off. See 433 U. S., at 89–90.

B

Respondents seek cause for their defaults in two circumstances. First, they urge that they could not have known at the time of their trials that the Due Process Clause addresses the burden of proving affirmative defenses. Second, they contend that any objection to Ohio's self-defense instruction would have been futile since Ohio had long required criminal defendants to bear the burden of proving this affirmative defense.

We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim.[35] Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.[36]

Respondents' claim, however, is not simply one of futility. They further allege that, at the time they were tried, they could not know that Ohio's self-defense instructions raised

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[35] See *Estelle* v. *Williams*, 425 U. S. 501, 515 (1976) (POWELL, J., concurring) (footnote omitted) (the policy disfavoring inferred waivers of constitutional rights "need not be carried to the length of allowing counsel for a defendant deliberately to forgo objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile"); *Myers* v. *Washington*, 646 F. 2d 355, 364 (CA9 1981) (Poole, J., dissenting) (futility cannot constitute cause if it means simply that a claim was "unacceptable to that particular court at that particular time"), cert. pending, No. 81–1056.

[36] In fact, the decision to withhold a known constitutional claim resembles the type of deliberate bypass condemned in *Fay* v. *Noia*, 372 U. S. 391 (1963). Since the cause-and-prejudice standard is more demanding than *Fay*'s deliberate bypass requirement, see *Sykes*, *supra*, at 87, we are confident that perceived futility alone cannot constitute cause.

constitutional questions. A criminal defendant, they urge, may not waive constitutional objections unknown at the time of trial.

We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object.[37] We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair.[38] These concerns, however, need not detain us here since respondents' claims were far from unknown at the time of their trials.

In re Winship, 397 U. S. 358 (1970), decided four and one-half years before the first of respondents' trials, laid the basis for their constitutional claim. In *Winship* we held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. During the five years following this decision,[39] dozens of defendants relied upon this language to challenge

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[37] The State stressed at oral argument before this Court that it does not seek such a ruling. Instead, Ohio urges merely that "when the tools are available to construct the argument, . . . you can charge counsel with the obligation of raising that argument." Tr. of Oral Arg. 8–9.

[38] See *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (separate opinion of Harlan, J.); *Williams* v. *United States*, 401 U. S. 646, 665–666 (1971) (MARSHALL, J., concurring in part and dissenting in part); *Hankerson* v. *North Carolina*, 432 U. S., at 246–248 (POWELL, J., concurring in judgment).

[39] Even before *Winship*, criminal defendants and courts perceived that placing a burden of proof on the defendant may violate due process. For example, in *Stump* v. *Bennett*, 398 F. 2d 111, cert. denied, 393 U. S. 1001 (1968), the Eighth Circuit ruled en banc that an Iowa rule requiring defendants to prove alibis by a preponderance of the evidence violated due process. The court, moreover, observed: "That an oppressive shifting of

the constitutionality of rules requiring them to bear a burden of proof.[40] In most of these cases, the defendants' claims countered well-established principles of law. Nevertheless,

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the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law." 398 F. 2d, at 122. See also *Johnson* v. *Bennett*, 393 U. S. 253 (1968) (vacating and remanding lower court decision for reconsideration in light of *Stump*); *State* v. *Nales*, 28 Conn. Supp. 28, 248 A. 2d 242 (1968) (holding that due process forbids requiring defendant to prove "lawful excuse" for possession of housebreaking tools).

[40] See, *e. g.*, *State* v. *Commenos*, 461 S. W. 2d 9 (Mo. 1970) (en banc) (intent to return allegedly stolen item); *Phillips* v. *State*, 86 Nev. 720, 475 P. 2d 671 (1970) (insanity), cert. denied, 403 U. S. 940 (1971); *Commonwealth* v. *O'Neal*, 441 Pa. 17, 271 A. 2d 497 (1970) (absence of malice); *Commonwealth* v. *Vogel*, 440 Pa. 1, 268 A. 2d 89 (1970) (insanity), overruled, *Commonwealth* v. *Rose*, 457 Pa. 380, 321 A. 2d 880 (1974); *Smith* v. *Smith*, 454 F. 2d 572 (CA5 1971) (alibi), cert. denied, 409 U. S. 885 (1972); *United States* v. *Braver*, 450 F. 2d 799 (CA2 1971) (inducement), cert. denied, 405 U. S. 1064 (1972); *Wilbur* v. *Robbins*, 349 F. Supp. 149 (Me. 1972) (heat of passion), aff'd *sub nom. Wilbur* v. *Mullaney*, 473 F. 2d 943 (CA1 1973), vacated, 414 U. S. 1139 (1974), on remand, 496 F. 2d 1303 (CA1 1974), aff'd, 421 U. S. 684 (1975); *State* v. *Cuevas*, 53 Haw. 110, 488 P. 2d 322 (1971) (lack of malice aforethought or presence of legal justification); *State* v. *Brown*, 163 Conn. 52, 301 A. 2d 547 (1972) (possession of license to deal in drugs), overruled on other grounds, *State* v. *Whistnant*, 179 Conn. 576, 427 A. 2d 414 (1980); *In re Foss*, 10 Cal. 3d 910, 519 P. 2d 1073 (1974) (en banc) (entrapment); *Woods* v. *State*, 233 Ga. 347, 211 S. E. 2d 300 (1974) (authority to sell narcotic drugs), appeal dism'd, 422 U. S. 1002 (1975); *State* v. *Buzynski*, 330 A. 2d 422 (Me. 1974) (mental disease); *People* v. *Jordan*, 51 Mich. App. 710, 216 N. W. 2d 71 (1974) (absence of intent), disapproved on other grounds, *People* v. *Johnson*, 407 Mich. 196, 284 N. W. 2d 718 (1979); *Commonwealth* v. *Rose*, 457 Pa. 380, 321 A. 2d 880 (1974) (intoxication); *Retail Credit Co.* v. *Dade County*, 393 F. Supp. 577 (SD Fla. 1975) (maintenance of reasonable procedures); *Fuentes* v. *State*, 349 A. 2d 1 (Del. 1975) (extreme emotional distress), overruled, *State* v. *Moyer*, 387 A. 2d 194 (Del. 1978); *Henderson* v. *State*, 234 Ga. 827, 218 S. E. 2d 612 (1975) (self-defense); *State* v. *Grady*, 276 Md. 178, 345 A. 2d 436 (1975) (alibi); *Evans* v. *State*, 28 Md. App. 640, 349 A. 2d 300 (1975) (absence of malice; further describing in detail that due process requires prosecution to negate most affirmative defenses, including self-defense), aff'd, 278 Md. 197, 362 A. 2d 629 (1976); *State* v. *Robinson*, 48 Ohio App. 2d 197, 356 N. E. 2d 725 (1975) (self-defense), aff'd, 47 Ohio St. 2d 103, 351 N. E. 2d 88

numerous courts agreed that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses.[41] In light of this activity, we cannot say that respondents lacked the tools to construct their constitutional claim.[42]

We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to

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(1976). See also *Trimble* v. *State*, 229 Ga. 399, 401–402 191 S. E. 2d 857, 858–859 (1972) (dissenting opinion) (alibi), overruled, *Patterson* v. *State*, 233 Ga. 724, 213 S. E. 2d 612 (1975); *Grace* v. *State*, 231 Ga. 113, 118, 125–128, 200 S. E. 2d 248, 252, 256–258 (1973) (dissenting opinions) (insanity).

Several commentators also perceived that *Winship* might alter traditional burdens of proof for affirmative defenses. *E. g.*, W. LaFave & A. Scott, Handbook on Criminal Law § 8, pp. 46–51 (1972); The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 159 (1970); Student Symposium, 33 Ohio St. L. J., *supra* n. 2, at 421; Comment, Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism After *Wilbur v. Mullaney*, 26 U. Maine L. Rev. 37 (1974).

[41] Even those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time.

[42] Respondent Isaac even had the benefit of our opinion in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), decided three months before his trial. In *Mullaney* we invalidated a Maine practice requiring criminal defendants to negate malice by proving that they acted in the heat of passion. We thus explicitly acknowledged the link between *Winship* and constitutional limits on assignment of the burden of proof. Cf. *Lee* v. *Missouri*, 439 U. S. 461, 462 (1979) *(per curiam)* (suggesting that defendants who failed, after *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), to object to the exclusion of women from juries must show cause for the failure).

Respondents argue at length that, before the Ohio Supreme Court's decision in *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (1976), they did not know that Ohio Rev. Code Ann. § 2901.05(A) changed the traditional burden of proof. Ohio's interpretation of § 2901.05(A), however, is relevant only to claims that we reject independently of respondents' procedural default. See *supra*, at 119–121; n. 25, *supra*.

omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.[43]

C

Respondents, finally, urge that we should replace or supplement the cause-and-prejudice standard with a plain-error inquiry. We rejected this argument when pressed by a federal prisoner, see *United States* v. *Frady*, *post*, p. 152, and find it no more compelling here. The federal courts apply a plain-error rule for direct review of federal convictions. Fed. Rule Crim. Proc. 52(b). Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners

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[43] Respondents resist this conclusion by noting that *Hankerson* v. *North Carolina*, 432 U. S., at 243, gave *Mullaney* v. *Wilbur*, the opinion explicitly recognizing *Winship*'s effect on affirmative defenses, "complete retroactive effect." *Hankerson* itself, however, acknowledged the distinction between the retroactive availability of a constitutional decision and the right to claim that availability after a procedural default. JUSTICE WHITE's majority opinion forthrightly suggested that the States "may be able to insulate past convictions [from the effect of *Mullaney*] by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." 432 U. S., at 244, n. 8. In these cases we accept the force of that language as applied to defendants tried after *Winship*.

Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice. Respondents urge that their prejudice was so great that it should permit relief even in the absence of cause. *Sykes*, however, stated these criteria in the conjunctive and the facts of these cases do not persuade us to depart from that approach.

is "greater than the showing required to establish plain error on direct appeal." *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977); *United States* v. *Frady*, *post*, at 166.[44]

Contrary to respondents' assertion, moreover, a plain-error standard is unnecessary to correct miscarriages of justice. The terms "cause" and "actual prejudice" are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard, see *Wainwright* v. *Sykes*, 433 U. S., at 91; *id.*, at 94–97 (STEVENS, J., concurring), we decline to adopt the more vague inquiry suggested by the words "plain error."

IV

Close analysis of respondents' habeas petitions reveals only one colorable constitutional claim. Because respondents failed to comply with Ohio's procedures for raising that contention, and because they have not demonstrated cause for the default, they are barred from asserting that claim under 28 U. S. C. § 2254. The judgments of the Court of Appeals are reversed, and these cases are remanded for proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN concurs in the result.

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[44] Respondents bolster their plain-error contention by observing that Ohio will overlook a procedural default if the trial defect constituted plain error. Ohio, however, has declined to exercise this discretion to review the type of claim pressed here. See n. 27, *supra*. If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review. See *Mullaney* v. *Wilbur*, *supra*, at 688, n. 7; *Ulster County Court* v. *Allen*, 442 U. S. 140, 147–154 (1979). Our opinions, however, make clear that the States have the primary responsibility to interpret and apply their plain-error rules. Certainly we should not rely upon a state plain-error rule when the State has refused to apply that rule to the very sort of claim at issue.

JUSTICE STEVENS, concurring in part and dissenting in part.

A petition for a writ of habeas corpus should be dismissed if it merely attaches a constitutional label to factual allegations that do not describe a violation of any constitutional right. In Part II–A of its opinion, the Court seems to agree with this proposition. See *ante*, at 119–121. The Court nevertheless embarks on an exposition of the procedural hurdles that must be surmounted before confronting the merits of an allegation that "states at least a plausible constitutional claim." *Ante*, at 122. Those rules, the Court states, "do not depend upon the type of claim raised by the prisoner." *Ante*, at 129. Yet, the Court concludes, they will not bar relief for "victims of a fundamental miscarriage of justice." *Ante*, at 135.

In my opinion, the Court's preoccupation with procedural hurdles is more likely to complicate than to simplify the processing of habeas corpus petitions by federal judges.[1] In

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[1] The Court establishes in this case and in *United States* v. *Frady*, *post*, p. 152, that "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his . . . procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *Post*, at 167–168. I joined *Frady* because the Court applied the prejudice prong of the cause-and-prejudice standard in an appropriate fashion, concluding that the erroneous instruction did not "[infect the] entire trial with error of constitutional dimensions," *post*, at 170, and "[perceiving] no risk of a fundamental miscarriage of justice in this case," *post*, at 172. Like the prejudice prong, the cause prong has some relation to the inquiry I believe the Court should undertake in habeas corpus cases. See *Rose* v. *Lundy*, 455 U. S. 509, 547–548, n. 17 (STEVENS, J., dissenting). The failure to object generally indicates that defense counsel felt that the trial error was not critical to his client's case; presumably, therefore, the error did not render the trial fundamentally unfair.

In these cases, however, the Court applies the cause prong without relating its application to the fairness of respondents' trials. Indeed, the Court categorically rejects respondents' argument "that their prejudice was so great that it should permit relief even in the absence of cause," noting that *Wainwright* v. *Sykes*, 433 U. S. 72, stated the cause-and-prejudice

these cases, I would simply hold that neither of the exhausted claims advanced by respondents justifies a collateral attack on their convictions.[2] I agree with the Court's rejection of the claim that the enactment of § 2901.05 imposed a constitutional burden on Ohio prosecutors to prove the absence of self-defense beyond a reasonable doubt. It seems equally clear to me that, apart from § 2901.05, the Constitution does not require the prosecutor to shoulder that burden whenever willfulness is an element of the offense, provided, of course, that the jury is properly instructed on the intent issue. Nothing in the Court's opinion persuades me that the second theory is any more "plausible" than the first.

I would reverse on the merits the judgment of the Court of Appeals.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today's decision is a conspicuous exercise in judicial activism—particularly so since it takes the form of disregard of precedent scarcely a month old. In its eagerness to expatiate upon the "significant costs" of the Great Writ, *ante*, at 126–128, and to apply "the principles articulated in *Wainwright* v. *Sykes*, [433 U. S. 72 (1977)]," *ante*, at 123, to the cases before us, the Court demonstrably misreads and reshapes the habeas claim of at least one of the state prisoners involved in this action. Respondent Isaac presented exactly one claim in his habeas petition. That claim *did not even*

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standard in the conjunctive. *Ante*, at 134, n. 43. I would not apply that standard, as the Court does in this case, to bar habeas corpus relief simply as a matter of procedural foreclosure.

[2] A third claim is that respondents were deprived of due process and equal protection of the laws because the Ohio Supreme Court refused to apply retroactively to their convictions its disapproval of the challenged jury instruction. The Court declines to address this claim on the ground that it was not expressly raised in the habeas corpus petition. *Ante*, at 124, n. 25. I am not sure whether it can be said that the claim has not been raised, but in any event I find the claim unpersuasive.

exist until after Isaac was denied relief on his last direct appeal. As a result, Isaac could not have "preserved" his claim in the state courts: He simply committed no "procedural default," and the Court is thus clearly wrong to apply *Sykes* to his claim in order to relegate it to the dustbin. Moreover, the Court does so by ignoring the holding only last month in *Rose* v. *Lundy*, 455 U. S. 509 (1982): namely, that a habeas petition that contains *any* unexhausted claims must be dismissed by the habeas court. The Court then compounds its error when it attempts to articulate the "principles" of *Sykes:* In purporting to give content to the "cause" standard announced in that case, the Court defines "cause" in a way supported neither by *Sykes* nor by common sense. I dissent from both of these errors, which are discussed in turn below.

I

Respondent Isaac was indicted in May 1975; he was convicted after a jury trial and sentenced during the following September.[1] While his conviction was on appeal in the Ohio Court of Appeals, the Ohio Supreme Court decided *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N. E. 2d 88 (July 1976), which construed Ohio Rev. Code Ann. § 2901.05(A) (effective Jan. 1, 1974) to require the prosecution to bear the burden of persuasion, beyond a reasonable doubt, with respect to an affirmative defense of self-defense raised by the defendant. The Ohio Court of Appeals affirmed Isaac's conviction in February 1977.[2] The Ohio Supreme Court dismissed Isaac's appeal in July 1977.[3] On the same day, the Ohio Supreme Court decided *State* v. *Humphries*, 51 Ohio St. 2d 95, 364 N. E. 2d 1354. That case declared *Robinson* retroactive to the effective date of § 2901.05(A), but only *partially:* It held that in order to gain the retroactive benefits of the *Robinson*

[1] App. 2; App. to Brief in No. 78–3488 (CA6), pp. 2, 3–4.
[2] App. 6.
[3] *Id.*, at 13.

decision, a defendant tried before a jury must have preserved his claim by objection *at trial* to the allocation of the affirmative-defense burden of proof, while a bench-trial defendant could have made the same objection as late as in the *Court of Appeals*, and the objection would still have been preserved. 51 Ohio St. 2d, at 102–103, 364 N. E. 2d, at 1359.

Isaac filed his habeas petition in the United States District Court for the Southern District of Ohio in March 1978.[4] The asserted ground for relief was "denial of due process of law," in that

> "[t]he trial court charged petitioner had the burden of proving self-defense. After conviction and during the first appeal the Ohio Supreme Court declared the instructions to be prejudicial error under *Robinson*. This case was immediately raised to the Appellate Court. They held any error was waived. The Ohio Supreme Court then held *Robinson* retroactive. Petitioner had raised retroactivity in its leave to appeal and was denied leave to appeal the same day *Humphries* was decided declaring retroactivity. The Ohio Supreme Court refuses to give relief despite its own pronouncement. The holding of the court is contrary to the Supreme Court of the United States in regard to proving self-defense."[5]

Isaac's memorandum in support of his habeas petition made it plain that his claim was that *Humphries*' selective retroactive application of the *Robinson* rule denied him due process of law.[6] It is obvious, of course, that it was simply impossible

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[4] App. to Brief in No. 78–3488 (CA6), p. 18.

[5] *Id.*, at 21 (emphasis added).

[6] *Id.*, at 25: "[T]he Ohio Supreme Court denied [Isaac] leave to appeal on the same day it decided *State* v. *Humphries*, . . . which declared its ruling in *Robinson* to be retroactive to January 1, 1974. . . . [Isaac] submits to make *Robinson* retroactive, and then to refuse to give him the benefits of retroactivity violates the due process guarantees of the Fourteenth Amendment . . . ."

to make this claim before *Humphries* was decided, in July 1977, on the same day that Isaac's direct appeals in the state court system were finally rejected.

Ohio Rev. Code Ann. § 2953.21(A) (1975) provides for postconviction relief under certain circumstances:

> "Any person convicted of a criminal offense . . . claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

By applying the doctrine of res judicata to postconviction petitions, the Ohio Supreme Court has allowed relief under this procedure only under limited circumstances: Constitutional issues can be raised under § 2953.21(A) only when they could not have been raised at trial or on appeal. *State* v. *Perry*, 10 Ohio St. 2d 175, 180–181, 226 N. E. 2d 104, 108 (1967); see *Keener* v. *Ridenour*, 594 F. 2d 581, 589–591 (CA6 1979) (construing scope of Ohio postconviction remedy); *Riley* v. *Havener*, 391 F. Supp. 1177, 1179–1180 (ND Ohio 1974) (same). But Isaac's claim is manifestly of the sort that *could not have been raised at trial or on appeal*, for the claim only came into existence on the day that Isaac's last appeal was rejected. Consequently, state postconviction remedies are available to Isaac and have *not* been exhausted.

I draw three conclusions from the foregoing account, all of which to my mind follow ineluctably from the undisputed facts of this case. First, Isaac's habeas petition should have been dismissed for his failure to exhaust available state remedies. See *Picard* v. *Connor*, 404 U. S. 270 (1971), where we emphasized that

> "the federal claim must be fairly presented to the state courts. . . . Only if the state courts have had the first

> opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." *Id.*, at 275–276.

In the present case, petitioner Engle responded to Isaac's petition by raising the issue of Isaac's failure to exhaust.[7] Therefore the Court of Appeals clearly erred, under *Picard* and our whole line of exhaustion precedents, in granting habeas relief to Isaac instead of requiring exhaustion. The proper disposition of Isaac's case is thus to reverse and remand with instructions to dismiss on exhaustion grounds. The Court's failure to order such a disposition is incomprehensible: Barely a month ago this Court emphatically reaffirmed the exhaustion doctrine, and indeed extended it, announcing a requirement of "total exhaustion" for habeas petitions. *Rose* v. *Lundy*, 455 U. S. 509 (March 3, 1982).[8] But today the Court finds the nostrum of "cause and prejudice" more attractive, and so *Rose* v. *Lundy* is not applied. *Sic transit gloria Lundy!* In scarcely a month, the bloom is off the *Rose*.[9]

My second conclusion is that Isaac simply committed no "procedural default" in failing to raise at trial or on direct appeal the claim that appears in his habeas petition. That claim *did not exist* at any time during Isaac's trial or direct appeal. Thus the essential factual predicate for an application of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), is com-

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[7] *Id.*, at 35–36.

[8] "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 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." 455 U. S., at 518–519.

[9] The Court notes, *ante*, at 123–124, n. 25, that Isaac added citations to *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and *Patterson* v. *New York*, 432 U. S. 197 (1977), in his memorandum in support of his habeas petition. The Court apparently holds that these citations somehow save Isaac's petition from dismissal. But that holding is flatly contrary to the explicit holding of *Rose*, that "the exhaustion rule in 28 U. S. C. §§ 2254(b), (c) requires

pletely absent in Isaac's case. *Sykes* involved a habeas petitioner who had failed to object in a timely manner to the admission of his confession at trial. *Id.*, at 86–87. Given that factual predicate, *Sykes* addressed the question of whether federal habeas review should be barred absent a showing of "cause" for the procedural default of failing to object, and a further showing of "prejudice" resulting from the admission of the confession. *Id.*, at 87, 90–91. But in the case before us, respondent Isaac could not have made any objection, timely or otherwise, at trial or on appeal. Thus the application of *Sykes* is completely and manifestly erroneous in this case.[10]

My last conclusion is that the Court is so intent upon applying *Sykes* to Isaac's case that it plays Procrustes with his claim. In order to bring Isaac's claim within the ambit of *Sykes*, the Court first characterizes his petition as "complex," *ante*, at 117, and "confused," *ante*, at 124, n. 25.[11] Then,

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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." 455 U. S., at 510 (emphasis added).

Recognizing this flat contradiction, the Court suggests that the claim "touted" by me "formed no part of Isaac's original habeas petition." *Ante*, at 124, n. 25. This suggestion is clearly belied by the plain language of Isaac's habeas petition, which the Court never quotes, but which is quoted in full *supra*, at 139. That language speaks for itself, far more clearly and eloquently than the Court's unsuccessful attempt to reconstruct it.

[10] The panel opinion of the United States Court of Appeals for the Sixth Circuit in Isaac's case reached this same conclusion. The panel correctly read Isaac's petition as presenting the question of "whether the decision of the Supreme Court of Ohio to withhold from petitioner the benefits of Section 2901.05(A), as established in *State* v. *Robinson*, for failure to comply with Ohio's contemporaneous objection rule was a deprivation of due process." 646 F. 2d 1122, 1124 (1980). As to this question, the panel accurately concluded that "*Wainwright* v. *Sykes*, *supra*, is not applicable to . . . [Isaac's] petition." *Id.*, at 1127.

[11] The full text of Isaac's claim appears *supra*, at 139. It is plain that the Court's claims of "complexity" and "confusion" are merely a smokescreen, behind which the Court feels free to reshape Isaac's claim.

without ever quoting the claim as it actually appeared in Isaac's petition, the Court delineates a "colorable constitutional claim" nowhere to be found in the petition. As the Court recasts it, Isaac's claim is as follows:

> "[T]he crim[e] charged against [Isaac] require[s] a showing of purposeful or knowing behavior. These terms, according to [Isaac], imply a degree of culpability that is absent when a person acts in self-defense. . . . Self-defense, [Isaac] urge[s], negates [essential] elements of criminal behavior. Therefore, once the defendant raises the possibility of self-defense, [Isaac] contend[s] that the State must disprove that defense as part of its task of establishing guilty *mens rea*, voluntariness, and unlawfulness. The Due Process Clause, according to [Isaac's] interpretation of *Winship*, *Mullaney*, and *Patterson*, forbids the States to disavow any portion of this burden." *Ante*, at 121–122.

This new-modeled claim bears no resemblance to the claim actually made by Isaac in his habeas petition. See *supra*, at 139.[12] But by virtue of this exercise in juristic revisionism, the Court puts itself in position to find that "Isaac's" claim was "forfeited before the state courts," *ante*, at 125—no difficult task, since the claim is wholly imagined by the Court itself—thus enabling the Court to reach its clearly sought goal of deciding "whether the principles articulated in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), bar consideration of the claim in a federal habeas proceeding." *Ante*, at 123. Unsurprisingly, the Court's bottom line is that Isaac's fictive claim is indeed barred by *Sykes*. In short, the Court reshapes respondent Isaac's actual claim into a form that enables it to foreclose all federal review, when as plainly pleaded the claim was unexhausted, thus calling for the dismissal of Isaac's pe-

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[12] It does bear some resemblance to Isaac's claim as construed by the plurality opinion of the Court of Appeals en banc below. 646 F. 2d, at 1133–1136. But the plurality's construction was simply incorrect, and this Court should correct such errors, not perpetuate them.

tition for habeas relief. The Court's analysis is completely result-oriented, and represents a noteworthy exercise in the very judicial activism that the Court so deprecates in other contexts.

II

For the reasons stated above, I conclude that in its unseemly rush to reach the merits of Isaac's case, the Court has ignored settled law respecting the exhaustion of state remedies. But lest it be thought that my disagreement with today's decision is confined to that point alone, I turn to the Court's treatment of the merits of the cases before us. I continue to believe that the "deliberate bypass" standard announced in *Fay* v. *Noia*, 372 U. S. 391 (1963), is the only sensible rule to apply in habeas cases such as respondents'. I adhere to my dissent in *Wainwright* v. *Sykes*, *supra*, in which I termed the "cause-and-prejudice" standard adopted in that case "a mere house of cards whose foundation has escaped any systematic inspection." 433 U. S., at 99–100, n. 1. The Court has now begun to furnish its house of cards—and the furniture is as jerry-built as the house itself.

A

Sykes did not give the terms "cause" and "prejudice" any "precise content," but promised that "later cases" would provide such content. *Id.*, at 91. Today the nature of that content becomes distressingly apparent. The Court still refuses to say what "cause" *is:* And I predict that on the Court's present view it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show "cause." But on the other hand, the Court is more than eager to say what "cause" is *not:* And in doing so, the Court is supported neither by common sense nor by the very reasons offered in *Sykes* for adoption of the "cause-and-prejudice" standard in the first place.

According to the Court, "cause" is *not* demonstrated when the Court "cannot say that [habeas petitioners] lacked the

tools to construct their constitutional claim," *ante*, at 133, however primitive those tools were and thus however inchoate the claim was when petitioners were in the state courts. The Court concludes, after several pages of tortuous reasoning, *ante*, at 130–133, and nn. 36–42, that respondents in the present cases did indeed have "the tools" to make their constitutional claims. This conclusion is reached by the sheerest inference: It is based on citations to other cases in other jurisdictions, where other defendants raised other claims assertedly similar to those that respondents "could" have raised. *Ante*, at 131–133, and n. 40. To hold the present respondents to such a high standard of foresight is tantamount to a complete rejection of the notion that there is a point before which a claim is so inchoate that there is adequate "cause" for the failure to raise it. In thus rejecting inchoateness as "cause," the Court overlooks the fact that none of the rationales used in *Sykes* to justify adoption of the cause-and-prejudice standard can justify today's definition of "cause."

Sykes adopted the cause-and-prejudice standard in order to accord "greater respect" to state contemporaneous-objection rules than was assertedly given by *Fay* v. *Noia*, *supra*. 433 U. S., at 88. The Court then offered a number of reasons why contemporaneous-objection rules should be given such greater respect:

> (1) "A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding." *Ibid.*
>
> (2) A contemporaneous objection "enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." *Ibid.*
>
> (3) "A contemporaneous-objection rule may lead to the exclusion of evidence objected to, thereby making a major contribution to finality in criminal litigation." *Ibid.*

(4) The *Fay* v. *Noia* rule "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." 433 U. S., at 89.

(5) A contemporaneous-objection rule "encourages the result that [criminal trials] be as free of error as possible." *Id.*, at 90.

None of these rationales has any force in the present case. The first three reasons are valid, if at all, only in the particular context of objections to the admission of evidence, such as were at issue in *Sykes*. As for the "sandbagging" rationale, dutifully repeated by today's Court, *ante*, at 129, n. 34, that was fully answered in my *Sykes* dissent: [13] That argument still "offends common sense," and does not become less offensive by sententious repetition. And the final reason—relied on again today, *ante*, at 127—is plainly irrelevant to a case involving inchoate constitutional claims. Such claims are *ex hypothesis* so embryonic that only the extraordinarily foresighted criminal defendant will raise them. It is completely implausible to expect that the raising of such claims will predictably—or even occasionally—make trials more "free of error."

B

The Court justifies its result today with several additional reasons—or, rather, sentiments in reasons' clothing. We are told, *ante*, at 126–127, that "the Great Writ entails sig-

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[13] 433 U. S., at 103–104, and n. 5:

"Under the regime of collateral review recognized since the days of *Brown* v. *Allen* [344 U. S. 443 (1953)], and enforced by the *Fay* bypass test, no rational lawyer would risk the 'sandbagging' feared by the Court.[5]

"[5] In brief, the defense lawyer would face two options: (1) He could elect to present his constitutional claims to the state courts in a proper fashion. If the state trial court is persuaded that a constitutional breach has occurred, the remedies dictated by the Constitution would be imposed, the defense would be bolstered, and the prosecution accordingly weakened,

nificant costs. Collateral review of a conviction extends the ordeal of trial for both society and the accused." But we are not told why the accused would consider it an "ordeal" to go to federal court in order to attempt to vindicate his constitutional rights. Nor are we told why society should be eager to ensure the finality of a conviction arguably tainted by unreviewed constitutional error directly affecting the truth-finding function of the trial. I simply fail to understand how allowance of a habeas hearing "entails significant costs" to *anyone* under the circumstances of the cases before us.

In a similar vein, we are told, *ante*, at 127, that "[w]e must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders." I for one will acknowledge nothing of the sort. Respondents were all convicted after trials in which they allege that the burden of proof respecting their affirmative defenses was imposed upon them in an unconstitutional manner. Thus they are not "admitted" offenders at all: If they had been tried with the assertedly proper allocation of the burden of proof, then they might very well have been acquitted. Further, it is sheer demagoguery to blame the "offender" for the logistical and temporal difficulties arising from retrial: If the writ of habeas

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perhaps precluded altogether. If the state court rejects the properly tendered claims, the defense has lost nothing: Appellate review before the state courts and federal habeas consideration are preserved. (2) He could elect to 'sandbag.' This presumably means, first, that he would hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of a conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims (subject to whatever 'plain error' rule is available). Third, to carry out his scheme, he would now be compelled to deceive the federal habeas court and to convince the judge that he did not 'deliberately bypass' the state procedures. If he loses on this gamble, all federal review would be barred, and his 'sandbagging' would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into option 2 by *Fay*. I do not. That belief simply offends common sense."

corpus has been granted, then it is at least as reasonable to blame the State for having prosecuted the first trial "in violation of the Constitution or laws . . . of the United States," 28 U. S. C. § 2254(a).

Finally, we are told that

> "the Great Writ imposes special costs on our federal system"; that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *ante*, at 128; and that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands." *Ante*, at 128, n. 33.

Once again, the Court drags a red herring across its path. I hope that the Court forgets only momentarily that "the States' sovereign power" is limited by the Constitution of the United States: that the "intrusion" complained of is that of the supreme law of the land. But it must be reason for deep concern when this Court forgets, as it certainly does today, that "it is *a constitution* we are expounding, . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[14] It is inimical to the principle of federal constitutional supremacy to defer to state courts' "frustration" at the requirements of federal constitutional law as it is interpreted in an evolving society. *Sykes* promised that its cause-and-prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." 433 U. S., at 91. Today's decision, with its unvarnished hostility to the assertion of federal constitutional claims, starkly reveals the emptiness of that promise.

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[14] *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415 (1819).

C

Finally, there is the issue of the Court's extension of the *Sykes* standard "to cases in which the constitutional error . . . affect[s] the truthfinding function of the trial." *Ante*, at 129. The Court concedes, *ibid.*, that *Sykes* itself involved the violation of the habeas petitioner's *Miranda* rights, and that although "this defect was serious, it did not affect the determination of guilt at trial." But despite the fact that the present cases admittedly do involve a defect affecting the determination of guilt, the Court refuses to limit *Sykes* and thus bars federal review: "We do not believe . . . that the principles of *Sykes* lend themselves to this limitation." *Ante*, at 129. In so holding, the Court ignores the manifest differences between claims that affect the truthfinding function of the trial and claims that do not.

The Court proclaimed in *Stone* v. *Powell*, 428 U. S. 465, 490 (1976), that "the ultimate question of guilt or innocence . . . should be the central concern in a criminal proceeding." A defendant's Fourth Amendment rights, see *Stone*, or his *Miranda* rights, see *Sykes*, may arguably be characterized as "crucially different from many other constitutional rights," *Kaufman* v. *United States*, 394 U. S. 217, 237 (1969) (Black, J., dissenting), in that evidence procured in violation of those rights has not ordinarily been rendered untrustworthy by the means of its procurement. But a defendant's right to a trial at which the burden of proof has been constitutionally allocated can *never* be violated without rendering the *entire* trial result untrustworthy. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome," *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), and petitioners in the present cases concede as much, Brief for Petitioners 22. As Justice Harlan noted in *In re Winship*, 397 U. S. 358 (1970):

> "If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof 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." *Id.*, at 371 (concurring opinion).

Where, as here, the burden was placed on *respondents*, rather than on the prosecution, to prove their affirmative defenses by a preponderance of the evidence, the risk of convicting the innocent is even greater than in Justice Harlan's example. And if this allocation of the burden of proof was erroneous, then that error constitutes a denial of due process of intolerable proportions. We have recognized the truth of this proposition in numerous precedents. In *Ivan V.* v. *City of New York*, 407 U. S. 203 (1972), we held our earlier decision in *Winship* to be fully retroactive, stating:

> "'Where the major purpose of a new constitutional doctrine is to overcome an aspect of a criminal trial *that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials*, the new rule has been given complete retroactive effect. *Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.*' *Williams* v. *United States*, 401 U. S. 646, 653 (1971). See *Adams* v. *Illinois*, 405 U. S. 278, 280 (1972); *Roberts* v. *Russell*, 392 U. S. 293, 295 (1968)." 407 U. S., at 204 (emphasis added).[15]

In sum, this Court has heretofore adhered to the principle that "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself," because "the interests of the defendant are of such magnitude." *Addington* v. *Texas*, 441 U. S. 418, 423–424 (1979). In the

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[15] We later relied on *Ivan V.* in holding that our decision in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), must be applied retroactively. *Hankerson* v. *North Carolina*, 432 U. S. 233, 242–244 (1977).

context of the cases before us today, this principle means that a habeas claim that a mistake was made in imposing that risk of error cannot be cavalierly dismissed as just another "type of claim raised by the prisoner," *ante*, at 129. In my view, the *Sykes* standard is misguided and insupportable in any context. But if it is to be suffered to exist at all, it should be limited to the arguable peripheries of the trial process: It should not be allowed to insulate from all judicial review all violations of the most fundamental rights of the accused.

I dissent.

UNITED STATES v. FRADY

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

No. 80–1595. Argued December 8, 1981—Decided April 5, 1982

In 1963, respondent was convicted of first-degree murder and sentenced to death by a jury in the Federal District Court for the District of Columbia, which at that time had exclusive jurisdiction over local felonies committed in the District. The Court of Appeals for the District of Columbia Circuit, which then acted as the local appellate court, upheld the conviction but set aside the death sentence, and respondent was then resentenced to a life term. Respondent filed the present motion in the District Court under 28 U. S. C. § 2255 (the latest in a long series of collateral attacks on his sentence), seeking to vacate the sentence on the ground that he was convicted by a jury erroneously instructed on the meaning of malice, thus allegedly eliminating any possibility of a manslaughter verdict. The District Court denied the motion because respondent failed to challenge the instructions on direct appeal or in prior motions. The Court of Appeals reversed, holding that the proper standard to apply to respondent's claim was the "plain error" standard of Federal Rule of Criminal Procedure 52(b) governing relief on direct appeal from errors not objected to at trial, and, finding the challenged instruction plainly erroneous, vacated respondent's sentence and remanded the case for a new trial or entry of a manslaughter judgment.

Held:

1. This Court has jurisdiction to review the decision below and is not required to refrain from doing so on the alleged ground that the decision of the Court of Appeals was based on an adequate and independent local ground of decision. There is no basis for concluding that the ruling below was or should have been grounded on local District of Columbia law, rather than on the general federal law applied to all § 2255 motions. Equal protection principles do not require that a § 2255 motion by a prisoner convicted in 1963 be treated as though it were a motion under the District of Columbia Code after 1970. Pp. 159–162.

2. The Court of Appeals' use of Rule 52(b)'s "plain error" standard to review respondent's § 2255 motion was contrary to long-established law. Because it was intended for use on direct appeal, such standard is out of place when a prisoner launches a collateral attack against a conviction after society's legitimate interest in the finality of the judgment has been

perfected by the expiration of time allowed for direct review or by the affirmance of the conviction on appeal. To obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal. Pp. 162–166.

3. The proper standard for review of respondent's conviction is the "cause and actual prejudice" standard under which, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both "cause" excusing his double procedural default and "actual prejudice" resulting from the errors of which he complains. Pp. 167–169.

4. Respondent has fallen far short of meeting his burden of showing not merely that the errors at his trial created a *possibility* of prejudice but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. The strong uncontradicted evidence of malice in the record, coupled with respondent's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified. Moreover, an examination of the jury instructions shows no substantial likelihood that the same jury that found respondent guilty of first-degree murder would have concluded, if only the malice instructions had been better framed, that his crime was only manslaughter. Pp. 169–175.

204 U. S. App. D. C. 234, 636 F. 2d 506, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 175. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 175. BRENNAN, J., filed a dissenting opinion, *post*, p. 178. BURGER, C. J., and MARSHALL, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *John R. Fisher*.

Daniel M. Schember, by appointment of the Court, 454 U. S. 809, argued the cause and filed a brief for respondent.

JUSTICE O'CONNOR delivered the opinion of the Court.

Rule 52(b) of the Federal Rules of Criminal Procedure permits a criminal conviction to be overturned on direct appeal for "plain error" in the jury instructions, even if the defend-

ant failed to object to the erroneous instructions before the jury retired, as required by Rule 30. In this case we are asked to decide whether the same standard of review applies on a collateral challenge to a criminal conviction brought under 28 U. S. C. § 2255.

I

A

Joseph Frady, the respondent, does not dispute that 19 years ago he and Richard Gordon killed Thomas Bennett in the front room of the victim's house in Washington, D. C. Nonetheless, because the resolution of this case depends on what the jury learned about Frady's crime, we must briefly recount what happened, as told by the witnesses at Frady's trial and summarized by the Court of Appeals. See *Frady* v. *United States*, 121 U. S. App. D. C. 78, 348 F. 2d 84 (en banc) *(Frady I)*, cert. denied, 382 U. S. 909 (1965).

The events leading up to the killing began at about 4:30 p. m. on March 13, 1963, when two women saw Frady drive slowly by Bennett's house in an old car. Later, at about 7:00 p. m., Frady, accompanied by Richard Gordon and Gordon's friend, Elizabeth Ryder, returned to the same block. On this second trip, Ryder overheard Frady say "something about that is the house over there," at which point Frady and Gordon looked in the direction of the victim's house.

After reconnoitering Bennett's home, Frady, Gordon, and Ryder drove across town to a restaurant, where they were joined by George Bennett, Thomas Bennett's brother. At the restaurant Ryder heard George Bennett tell Frady that "he needed time to get the furniture and things settled." She also heard Frady ask Bennett "if he hit a man in the chest, could you break a rib and fracture or puncture a lung, could it kill a person?" Bennett answered that "[y]ou have to hit a man pretty hard." Just before they left the restaurant, Ryder heard George Bennett say: "If you do a good job you will get a bonus."

Ryder, Gordon, and Frady then set out by car for 11th Place, around the corner from Thomas Bennett's home, where they parked, leaving the motor running. Gordon and Frady told Ryder they were going "just around the corner." As Gordon got out, Ryder saw him reach down and pick up something. She could not see exactly what it was, but it "looked like a cuff of a glove or heavy material of some kind."

A little after 8:30 p. m., a neighbor heard knocking at the front door of Bennett's house, followed by the noise of a fight in progress. At 8:44 p. m., she called the police. Within a couple of minutes, two policemen in a patrol wagon arrived, and one of them got out in time to see Frady and Gordon emerge from Bennett's front door.

Inside Bennett's house, police officers later found a shambles of broken, disordered furniture and blood-spattered walls. Thomas Bennett lay dead in a pool of blood. His neck and chest had suffered horseshoe-shaped wounds from the metal heel plates on Frady's leather boots and his head was caved in by blows from a broken piece of a tabletop, which, significantly, bore no fingerprints. One of Bennett's eyes had been knocked from its socket.

Outside, the policeman on foot heard Frady and Gordon exclaim, "The cops!" as they emerged from the house. They immediately took flight, running around the corner toward their waiting automobile. Both officers pursued, one on foot, the other in the police wagon. As Frady and Gordon ran, one of them threw Thomas Bennett's wallet and a pair of gloves under a parked car. Frady and Gordon managed to reach their waiting automobile and scramble into it without being captured by the officer following on foot, but the patrol wagon arrived in time to block their departure. One of them was then heard to remark, "They've got us." When arrested, Frady and Gordon were covered with their victim's blood. Unlike their victim, however, neither had sustained an injury, apart from a cut on Gordon's forehead.

B

Although Frady now admits that the evidence that he and Gordon caused Bennett's death was "overwhelming,"[1] at his trial in the United States District Court for the District of Columbia Frady defended solely by denying all responsibility for the killing, suggesting through his attorney that another man, the real murderer, had been seen leaving the victim's house while the police were preoccupied apprehending Frady and Gordon. Consistent with this theory, Frady did not raise any justification, excuse, or mitigating circumstance. A jury convicted Frady of first-degree murder and robbery, and sentenced him to death by electrocution.

Sitting en banc, the Court of Appeals for the District of Columbia Circuit upheld Frady's first-degree murder conviction by a vote of 8–1. *Frady I*, *supra*. Apparently all nine judges would have affirmed a conviction for second-degree murder.[2]

Nevertheless, by a vote of 5–4, the court set aside Frady's death sentence. The five judges in the majority were unable to agree on a rationale for that result. Four of the five believed the procedures used to instruct and poll the jury on the death penalty were too ambiguous to sustain a sentence of death.[3] The fifth and deciding vote was cast by a judge who

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[1] Brief for Appellant in No. 79–2356 (CADC), p. 12 *(pro se)*.

[2] The sole dissenter, Judge J. Skelly Wright, noted that under the law of the District of Columbia an "intent to inflict serious injury, unaccompanied by premeditation, is sufficient for second degree murder, but first degree murder requires, in addition to premeditation, the specific intent to kill." *Frady I*, 121 U. S. App. D. C., at 91, n. 13, 348 F. 2d, at 97, n. 13 (dissenting in part and concurring in part) (citations omitted). Because Judge Wright believed the evidence sufficient only to sustain a verdict that Frady deliberately intended to injure Thomas Bennett, Judge Wright would have reversed Frady's conviction for first-degree murder. *Id.*, at 91, 348 F. 2d, at 97.

[3] In dissent, THE CHIEF JUSTICE (who was then serving as a Circuit Judge on the Court of Appeals) characterized that view as having "no basis

believed the District Court should have adopted, for the first time in the District of Columbia, a procedure bifurcating the guilt and sentencing phases of Frady's trial. 121 U. S. App. D. C., at 85, 348 F. 2d, at 91 (McGowan, J., concurring). By this narrow margin, Frady escaped electrocution.

Frady was then resentenced to a life term. Almost immediately, he began a long series of collateral attacks on his sentence,[4] culminating in the case now before us.

C

Frady initiated the present action by filing a motion under 28 U. S. C. § 2255[5] seeking the vacation of his sentence because the jury instructions used at his trial in 1963 were defective. Specifically, Frady argued that the Court of Appeals, in cases decided after his trial and appeal, had disapproved instructions identical to those used in his case. As determined by these later rulings,[6] the judge at Frady's trial

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without an assumption that these jurors were illiterate morons." *Id.*, at 107, 348 F. 2d, at 113 (concurring in part and dissenting in part).

[4] As summarized by the Court of Appeals, 204 U. S. App. D. C. 234, 236, n. 2, 636 F. 2d 506, 508, n. 2 (1980), Frady filed four motions to vacate or reduce his sentence in 1965, and one each in 1974, 1975, 1976, and 1978. This last motion resulted in a Court of Appeals decision directing that Frady's separate sentences for robbery and murder run concurrently rather than consecutively. *United States* v. *Frady*, 197 U. S. App. D. C. 69, 607 F. 2d 383 (1979) *(Frady II)*.

[5] Section 2255 provides in pertinent part:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

[6] Frady cited *Belton* v. *United States*, 127 U. S. App. D. C. 201, 204–205, 382 F. 2d 150, 153–154 (1967); *Green* v. *United States*, 132 U. S. App. D. C.

had improperly equated intent with malice by stating that "a wrongful act . . . intentionally done . . . is therefore done with malice aforethought." See 204 U. S. App. D. C. 234, 236, n. 6, 636 F. 2d 506, 508, n. 6 (1980). Also, the trial judge had incorrectly instructed the jury that "the law infers or presumes from the use of such weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide." See *id.*, at 236, 636 F. 2d, at 508. In his § 2255 motion Frady contended that these instructions compelled the jury to presume malice and thereby wrongfully eliminated any possibility of a manslaughter verdict, since manslaughter was defined as culpable homicide without malice.[7]

The District Court denied Frady's § 2255 motion, stating that Frady should have challenged the jury instructions on direct appeal, or in one of his many earlier motions. The Court of Appeals reversed. The court held that the proper standard to apply to Frady's claim is the "plain error" standard governing relief on direct appeal from errors not objected

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98, 99–100, 405 F. 2d 1368, 1369–1370 (1968) *(Green I);* and *United States* v. *Wharton*, 139 U. S. App. D. C. 293, 297–298, 433 F. 2d 451, 455–456 (1970). The Government does not contest Frady's assertion that the jury instructions were erroneous as determined by these later rulings.

[7] See, *e. g.*, *Fryer* v. *United States*, 93 U. S. App. D. C. 34, 38, 207 F. 2d 134, 138 (manslaughter is "the unlawful killing of a human being without malice") (emphasis deleted), cert. denied, 346 U. S. 885 (1953); *United States* v. *Wharton*, *supra*, at 296, 433 F. 2d, at 454 (malice is "the sole element differentiating murder from manslaughter").

Frady also challenged the trial judge's instruction that "[a] person is presumed to intend the natural [and] probable consequences of his act." See 204 U. S. App. D. C., at 237, n. 7, 636 F. 2d, at 509, n. 7. Frady argued that this instruction was unconstitutional under our decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), in which we held that a similar instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" might impermissibly lead a reasonable juror to believe the presumption is conclusive. The Court of Appeals refrained from deciding this issue, however, so we do not consider it here.

to at trial, Fed. Rule Crim. Proc. 52(b), rather than the "cause and actual prejudice" standard enunciated in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), *Francis* v. *Henderson*, 425 U. S. 536 (1976), and *Davis* v. *United States*, 411 U. S. 233 (1973), governing relief on collateral attack following procedural default at trial. Finding the challenged instructions to be plainly erroneous, the court vacated Frady's sentence and remanded the case for a new trial or, more realistically, the entry of a judgment of manslaughter. Over a vigorous dissent, the full Court of Appeals denied the Government a rehearing en banc.

We granted the Government's petition for a writ of certiorari to review whether the Court of Appeals properly invoked the "plain error" standard in considering Frady's belated collateral attack. 453 U. S. 911 (1981).

II

Before we reach the merits, however, we first must consider an objection Frady makes to our grant of certiorari. Frady argues that we should refrain from reviewing the decision below because the issues presented pertain solely to the local law of the District of Columbia, with which we normally do not interfere.[8]

Frady's contention is that the federal courts in the District of Columbia exercise a purely local jurisdictional function when they rule on a § 2255 motion brought by a prisoner convicted of a local law offense. Thus, according to Frady, the general federal law controlling the disposition of § 2255 motions does not apply to his case. Instead, a special local brand of § 2255 law, developed to implement that section for

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[8] As we said in *Fisher* v. *United States*, 328 U. S. 463, 476 (1946): "Matters relating to law enforcement in the District [of Columbia] are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed."

the benefit of local offenders in the District of Columbia, controls. Frady concludes that we should therefore refrain from disturbing the ruling below, since it is based on an adequate and independent local ground of decision.[9]

To examine Frady's contention, it is necessary to review some history. When Frady was tried in 1963, the United States District Court for the District of Columbia had exclusive jurisdiction over local felonies, and the United States Court of Appeals for the District of Columbia Circuit acted as the local appellate court, issuing binding decisions of purely local law. In 1970, however, the District of Columbia Court Reform and Criminal Procedure Act (Court Reform Act), 84 Stat. 473, split the local District of Columbia and federal criminal jurisdictions, directing local criminal cases to a newly created local court system and retaining (with minor exceptions) only federal criminal cases in the existing Federal District Court and Court of Appeals.

As part of this division of jurisdiction, the Court Reform Act substituted for § 2255 a new local statute controlling collateral relief for those convicted in the new local trial court. See D. C. Code § 23–110 (1981). The Act, however, did not alter the jurisdiction of the federal courts in the District to hear postconviction motions and appeals brought under § 2255, either by prisoners like Frady who were convicted of local offenses prior to the Act, or by prisoners convicted in federal court after the Act.

The crux of Frady's argument is that the equal protection component of the Due Process Clause of the Fifth Amendment would be violated unless the Court Reform Act is interpreted as implicitly and retroactively splitting, not just the District's court system, but also the District's law governing § 2255 motions. According to Frady, equal protection principles require that a § 2255 motion brought by a prisoner con-

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[9] Frady, of course, does not argue that we do not have jurisdiction under 28 U. S. C. § 1254(1) to hear this case, only that we should, in our discretion, refrain from exercising it.

victed of a local crime in Federal District Court prior to the passage of the Court Reform Act be treated identically to a motion under local D. C. Code § 23–110 brought by a prisoner convicted in the local Superior Court after the passage of the Act. Frady suggests that the Court of Appeals for this reason must have ruled on his motion as though it were subject to the local law developed pursuant to § 23–110, and that we should not intervene in this local dispute.

Frady's argument, however, was neither made to the court below nor followed by it. Nowhere in the Court of Appeals' opinion—or in the submissions to that court or to the District Court[10]—is there any hint that there may be peculiarities of § 2255 law unique to collateral attack in the District of Columbia. To the contrary, the analysis and authorities cited by the Court of Appeals make it clear that the court relied on the general federal law controlling all § 2255 motions, and did not intend to afford Frady's § 2255 motion special treatment simply because Frady was convicted under the District of Columbia Code rather than under the United States Code.

Moreover, the Court of Appeals would have erred had it done so. There is no reason to believe that Congress intended the result Frady suggests, and he does not attempt the impossible task of showing that it did. Furthermore, Frady's suggestions to the contrary notwithstanding, equal protection principles do not require that a motion filed pursuant to § 2255 by a prisoner convicted in the Federal District Court in 1963 be treated as though it had been filed pursuant to D. C. Code § 23–110 after 1970. In fact, even those tried in federal court contemporaneously with those tried for the same offense in the local court need not always be treated identically. As we noted in *Swain* v. *Pressley*, 430 U. S. 372, 379–380, n. 12 (1977), for example, persons

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[10] We note that Frady's winning *pro se* brief to the court below, though extensively discussing the general federal law regarding the proper disposition of § 2255 motions, nowhere suggested that special local rules should be applied to the case.

convicted in the local courts are not denied equal protection of the laws simply because they, unlike persons convicted in the federal courts, must bring collateral challenges to their convictions before Art. I judges.[11]

In short, we find no basis whatever for concluding that the ruling below was or should have been grounded on local District of Columbia law, rather than the general federal law applied to all § 2255 motions.[12] Therefore, we proceed to the merits.

III

A

Nineteen years after his crime, Frady now complains he was convicted by a jury erroneously instructed on the meaning of malice. At trial, however, Frady did not object to the instructions, nor did he raise the issue on direct appeal. Rule 30 of the Federal Rules of Criminal Procedure declares in pertinent part:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

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[11] The Court of Appeals for the District of Columbia Circuit has reached the same conclusion on an analogous issue. See *United States* v. *Brown*, 157 U. S. App. D. C. 311, 483 F. 2d 1314 (1973) (federal, not local, bail law applies to an appellant convicted of a local offense in federal court, despite the fact that the harsher local law applies to those convicted of the same offense in the local courts).

[12] We mention in passing that it is unclear that Frady would face law more favorable to his cause were his § 2255 motion treated as though it were a local § 23–110 motion. The highest local court, the District of Columbia Court of Appeals, has written that "[o]ur rule, D. C. Code 1973, § 23–110, is nearly identical and functionally equivalent to § 2255, and we may therefore rely on cases construing the federal rule." *Butler* v. *United States*, 388 A. 2d 883, 886, n. 5 (1978). We express no view on the similarities between § 23–110 and § 2255, however. As Frady has reminded us:

Rule 52(b), however, somewhat tempers the severity of Rule 30. It grants the courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice.[13] By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so "plain" the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it. The Rule thus reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.[14]

"The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern." *Fisher* v. *United States*, 328 U. S., at 476.

[13] The Rule merely restated existing law. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 52(b), 18 U. S. C. App., p. 1478, citing *Wiborg* v. *United States*, 163 U. S. 632, 658 (1896) ("although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it"). See also *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings").

[14] The Courts of Appeals long have recognized that the power granted them by Rule 52(b) is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result. See, *e. g.*, *United States* v. *Gerald*, 624 F. 2d 1291, 1299 (CA5 1980) ("Plain error is error which is 'both obvious and substantial'. . . . The plain error rule is not a run-of-the-mill remedy. The intention of the rule is to serve the ends of justice; therefore it is invoked 'only in exceptional circumstances [where necessary] to avoid a miscarriage of justice'" (citations omitted)), cert. denied, 450 U. S. 920 (1981); *United States* v. *DiBenedetto*, 542 F. 2d 490, 494

Because it was intended for use on direct appeal, however, the "plain error" standard is out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal. Nevertheless, in 1980 the Court of Appeals applied the "plain error" standard to Frady's long-delayed § 2255 motion, as though the clock had been turned back to 1965 when Frady's case was first before the court on direct appeal. In effect, the court allowed Frady to take a second appeal 15 years after the first was decided.

As its justification for this action, the Court of Appeals pointed to a single phrase to be found in our opinion in *Davis* v. *United States*, 411 U. S., at 240–241. There we asserted that "no more lenient standard of waiver should apply" on collateral attack than on direct review. Seizing on this phrase, the Court of Appeals interpreted "no more lenient" as meaning, in effect, no more stringent, and for this reason applied the "plain error" standard for direct review to Frady's collateral challenge, despite long-established contrary authority.

By adopting the same standard of review for § 2255 motions as would be applied on direct appeal, the Court of Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal. Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect

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(CA8 1976) ("This court, along with courts in general, have applied the plain error rule sparingly and only in situations where it is necessary to do so to prevent a great miscarriage of justice" (citations omitted)).

beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect.

For this reason, we have long and consistently affirmed that a collateral challenge may not do service for an appeal. See, *e. g.*, *United States* v. *Addonizio*, 442 U. S. 178, 184–185 (1979); *Hill* v. *United States*, 368 U. S. 424, 428–429 (1962); *Sunal* v. *Large*, 332 U. S. 174, 181–182 (1947); *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274 (1942); *Glasgow* v. *Moyer*, 225 U. S. 420, 428 (1912); *In re Gregory*, 219 U. S. 210, 213 (1911). As we recently had occasion to explain:

> "When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice." *United States* v. *Addonizio*, *supra*, at 184 (footnotes omitted).

This citation indicates that the Court of Appeals erred in reviewing Frady's § 2255 motion under the same standard as would be used on direct appeal, as though collateral attack and direct review were interchangeable.

Moreover, only five years ago we expressly stated that the plain-error standard is inappropriate for the review of a state prisoner's collateral attack on erroneous jury instructions:

> "Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to de-

liver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

"*The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.*" *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977) (emphasis added) (footnotes omitted).

Seemingly, we could not have made the point with greater clarity. Of course, unlike in the case before us, in *Kibbe* the final judgment of a state, not a federal, court was under attack, so considerations of comity were at issue that do not constrain us here. But the Federal Government, no less than the States, has an interest in the finality of its criminal judgments. In addition, a federal prisoner like Frady, unlike his state counterparts, has already had an opportunity to present his federal claims in federal trial and appellate forums. On balance, we see no basis for affording federal prisoners a preferred status when they seek postconviction relief.

In sum, the lower court's use of the "plain error" standard to review Frady's § 2255 motion was contrary to long-established law from which we find no reason to depart. We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.[15]

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[15] In the present case we address only the proper standard to be used by a district court engaged pursuant to § 2255 in the *collateral* review of the original criminal trial. We of course do not hold that the "plain error" standard cannot be applied by a court of appeals on *direct* review of a district court's conduct of the § 2255 hearing itself.

JUSTICE BRENNAN in his dissenting opinion, *post*, at 182–183, and JUSTICE BLACKMUN in his opinion concurring in the judgment, *post*, at 176,

B

We believe the proper standard for review of Frady's motion is the "cause and actual prejudice" standard enunciated in *Davis* v. *United States*, 411 U. S. 233 (1973), and later confirmed and extended in *Francis* v. *Henderson*, 425 U. S. 536 (1976), and *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Under this standard, to obtain collateral relief based on trial

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and n., point out that § 2255 Rule 12 directs that "[i]f no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems more appropriate, to motions filed under these rules." JUSTICES BRENNAN and BLACKMUN contend that the procedural directive of § 2255 Rule 12 indicates that the "plain error" standard of Rule 52(b) of the Federal Rules of Criminal Procedure applies to the district court's collateral review of the original trial. They do not point to any evidence that § 2255 Rule 12 was intended to have such a surprising effect, however.

By approving § 2255 Rule 12, we believe Congress intended merely to authorize a court in its discretion to use the Federal Rules of Criminal Procedure to regulate the conduct of a § 2255 proceeding. A court of appeals, for example, could invoke the "plain error" standard on direct review of a district court's conduct of a § 2255 hearing, if the court of appeals found a sufficiently egregious error in the § 2255 proceeding itself that had not been brought to the attention of the district court. Thus, as § 2255 Rule 12 suggests, under proper circumstances Rule 52(b) can play a role in § 2255 proceedings.

We also note that, contrary to the suggestions in the dissenting opinion, § 2255 Rule 12 does not mandate by its own force the use of any particular Rule of Civil or Criminal Procedure. The Advisory Committee's Note to § 2255 Rule 12, 28 U. S. C., p. 287, refers the reader "[f]or discussion" of possible restrictions on the use of the Rules of Procedure to the Note to the analogous provision governing proceedings under 28 U. S. C. § 2254, § 2254 Rule 11 (which provides: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules"). The Advisory Committee's Note to § 2254 Rule 11, 28 U. S. C., p. 275, explains that the Rule "allow[s] the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case. The court does not have to rigidly ap-

errors to which no contemporaneous objection was made, a convicted defendant must show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains. In applying this dual standard to the case before us, we find it unnecessary to determine whether Frady has shown cause, because we are confident he suffered no actual prejudice of a degree sufficient to justify collateral relief 19 years after his crime.[16]

In considering the prejudice, if any, occasioned by the erroneous jury instructions used at Frady's trial, we note that in *Wainwright* v. *Sykes* we refrained from giving "precise content" to the term "prejudice," expressly leaving to future cases further elaboration of the significance of that term. *Id.*, at 91. While the import of the term in other situations thus remains an open question, our past decisions nevertheless eliminate any doubt about its meaning for a defendant who has failed to object to jury instructions at trial.

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ply rules which would be inconsistent or inequitable in the overall framework of habeas corpus." As we have explained in the text above, use of the "plain error" standard is "inconsistent or inequitable in the overall framework" of collateral review of federal criminal convictions under § 2255.

[16] Frady claims that he had "cause" not to object at trial or on appeal because those proceedings occurred before the decisions of the Court of Appeals disapproving the erroneous instructions. Any objection, he asserts, therefore would have been futile.

In this regard, the Government points out that the first case to reject the jury instructions Frady now attacks was decided only two years after Frady's appeal was decided. *Belton* v. *United States*, 127 U. S. App. D. C. 201, 382 F. 2d 150 (1967). The *Belton* court seemed to consider the law as clearcut, and attributed the erroneous instruction to inadvertence by the trial judge, stating: "We have little doubt that if objection had been made this slip of the tongue by a capable trial judge—assuming the reporter heard him right—would have been corrected." *Id.*, at 205, 382 F. 2d, at 154. Likewise, in *Green I*, the court asserted that the trial court had given the erroneous instruction "no doubt inadvertently." 132 U. S. App. D. C., at 100, 405 F. 2d, at 1370. In light of these decisions, the Government argues here that "[i]t is difficult to believe that it would have

Recently, for example, JUSTICE STEVENS, in his opinion without dissent in *Henderson* v. *Kibbe*, summarized the degree of prejudice we have required a prisoner to show before obtaining collateral relief for errors in the jury charge as "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undesirable, erroneous, or even universally condemned.'" 431 U. S., at 154 (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 147, 146 (1973)).[17] We reaffirm this formulation, which requires that the degree of prejudice resulting from instruction error be evaluated in the total context of the events at trial. As we have often emphasized: "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, *supra*, at 146–147 (citations omitted). Moreover, "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Id.*, at 147.

We now apply these established standards to Frady's case.

IV

Frady bases his claim that he was prejudiced on his assertion that the jury was not given an adequate opportunity to

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been futile in 1965 for respondent to present his current objections to the jury instructions to the court of appeals that decided *Belton* in 1967 and *Green I* in 1968." Brief for United States 33. See *Engle* v. *Isaac*, *ante*, p. 107, in which we addressed a similar argument.

[17] *Kibbe* involved a habeas petition brought by a state, not a federal, convict. As we noted *supra*, at 166, however, the federal interest in finality is as great as the States', and the relevant federal constitutional strictures apply with equal force to both jurisdictions.

consider a manslaughter verdict. According to Frady, the trial court's erroneous instructions relieved the Government of the burden of proving malice, an element of the crime of murder, beyond a reasonable doubt, so that, as Frady would have it, his conviction must be overturned.[18]

So stated, Frady's claim of actual prejudice has validity only if an error in the instructions concerning an element of the crime charged amounts to prejudice *per se*, regardless of the particular circumstances of the individual case. Our precedents, however, hold otherwise. Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

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[18] At the time Frady was tried, murder in the first degree was defined (and still is) as a killing committed "purposely" "of deliberate and premeditated malice." D. C. Code § 22–2401 (1981). Murder in the second degree was defined as a killing (other than a first-degree murder) with "malice aforethought." § 22–2403. Culpable killings without malice were defined to be manslaughter. See n. 7, *supra*.

The District of Columbia statutes defining murder in the first and second degree were first passed at the turn of the century, Act of Mar. 3, 1901, 31 Stat. 1321, ch. 854, §§ 798, 800, as a codification of the common-law definitions, which they did not displace. See *O'Connor* v. *United States*, 399 A. 2d 21 (D. C. 1979); *Hamilton* v. *United States*, 26 App. D. C. 382, 385 (1905). The definition of manslaughter was never codified, but remains a matter of common law. See *United States* v. *Pender*, 309 A. 2d 492 (D. C. 1973).

The significance of the various degrees of homicide under the law of the District was summarized by the Court of Appeals in 1967:

"In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion. . . . [A] homicide conceived in passion constitutes murder in the first degree only if the jury is convinced beyond a reasonable doubt that there was an appreciable time after the design was conceived and that in this interval there was a further thought, and a turning over in the mind—and not a mere persistence of the initial impulse of passion.

". . . An unlawful killing in the sudden heat of passion—whether pro-

This Frady has failed to do. At the outset, we emphasize that this would be a different case had Frady brought before the District Court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent. But Frady, it must be remembered, did not assert at trial that he and Richard Gordon beat Thomas Bennett to death without malice. Instead, Frady claimed he had nothing whatever to do with the crime. The evidence, however, was overwhelming, and Frady promptly abandoned that theory on appeal. *Frady I*, 121 U. S. App. D. C., at 95, 348 F. 2d, at 101. Since that time, Frady has never presented colorable evidence, even from his own testimony, indicating such justification, mitigation, or excuse that would reduce his crime from murder to manslaughter.

Indeed, the evidence in the record compels the conclusion that there was, as the dissenters from the denial of a rehearing en banc below put it, "malice aplenty." 204 U. S. App. D. C., at 245, 636 F. 2d, at 517. Frady and Gordon twice reconnoitered their victim's house on the afternoon and evening of the murder. Just before the killing, they were overheard in a conversation suggesting that they "were assassins

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duced by rage, resentment, anger, terror or fear—is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection." *Austin* v. *United States*, 127 U. S. App. D. C. 180, 188, 382 F. 2d 129, 137 (citations omitted).

The policy basis for the distinction between first-degree murder and other homicides was explained in *Bullock* v. *United States*, 74 App. D. C. 220, 221, 122 F. 2d 213, 214 (1941):

"Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not."

hired by George Bennett to do away with his brother." *Frady I*, *supra*, at 97, 348 F. 2d, at 103 (Miller, J., concurring in part and dissenting in part). They brought gloves to the scene of the murder which they discarded during their flight from the police, and the murder weapon bore no fingerprints. Finally, there was the unspeakable brutality of the killing itself.

Indeed, the evidence of malice was strong enough that the 10 judges closest to the case—the trial judge and the 9 judges who 17 years ago decided Frady's appeal en banc—were at that time *unanimous* in finding the record at least sufficient to sustain a conviction for second-degree murder—a killing with malice. Nine of the ten judges went further, finding the evidence sufficient to sustain the jury's verdict that Frady not only killed with malice, but with premeditated and deliberate intent.

We conclude that the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified. We perceive no risk of a fundamental miscarriage of justice in this case.

Should any doubt remain, our examination of the jury instructions shows no substantial likelihood that the same jury that found Frady guilty of first-degree murder would have concluded, if only the malice instructions had been better framed, that his crime was only manslaughter. The jury, after all, did not merely find Frady guilty of second-degree murder, which requires only malice. It found Frady guilty of first-degree—deliberate and premeditated—murder.

To see precisely what the jury had to conclude to make this finding, it is necessary to examine the instructions the trial judge gave the jury on the meaning of premeditation and deliberation:

"[P]remeditation is the formation of the intent or plan to kill, the formation of a positive design to kill. It must have been considered by the defendants.

"It is your duty to determine from the facts and circumstances in this case as you find them surrounding the killing whether reflection and consideration amounting to deliberation occurred. If so, even though it be of exceedingly brief duration, that is sufficient, because it is the fact of deliberation rather than the length of time it continued that is important. Although some appreciable period of time must have elapsed during which the defendants deliberated in order for this element to be established, no particular length of time is necessary for deliberation; and it does not require the lapse of days or hours or even of minutes." Tr. in No. 402–63 (DC), p. 806, reprinted at App. 28.

By contrast, to have found Frady guilty of manslaughter the jury would have had to find the presence of the kind of excuse, justification, or mitigation that reduces a killing from murder to manslaughter. As the trial court put it:

"The element *[sic]* the Government must prove in order for you to find the defendants guilty of manslaughter are:

"One, that the defendants inflicted a wound or wounds from which the deceased died, these being inflicted in the District of Columbia.

"Two, that the defendants struck the deceased in sudden passion, without malice, that the defendants' sudden passion was aroused by adequate provocation. When I say sudden passion, I mean to include rage, resentment, anger, terror and fear; so when I use the expression 'sudden passion.' *[sic]* I include all of these.

"Provacation, *[sic]* in order to bring a homicide under the offense of manslaughter, must be adequate, must be such as might naturally induce a reasonable man in anger

> of the moment to commit the deed. It must be such provocation would *[sic]* have like effect upon the mind of a reasonable or average man causing him to lose his self-control.
>
> "In addition to the great provocation, there must be passion and hot blood caused by that provocation. Mere words, however, no matter how insulting, offensive or abusive, are not adequate to induce *[sic]* a homicide although committed in passion, provoked, as I have explained, from murder to manslaughter." *Id.*, at 809, reprinted at App. 30.

Plainly, a rational jury that believed Frady had formed a "plan to kill . . . a positive design to kill" with "reflection and consideration amounting to deliberation," could not also have believed that he acted in "sudden passion . . . aroused by adequate provocation . . . causing him to lose his self-control." We conclude that, whatever it may wrongly have believed malice to be, Frady's jury would not have found passion and provocation, especially since Frady presented no evidence whatever of mitigating circumstances, but instead defended by disclaiming any involvement with the killing.[19] Surely there is no substantial likelihood the erroneous malice instructions prejudiced Frady's chances with the jury.

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[19] Nor, on the facts of this case, would a finding of a premeditated and deliberate intent to kill be consistent as a matter of law with an absence of malice. See n. 18, *supra*.

We are not alone in finding that an erroneous malice instruction is not necessarily cause for reversal. Even on direct appeal rather than on collateral attack, the highest court in the District of Columbia has refused to reverse convictions obtained after the use of precisely the same instructions of which Frady complains here. For example, in *Belton* v. *United States*, 127 U. S. App. D. C. 201, 382 F. 2d 150 (1967), the first decision expressly to disapprove the instruction that the law infers malice from the use of a deadly weapon, the court affirmed a first-degree murder conviction with the observation that a "jury inferring premeditation and deliberation could hardly have failed to infer malice." *Id.*, at 206, 382 F. 2d, at 155. Similarly, in *Howard* v. *United States*, 128 U. S. App. D. C. 336, 389 F. 2d 287 (1967), a second-degree murder conviction was affirmed on direct ap-

V

In sum, Frady has fallen far short of meeting his burden of showing that he has suffered the degree of actual prejudice necessary to overcome society's justified interests in the finality of criminal judgments. Therefore, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

THE CHIEF JUSTICE and JUSTICE MARSHALL took no part in the consideration or decision of this case.

JUSTICE STEVENS, concurring.

Although my view of the relevance of the cause for counsel's failure to object to a jury instruction is significantly different from the Court's, see *Wainwright* v. *Sykes*, 433 U. S. 72, 94–97 (STEVENS, J., concurring); *Rose* v. *Lundy*, 455 U. S. 509, 538 (STEVENS, J., dissenting); *Engle* v. *Isaac*, *ante*, at 136–137, n. 1 (STEVENS, J., concurring in part and dissenting in part), I have joined the Court's opinion in this case because it properly focuses on the character of the prejudice to determine whether collateral relief is appropriate.

JUSTICE BLACKMUN, concurring in the judgment.

Like JUSTICE BRENNAN, I believe that the plain-error rule of Federal Rule of Criminal Procedure 52(b) has some applicability in a § 2255 proceeding. In my view, recognizing a federal court's discretion to redress plain error on collateral review neither nullifies the cause-and-prejudice requirement articulated in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), nor disserves the policies underlying that requirement.

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peal, although the same defective instruction had been given. In two cases in which the defendants put malice in issue by raising self-defense claims at trial, however, the court, on direct appeal, reversed murder convictions obtained through the use of the faulty instructions. *Green I*, 132 U. S. App. D. C. 98, 405 F. 2d 1368 (1968); *United States* v. *Wharton*, 139 U. S. App. D. C. 293, 433 F. 2d 451 (1970).

Despite the Court's assertions that Rule 52(b) was intended for use only on direct appeal and that the Court of Appeals ignored "long-established contrary authority," *ante*, at 164, I find nothing in the Rule's seemingly broad language supporting the Court's restriction of its scope. In fact, the plain-error doctrine is specifically made applicable to all stages of all criminal proceedings, which, as the dissenting opinion points out, include the collateral review procedures of § 2255. See *post*, at 179–180, 182, and nn. 5, 6. Even more striking, § 2255 Rule 12 explicitly permits a federal court to "apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules."*

The cause-and-prejudice standard of *Wainwright* v. *Sykes*, *supra*, is premised on the notion that contemporaneous-objection rules are entitled to respect—in the interests of preserving comity and effecting the administrative goals such rules are designed to serve. See 433 U. S., at 88–90. As the Court concedes, considerations of comity are not at issue here. See *ante*, at 166. The second objective of the cause-and-prejudice requirement—to enforce contemporaneous-objection rules and, in particular, to ensure finality—is, in

*Although § 2255 Rule 12 does not "mandate by its own force the use of any particular Rule of Civil or Criminal Procedure," *ante*, at 167, n. 15, it does afford a federal court discretion in determining whether to apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure. The Court's extended discussion, in the same footnote, of the Advisory Committee's Note to § 2254 Rule 11, is beside the point. The Advisory Committee's Note to § 2255 Rule 12 expressly observes that Rule 12 "differs" from § 2254 Rule 11 in that the former "includes the Federal Rules of Criminal Procedure as well as the civil." 28 U. S. C., p. 287. And the note to Rule 12 apparently refers to the note accompanying § 2254 Rule 11 "[f]or discussion" only of "the restrictions in Fed. R. Civ. P. 81(a)(2). . . ." Even if the note to § 2254 Rule 11 is relevant to our decision in this case, I do not subscribe to the Court's conclusion that the plain-error doctrine is " 'inconsistent or inequitable in the overall framework' " of collateral review pursuant to § 2255. See *ante*, at 167–168, n. 15, quoting Advisory Committee's Note to § 2254 Rule 11.

my view, similarly irrelevant where, as the Court of Appeals found here, an explicit exception to the contemporaneous-objection rule is applicable. Giving effect to an express exception to a contemporaneous-objection rule is hardly inconsistent with that rule. Where a jurisdiction has established an exception to its contemporaneous-objection requirement and a prisoner's petition for collateral review falls within that exception, I see no need for the prisoner to prove "cause" for his failure to comply with a rule that is inapplicable in his case.

In the federal courts, the plain-error doctrine constitutes an exception to Federal Rule of Criminal Procedure 30's requirement that defendants make timely objections to instructions. If the Court of Appeals properly characterized the errors identified by respondent as plain error, it correctly refused to require him to make the cause-and-prejudice showing described in *Wainwright* v. *Sykes*, *supra*.

This approach does not, as the Court charges, "affor[d] federal prisoners a preferred status when they seek post-conviction relief." *Ante*, at 166. The Court has long recognized that the *Wainwright* v. *Sykes* standard need not be met where a State has declined to enforce its own contemporaneous-objection rule. See, *e. g.*, *Ulster County Court* v. *Allen*, 442 U. S. 140, 148–154 (1979); *Wainwright* v. *Sykes*, 433 U. S., at 87; *Francis* v. *Henderson*, 425 U. S. 536, 542, n. 5 (1976). Similarly, the cause-and-prejudice standard should not be a barrier to relief when the plain-error exception to the federal contemporaneous-objection requirement is applicable. The federal contemporaneous-objection rules may differ from those of the States, and the applicability of the *Wainwright* v. *Sykes* standard therefore may vary according to the contours of the particular jurisdiction's contemporaneous-objection requirement. But that variance does not improperly distinguish between federal and state prisoners, just as respecting any differences between the contemporaneous-objection rules of two States creates no impermissible

distinction. In fact, it is the Court's approach—refusing to give effect to the plain-error exception to the federal contemporaneous-objection rule, while recognizing exceptions to the analogous state rules—that gives some prisoners a "preferred status."

Similarly, my approach does not afford prisoners "a second appeal," *ante*, at 164, thus sacrificing the interest in finality of convictions. As the dissenting opinion observes, acknowledging the applicability of Rule 52(b) in § 2255 proceedings does not merge direct appeal and collateral review. See *post*, at 180–181, n. 2; see also *United States* v. *Addonizio*, 442 U. S. 178, 186 (1979); *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977).

Because I agree with the Court, however, that respondent has not demonstrated that the erroneous jury instructions of which he complains "so infected the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973), I conclude that the Court of Appeals erred in holding that respondent was entitled to relief under Rule 52(b). Accordingly, I concur in the reversal of the judgment of the Court of Appeals.

JUSTICE BRENNAN, dissenting.

I have frequently dissented from this Court's progressive emasculation of collateral review of criminal convictions. *E. g.*, *Engle* v. *Isaac*, *ante*, p. 107; *Sumner* v. *Mata*, 449 U. S. 539, 552 (1981); *Wainwright* v. *Sykes*, 433 U. S. 72, 99 (1977); *Stone* v. *Powell*, 428 U. S. 465, 502 (1976); see also *Davis* v. *United States*, 411 U. S. 233, 245 (1973) (MARSHALL, J., dissenting). Today the Court takes a further step down this unfortunate path by declaring the plain-error standard of the Federal Rules of Criminal Procedure inapplicable to petitions for relief under 28 U. S. C. § 2255. In so doing, the Court does not pause to consider the nature of the plain-error Rule. Nor does the Court consider the *criminal* character of a proceeding under § 2255 as distinguished from

the *civil* character of a proceeding under 28 U. S. C. § 2254. Because the Court's decision is obviously inconsistent with both, I dissent.

I

A

The Court declares that the plain-error Rule, Fed. Rule Crim. Proc. 52(b), was intended for use only on direct appeal and is "out of place" when the prisoner is collaterally attacking his conviction. *Ante*, at 164. But the power to notice plain error at any stage of a criminal proceeding is fundamental to the courts' obligation to correct substantial miscarriages of justice. That obligation qualifies what the Court characterizes as our entitlement to presume that the defendant has been fairly and finally convicted. *Ibid.*

The Court correctly points out, *ante*, at 163, n. 13, that Rule 52(b)[1] was merely a restatement of existing law. The role of the plain-error doctrine has always been to empower courts, especially in criminal cases, to correct errors that seriously affect the "fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936). Significantly, although some of the Rules of Criminal Procedure appear under headings such as "Preliminary Proceedings," "Trial," or "Appeal," Rule 52(b) is one of the "General Provisions" of the Rules, applicable to all stages of all criminal proceedings in federal courts. See Fed. Rule Crim. Proc. 1.

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[1] Rule 52(b) provides:

"Plain errors or defects affecting sustantial rights may be noticed although they were not brought to the attention of the court."

Although the Rule applies to "plain errors *or* defects affecting substantial rights," one commentator has suggested that the disjunctive form of the Rule is only a means of distinguishing between "errors" (*e. g.*, exclusion of evidence) and "defects" (*e. g.*, defective pleading), and that in either event plain error applies only to errors affecting substantial rights. 8B J. Moore, Moore's Federal Practice ¶ 52.02 [2] (1981).

The Rule has been relied upon to correct errors that may have seriously prejudiced a possibly innocent defendant, see, *e. g.*, *United States* v. *Mann*, 557 F. 2d 1211, 1215–1216 (CA5 1977), and errors that severely undermine the integrity of the judicial proceeding, see, *e. g.*, *United States* v. *Vaughan*, 443 F. 2d 92, 94–95 (CA2 1971). The plain-error Rule mitigates the harsh impact of the adversarial system, under which the defendant is generally bound by the conduct of his lawyer, by providing relief in exceptional cases despite the lawyer's failure to object at trial. The Rule thus "has a salutary effect on the prosecution's conduct of the trial. If the intelligent prosecutor wishes to guard against the possibility of reversible error, he cannot rely on the incompetence or inexperience of his adversary but, on the contrary, must often intervene to protect the defendant from the mistakes of counsel." 8B J. Moore, Moore's Federal Practice ¶ 52.02 [2] (1981).

The Rule does not undermine our interest in the finality of criminal convictions. Rule 52(b) permits, rather than directs, the courts to notice plain error; the power to recognize plain error is one that the courts are admonished to exercise cautiously, see *United States* v. *Diez*, 515 F. 2d 892, 896 (CA5 1975), and resort to only in "exceptional circumstances," *Atkinson*, *supra*, at 160. Yet, it is this power that the Court holds Congress intended to deny federal courts reviewing actions brought under § 2255. But the text and history of the Federal Rules of Criminal Procedure, § 2255, and the special Rules governing § 2255 actions make clear that the Court errs.[2]

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[2] The Court suggests that allowing federal courts to recognize plain error on collateral review would obscure the differences between collateral review and appeal. *Ante*, at 165. But the significant differences between § 2255 and direct appeal remain unaffected by the application of Rule 52(b) to § 2255 actions. Even if an objection is properly preserved, an error which can be raised on appeal is not cognizable under § 2255 unless it is a constitutional violation or an error of law or fact of such "fundamental char-

B

The Court's assumption that Rule 52(b) is inapplicable to proceedings under § 2255 is built upon dictum in *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977), which suggests that the plain-error Rule is inapplicable in a habeas corpus action under 28 U. S. C. § 2254. Even if I were to agree, and I do not, that the plain-error doctrine has no role in § 2254 actions, I could not accept the Court's analysis because it fails to consider the explicit congressional distinction between § 2254,[3] a *civil* collateral review procedure for *state* prisoners, and § 2255,[4] a *criminal* collateral review procedure for *federal* prisoners.

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acter" that it "renders the entire proceeding irregular and invalid." *United States* v. *Addonizio*, 442 U. S. 178, 186 (1979). See also *Hill* v. *United States*, 368 U. S. 424, 428 (1962).

[3] Title 28 U. S. C. § 2254 provides in pertinent part:

"State custody; remedies in State courts

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

[4] Title 28 U. S. C. § 2255 provides in pertinent part:

"Federal Custody; remedies on motion attacking sentence:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

. . . . .

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

In enacting 28 U. S. C. §§ 2254 and 2255, Congress could not have been more explicit: Section 2254 provided for a separate civil action, but a § 2255 motion was "a further step in the criminal case in which petitioner is sentenced." S. Rep. No. 1526, 80th Cong., 2d Sess., 2 (1948).[5] This was reaffirmed in the 28 U. S. C. § 2254 Rules and the 28 U. S. C. § 2255 Rules, approved by Congress in 1976. 90 Stat. 1334. The Advisory Committee's Notes for the § 2255 Rules emphasize repeatedly that a proceeding under § 2255 is a continuation of the criminal trial and not a civil proceeding. Advisory Committee's Notes to § 2255 Rules 1, 3, 11, 12, 28 U. S. C., pp. 280, 282, 287.[6]

Section 2255 Rule 12 directs that "[i]f no procedure is specifically prescribed by these rules, the district court [consid-

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[5] Section 2255 was intended to be in the nature of, but much broader than, the ancient writ of *coram nobis*. Unlike the writ of habeas corpus provided for state prisoners under § 2254, § 2255 directs the prisoner back to the court that sentenced him. The habeas writ remains available to federal prisoners where the motion provided under § 2255 is for some reason inadequate. S. Rep. No. 1526, 80th Cong., 2d Sess., 2 (1948). See also H. R. Rep. No. 308, 80th Cong., 1st Sess., A180 (1947). See generally *United States* v. *Hayman*, 342 U. S. 205 (1952).

[6] The Advisory Committee's Note to Rule 1 states in pertinent part:

"Whereas sections 2241–2254 (dealing with federal habeas for those in state custody) speak of the district court judge 'issuing the writ' as the operative remedy, section 2255 provides that, if the judge finds the movant's assertions to be meritorious, he 'shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.' This is possible because a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action, as appears from the legislative history of section 2 of S. 20, 80th Congress, the provisions of which were incorporated by the same Congress in title 28 U. S. C. as § 2255." 28 U. S. C., p. 280.

The Note to Rule 3 states that the filing fee required for actions under § 2254 actions is not required for motions under § 2255: "[A]s in other motions filed in a criminal action, there is no requirement of a filing fee." 28 U. S. C., p. 283.

Rule 11 was amended in 1979 to provide that the time for appeal of § 2255 motions is governed by Rule 4(a), the civil provison of the Federal Rules of

ering a motion under § 2255] may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and *may apply the Federal Rules of Criminal Procedure* or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules." (Emphasis added.) This is in contrast to the parallel Rule governing motions under § 2254, which provides: "The Federal Rules of *Civil* Procedure, to the extent that they are not inconsistent with [the Rules governing § 2254 cases], may be applied, when appropriate . . . ." 28 U. S. C. § 2254 Rule 11 (emphasis added). The Court today blurs the distinction between § 2255 and § 2254, ignores Congress' insistence that a § 2255 motion is a continuation of the criminal trial, and makes no mention of Congress' express authorization to apply the Federal Rules of Criminal Procedure.

The Court suggests that to apply the plain-error Rule in § 2255 proceedings and not in § 2254 habeas actions would grant federal prisoners a "preferred" status. *Ante*, at 166. To the contrary, to bar federal judges from recognizing plain errors on collateral review is to bind the federal prisoners more tightly than their state counterparts to this Court's procedural barriers. State-court judges may have power to recognize plain error in collateral review of state-court convictions, see, *e. g.*, *Nelson* v. *State*, 208 So. 2d 506, 509 (Fla. App. 1968); *People* v. *Weathers*, 83 Ill. App. 3d 451, 453, 404 N. E. 2d 1011, 1012 (1980); *Wright* v. *State*, 33 Md. App. 68, 70, 363 A. 2d 520, 522 (1976); *Riggs* v. *State*, 50 Ore. App.

Appellate Procedure, rather than Rule 4(b), the criminal provision. But the Note to Rule 11 states: "Even though section 2255 proceedings are a further step in the criminal case, [this provision] correctly states current law." 28 U. S. C., p. 695 (1976 ed., Supp. IV).

The Note to Rule 12 states:

"This rule differs from rule 11 of the § 2254 rules in that it includes the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a § 2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners." 28 U. S. C., p. 287.

109, 114, 622 P. 2d 327, 329 (1981); indeed, by waiving a procedural bar, state courts can permit the petitioner collateral review in federal court as well. See *Mullaney* v. *Wilbur*, 421 U. S. 684, 688, n. 7 (1975). But the federal prisoner's only source of respite from this Court's "airtight system of [procedural] forfeitures," *Wainwright* v. *Sykes*, 433 U. S., at 101 (BRENNAN, J., dissenting), lies with the discretionary exercise of the federal courts' power. The Court's ruling does not establish parity between federal and state prisoners; rather it unduly restricts the power of the federal courts to remedy substantial injustice.

As the Court notes, *ante*, at 166, the concerns of comity which underlie many of the opinions establishing obstacles to § 2254 review of state confinement, *e. g.*, *Sumner* v. *Mata*, 449 U. S., at 550; *Stone* v. *Powell*, 428 U. S., at 491, n. 31; *Francis* v. *Henderson*, 425 U. S. 536, 541 (1976), are absent here. If it is true, as the Court has repeatedly asserted, that the tensions inherent in federal-court review of state-court convictions require that substantive rights yield at times to procedural rules, no similar tension exists in a § 2255 proceeding. Under § 2255, the prisoner is directed back to the same court that first convicted him. The plain-error doctrine merely allows federal courts the discretion common to most courts to waive procedural defaults where justice requires.

I might add that this is not the first instance in which the Court has obscured the distinction between § 2254 and § 2255. In *Francis* v. *Henderson*, *supra*, and then in *Wainwright* v. *Sykes*, *supra*, the Court ignored the distinction between § 2255 and § 2254 in order to *apply* a Federal Rule of Criminal Procedure to the purely *civil* § 2254 proceeding. Now, ironically, the Court again obscures the distinction, this time to *avoid* application of a Criminal Procedure Rule to a *criminal* § 2255 proceeding. With each obfuscation of the distinction between § 2254 and § 2255, the Court has erected a new "procedural hurdl[e]," see *Engle* v. *Issac*, *ante*, at 136 (STEVENS, J., concurring in part and dissenting in part), for prisoners seeking collateral review of their convictions. Indeed,

the "cause and prejudice" standard, which the Court today decides pre-empts the plain-error Rule, and which I continue to view as antithetical to this Court's duty to ensure that "'federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review,'"[7] has its origin in the Federal Rules of Criminal Procedure that the Court now finds inapplicable. As the cause-and-prejudice standard has taken on its talismanic role in the law of habeas corpus only through the Court's past application of the principles of the Federal Rules of Criminal Procedure in both § 2254 and § 2255 actions, perhaps a brief review of this history is in order.

The "cause and prejudice" standard originated in *Davis* v. *United States*, 411 U. S. 233 (1973). In *Davis*, the Court applied Rule 12(b)(2) of the Federal Rules of Criminal Procedure[8] to hold that a federal prisoner seeking collateral review under § 2255 had waived his objection to the composition of the grand jury. Relying on the exception for "cause shown" in Rule 12(b)(2), and *Shotwell Manufacturing Co.* v. *United States*, 371 U. S. 341 (1963) (a case of direct appeal from a federal conviction in which the Court construed the cause exception to Rule 12(b)(2) as encompassing an inquiry into prejudice), the Court divined a rule for § 2255 challenges to the composition of the grand jury: such claims were cognizable only if the prisoner showed both "cause" and "prejudice." *Davis* v. *United States*, *supra*, at 243–245.

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[7] *Francis* v. *Henderson*, 425 U. S. 536, 543 (1976) (BRENNAN, J., dissenting), quoting *Fay* v. *Noia*, 372 U. S. 391, 424 (1963).

[8] Rule 12(b)(2), amended in 1974, provided in pertinent part at the time *Davis* was decided:

"Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

On the foundation of *Davis*, the Court has built an incredible "house of cards whose foundation has escaped any systematic inspection." *Wainwright* v. *Sykes*, *supra*, at 100, n. 1 (BRENNAN, J., dissenting). Notwithstanding the lack of any evidence of congressional purpose to apply the Federal Rules of Criminal Procedure except in § 2255 proceedings,[9] *Francis* v. *Henderson*, *supra*, applied the *Davis* "cause and prejudice" standard to a *state* prisoner who, in a § 2254 proceeding, raised a constitutional challenge to the composition of the grand jury. 425 U. S., at 541–542; see *id.*, at 548 (BRENNAN, J., dissenting). Building upon this strained foundation, *Wainwright* v. *Sykes* relied on *Davis* and *Francis* to declare the "cause and prejudice" standard applicable to *all* procedural defaults occurring during the trial of a *state* criminal defendant. Finally, coming full circle, the Court today relies on this "cause and prejudice" standard to pre-empt the plain-error standard of Rule 52(b).

Francis and *Wainwright* held applicable to a *civil* proceeding an inapplicable Rule of Criminal Procedure in order to defeat substantial claims of state prisoners. Today the Court excludes the applicablity in a criminal proceeding of a Rule of Criminal Procedure plainly intended by Congress to be available to federal prisoners. Any consistency in these decisions lies in their announcement that even in the teeth of clear congressional direction to the contrary, this Court will strain to subordinate a prisoner's interest in substantial justice to a supposed government interest in finality.

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[9] The Court stated in *Davis*, without citation, that "[t]he Federal Rules of Criminal Procedure do not *ex proprio vigore* govern post-conviction proceedings." 411 U. S., at 241. This statement was plainly wrong! The special § 2255 Rules had not yet been adopted and the Criminal Rules expressly state that they govern all criminal proceedings, see n. 7, *supra*. At any rate, the Court then went on, *ipse dixit*, to find it "inconceivable" that Congress did not intend to have Rule 12(b)(2) govern in the § 2255 action. 411 U. S., at 242.

II

The Court's determination to ride roughshod over congressional intention in order to curtail the collateral remedies of prisoners, state and federal, is evident in its passing up the opportunity to decide this case on the ground offered by the Government, Brief for United States 41, n. 34, and adopted by JUSTICE BLACKMUN in his opinion concurring in the judgment, that, in any event, petitioner did not show that the instructions constituted plain error affecting his substantial rights. That admittedly is a close question on this record.[10]

The Government argues that because the jury could not have found premeditation without also inferring malice, the unobjected to instructions did not affect "substantial rights." A plausible counter to this argument occurs to me in that the trial court instructed the jury that malice and premeditation were two separate elements of the crime, App. 26–29. The premeditation instruction did not, in terms, require the jury to find that the defendant acted without such provocation as would preclude a finding of malice. Yet, if the Court had concluded that there was not "plain" error, it might be difficult to support a dissent from that conclusion, given the particular facts of this case. As the Court did not base it's holding upon this ground, I dissent.

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[10] I certainly agree with the Court of Appeals that "[a] clear miscarriage of justice has occurred if [respondent] was guility of manslaughter and is now serving the penalty for murder." 204 U. S. App. D. C. 234, 240, 636 F. 2d 506, 512 (1980). But it is by no means clear that there was a basis for finding that such a miscarriage may have occurred in this case.

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* McCLURE ET AL.

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

No. 81-212. Argued March 1, 1982—Decided April 20, 1982

Part B of the Medicare program under the Social Security Act provides federally subsidized insurance against the cost of certain physician services, outpatient physical therapy, X-rays, laboratory tests, and certain other medical and health care. The Secretary of Health and Human Services is authorized to contract with private insurance carriers to administer the payment of Part B claims. If the carrier refuses on the Secretary's behalf to pay a portion of a claim, the claimant is entitled to a "review determination," based on the submission of written evidence and arguments, and, if the amount in dispute is $100 or more, a still-dissatisfied claimant then has a right to an oral hearing, at which an officer chosen by the carrier presides. The statute and regulations make no further provision for review of the hearing officer's decision. After decisions by hearing officers were rendered against them, appellee claimants sued in Federal District Court to challenge the constitutional adequacy of the hearings afforded to them. The court held that the hearing procedures violated appellees' rights to due process insofar as the final, unappealable decision regarding their claims was made by carrier appointees, that due process required additional safeguards to reduce the risk of erroneous deprivation of Part B benefits, and that appellees were entitled to a *de novo* hearing conducted by an administrative law judge of the Social Security Administration.

Held: The hearing procedures in question do not violate due process requirements. Pp. 195–200.

(a) While due process demands impartiality on the part of those who function in a quasi-judicial capacity, such as the hearing officers involved in this case, there is a presumption that these officers are unbiased. This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. But the factual findings here disclose no disqualifying interest. The officers' connection with the private insurance carriers would be relevant only if the carriers themselves are biased or interested, and there is no basis in the record for such a conclusion. The carriers pay Part B claims from federal, not their own, funds, the hearing officers' salaries are paid by the Federal Government, and the carriers operate under contracts requiring compliance with standards prescribed by the statute and the Secretary. In

the absence of proof of financial interest on the carriers' part, there is no basis for assuming a derivative bias among their hearing officers. Pp. 195–197.

(b) Nor does the record support the contention that accuracy of Part B decisionmaking may suffer because the carriers appoint unqualified hearing officers and that thus additional procedures would reduce the risk of erroneous decisions. Pp. 198–200.

503 F. Supp. 409, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous court.

Deputy Solicitor General Geller argued the cause for appellant. With him on the briefs were *Solicitor General Lee*, *Edwin S. Kneedler*, *Lynne K. Zusman*, *Robert P. Jaye*, and *Henry Eigles*.

Harvey Sohnen argued the cause for appellees. With him on the brief were *Stefan M. Rosenzweig*, *Clifford Sweet*, *Sally Hart Wilson*, and *Gill Deford*.*

JUSTICE POWELL delivered the opinion of the Court.

The question is whether Congress, consistently with the requirements of due process, may provide that hearings on disputed claims for certain Medicare payments be held by private insurance carriers, without a further right of appeal.

I

Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U. S. C. § 1395 *et seq.* (1976 ed. and Supp. IV), commonly known as the Medicare program, is administered by the Secretary of Health and Human Services. It consists of two parts. Part A, which is not at issue in this case, provides insurance against the cost of institutional health services, such as hospital and nursing home fees. §§ 1395c–1395i–2 (1976 ed. and Supp. IV). Part B is entitled "Sup-

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*Briefs of *amici curiae* urging affirmance were filed by *David R. Brink* for the American Bar Association; and by *Mary Ellen McCarthy* for Coalition of Senior Citizens, Inc., et al.

plementary Medical Insurance Benefits for the Aged and Disabled." It covers a portion (typically 80%) of the cost of certain physician services, outpatient physical therapy, X-rays, laboratory tests, and other medical and health care. See §§ 1395k, 1395*l*, and 1395x(s) (1976 ed. and Supp. IV). Only persons 65 or older or disabled may enroll, and eligibility does not depend on financial need. Part B is financed by the Federal Supplementary Medical Insurance Trust Fund. See § 1395t (1976 ed. and Supp. IV). This Trust Fund in turn is funded by appropriations from the Treasury, together with monthly premiums paid by the individuals who choose voluntarily to enroll in the Part B program. See §§ 1395j, 1395r, and 1395w (1976 ed. and Supp. IV). Part B consequently resembles a private medical insurance program that is subsidized in major part by the Federal Government.

Part B is a social program of substantial dimensions. More than 27 million individuals presently participate, and the Secretary pays out more than $10 billion in benefits annually. Brief for Appellant 9. In 1980, 158 million Part B claims were processed. *Ibid.* In order to make the administration of this sweeping program more efficient, Congress authorized the Secretary to contract with private insurance carriers to administer on his behalf the payment of qualifying Part B claims. See 42 U. S. C. § 1395u (1976 ed. and Supp. IV). (In this case, for instance, the private carriers that performed these tasks in California for the Secretary were Blue Shield of California and the Occidental Insurance Co.) The congressional design was to take advantage of such insurance carriers' "great experience in reimbursing physicians." H. R. Rep. No. 213, 89th Cong., 1st Sess., 46 (1965). See also 42 U. S. C. § 1395u(a); S. Rep. No. 404, 89th Cong., 1st Sess., 53 (1965).

The Secretary pays the participating carriers' costs of claims administration. See 42 U. S. C. § 1395u(c). In return, the carriers act as the Secretary's agents. See 42 CFR § 421.5(b) (1980). They review and pay Part B claims for the

Secretary according to a precisely specified process. See 42 CFR part 405, subpart H (1980). Once the carrier has been billed for a particular service, it decides initially whether the services were medically necessary, whether the charges are reasonable, and whether the claim is otherwise covered by Part B. See 42 U. S. C. § 1395y(a) (1976 ed. and Supp. IV); 42 CFR § 405.803(b) (1980). If it determines that the claim meets all these criteria, the carrier pays the claim out of the Government's Trust Fund—not out of its own pocket. See 42 U. S. C. §§ 1395u(a)(1), 1395u(b)(3), and 1395u(c) (1976 ed. and Supp. IV).

Should the carrier refuse on behalf of the Secretary to pay a portion of the claim, the claimant has one or more opportunities to appeal. First, all claimants are entitled to a "review determination," in which they may submit written evidence and arguments of fact and law. A carrier employee, other than the initial decisionmaker, will review the written record *de novo* and affirm or adjust the original determination. 42 CFR §§ 405.807–405.812 (1980); *McClure* v. *Harris*, 503 F. Supp. 409, 411 (ND Cal. 1980). If the amount in dispute is $100 or more, a still-dissatisfied claimant then has a right to an oral hearing. See 42 U. S. C. § 1395u(b)(3)(C); 42 CFR §§ 405.820–405.860 (1980). An officer chosen by the carrier presides over this hearing. § 405.823. The hearing officers "do not participate personally, prior to the hearing [stage], in any case [that] they adjudicate." 503 F. Supp., at 414. See 42 CFR § 405.824 (1980).

Hearing officers receive evidence and hear arguments pertinent to the matters at issue. § 405.830. As soon as practicable thereafter, they must render written decisions based on the record. § 405.834. Neither the statute nor the regulations make provision for further review of the hearing officer's decision.[1] See *United States* v. *Erika, Inc.*, *post*, p. 201.

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[1] Hearing officers may decide to reopen proceedings under certain circumstances. See 42 CFR §§ 405.841–405.850 (1980).

II

This case arose as a result of decisions by hearing officers against three claimants.[2] The claimants, here appellees, sued to challenge the constitutional adequacy of the hearings afforded them. The District Court for the Northern District of California certified appellees as representatives of a nationwide class of individuals whose claims had been denied by carrier-appointed hearing officers. 503 F. Supp., at 412–414. On cross-motions for summary judgment, the court concluded that the Part B hearing procedures violated appellees' right to due process "insofar as the final, unappealable decision regarding claims disputes is made by carrier appointees . . . ." *Id.*, at 418.

The court reached its conclusion of unconstitutionality by alternative lines of argument. The first rested upon the principle that tribunals must be impartial. The court thought that the impartiality of the carrier's hearing officers was compromised by their "prior involvement and pecuniary interest." *Id.*, at 414. "Pecuniary interest" was shown, the District Court said, by the fact that "their incomes as hearing officers are entirely dependent upon the carrier's decisions regarding whether, and how often, to call upon their services."[3] *Id.*, at 415. Respecting "prior involvement," the

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[2] Appellee William McClure was denied partial reimbursement for the cost of an air ambulance to a specially equipped hospital. The hearing officer determined that the air ambulance was necessary, but that McClure could have been taken to a hospital closer to home. Appellee Charles Shields was allowed reimbursement for a cholecystectomy but was denied reimbursement for an accompanying appendectomy. The hearing officer reasoned that the appendectomy was merely incidental to the cholecystectomy. Appellee "Ann Doe" was denied reimbursement for the entire cost of a sex-change operation. The hearing officer ruled that the operation was not medically necessary.

[3] The District Court recognized that hearing officer salaries are paid from a federal fund and not the carrier's resources. *McClure* v. *Harris*, 503 F. Supp. 409, 415 (1980).

court acknowledged that hearing officers *personally* had not been previously involved in the cases they decided. But it noted that hearing officers "are appointed by, and serve at the will of, the carrier [that] has not only participated in the prior stages of each case, but has twice denied the claims [that] are the subject of the hearing," and that five out of seven of Blue Shield's past and present hearing officers "are former *or current* Blue Shield employees."[4] *Id.*, at 414. (Emphasis in original.) See also 42 CFR § 405.824 (1980). The District Court thought these links between the carriers and their hearing officers sufficient to create a constitutionally intolerable risk of hearing officer bias against claimants.

The District Court's alternative reasoning assessed the costs and benefits of affording claimants a hearing before one of the Secretary's adminstrative law judges, "either subsequent to or substituting for the hearing conducted by a carrier appointee." 503 F. Supp., at 415. The court noted that *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), makes three factors relevant to such an inquiry:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's in-

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[4] In this connection, the court referred to the judicial canon requiring a judge to disqualify himself from cases where a " 'lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter.' " 503 F. Supp., at 414–415, quoting Judicial Conference of the United States, Code of Judicial Conduct, Canon 3C(1)(b). The court found that application to hearing officers of standards more lax than those applicable to the judiciary posed "a constitutionally-unacceptable risk of decisions tainted by bias." 503 F. Supp., at 415.

Additionally, the court thought it significant that "no meaningful, specific selection criteria govern[ed] the appointment of hearing officers" and that hearing officers were trained largely by the carriers whose decisions they were called upon to review. *Ibid.*

terest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Considering the first *Mathews* factor, the court listed three considerations tending to show that the private interest at stake was not overwhelming.[5] The court then stated, however, that "it cannot be gainsaid" that denial of a Medicare beneficiary's claim to reimbursement may impose "considerable hardship." 503 F. Supp., at 416.

As to the second *Mathews* factor of risk of erroneous deprivation and the probable value of added process, the District Court found the record "inconclusive." 503 F. Supp., at 416. The court cited statistics showing that the two available Part B appeal procedures frequently result in reversal of the carriers' original disposition.[6] But it criticized these statistics for failing to distinguish between partial and total reversals. The court stated that hearing officers were required neither to receive training nor to satisfy "threshold criteria such as having a law degree." *Ibid.* On this basis it held that "it must be assumed that additional safeguards would reduce the risk of erroneous deprivation of Part B benefits." *Ibid.*

On the final *Mathews* factor involving the Government's interest, the District Court noted that carriers processed 124 million Part B claims in 1978. 503 F. Supp., at 416. The court stated that "[o]nly a fraction of those claimants pursue their currently-available appeal remedies," and that "there is no indication that anything but an even smaller group of claimants will actually pursue [an] additional remedy" of ap-

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[5] "Eligibility for Part B Medicare benefits is not based on financial need. Part B covers supplementary rather than primary services. Denial of a particular claim in a particular case does not deprive the claimant of reimbursement for other, covered, medical expenses." *Id.*, at 416.

[6] "[Appellant] establish[es] that between 1975 and 1978, carriers wholly or partially reversed, upon 'review determination,' their initial determinations in 51–57 percent of the cases considered. Of the adverse determination decisions brought before hearing officers, 42–51 percent of the carriers' decisions were reversed in whole or in part." *Ibid.*

peal to the Secretary. *Ibid.* Moreover, the court said, the Secretary already maintained an appeal procedure using administrative law judges for appeals by Part A claimants. Increasing the number of claimants who could use this Part A administrative appeal "would not be a cost-free change from the status quo, but neither should it be a costly one." *Ibid.*

Weighing the three *Mathews* factors, the court concluded that due process required additional procedural protection over that presently found in the Part B hearing procedure. The court ordered that the appellees were entitled to a *de novo* hearing of record conducted by an administrative law judge of the Social Security Administration.[7] App. to Juris. Statement 36a. We noted probable jurisdiction, 454 U. S. 890 (1981), and now reverse.

III

A

The hearing officers involved in this case serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges. As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *E. g.*, *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242–243, and n. 2 (1980). We must start, however, from the presumption that the hearing officers who decide Part B claims are unbiased. See *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975); *United States* v. *Morgan*, 313 U. S. 409, 421 (1941). This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification.[8] See *Gibson*

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[7] The court added that appellees "are not entitled to further appeal or review of the Adminstrative Law Judge's decision." App. to Juris. Statement 36a.

[8] The Secretary's regulations provide for the disqualification of hearing officers for prejudice and other reasons. See 42 CFR § 405.824 (1980); App. 23–25. Appellees neither sought to disqualify their hearing officers nor presently make claims of *actual* bias. Tr. of Oral Arg. 34 (argument of counsel for appellees).

v. *Berryhill*, 411 U. S. 564, 578–579 (1973); *Ward* v. *Village of Monroeville*, 409 U. S. 57, 60 (1972). See also *In re Murchison*, 349 U. S. 133, 136 (1955) ("to perform its high function in the best way 'justice must satisfy the appearance of justice'") (quoting *Offutt* v. *United States*, 348 U. S. 11, 14 (1954)). But the burden of establishing a disqualifying interest rests on the party making the assertion.

Fairly interpreted, the factual findings made in this case do not reveal any disqualifying interest under the standard of our cases. The District Court relied almost exclusively on generalized assumptions of possible interest, placing special weight on the various connections of the hearing officers with the private insurance carriers.[9] The difficulty with this reasoning is that these connections would be relevant only if the carriers themselves are biased or interested. We find no basis in the record for reaching such a conclusion.[10] As previously noted, the carriers pay all Part B claims from federal, and not their own, funds. Similarly, the salaries of the hearing officers are paid by the Federal Government. Cf. *Mar-*

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[9] Before this Court, appellees urge that the Secretary himself is biased in favor of inadequate Part B awards. They attempt to document this assertion—not mentioned by the District Court—by relying on the fact that the Secretary both has helped carriers identify medical providers who allegedly bill for more services than are medically necessary and has warned carriers to control overutilization of medical services. See Brief for Appellees 17–18.

This action by the Secretary is irrelevant. It simply shows that he takes seriously his statutory duty to ensure that only *qualifying* Part B claims are paid. See 42 U. S. C. § 1395y(a) (1976 ed. and Supp. IV); 42 CFR § 405.803(b) (1980). It does not establish that the Secretary has sought to discourage payment of Part B claims that *do* meet Part B requirements. Such an effort would violate Congress' direction. Absent evidence, it cannot be presumed.

[10] Similarly, appellees adduced no evidence to support their assertion that, for reasons of psychology, institutional loyalty, or carrier coercion, hearing officers would be reluctant to differ with carrier determinations. Such assertions require substantiation before they can provide a foundation for invalidating an Act of Congress.

shall v. *Jerrico, Inc.*, *supra*, at 245, 251. Further, the carriers operate under contracts that require compliance with standards prescribed by the statute and the Secretary. See 42 U. S. C. §§ 1395u(a)(1)(A)–(B), 1395u(b)(3), and 1395u(b)(4) (1976 ed. and Supp. IV); 42 CFR §§ 421.200, 421.202, and 421.205(a) (1980). In the absence of proof of financial interest on the part of the carriers, there is no basis for assuming a derivative bias among their hearing officers.[11]

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[11] The District Court's analogy to judicial canons, see n. 4, *supra*, is not apt. The fact that a hearing officer is or was a carrier employee does not create a risk of partiality analogous to that possibly arising from the professional relationship between a judge and a former partner or associate.

We simply have no reason to doubt that hearing officers will do their best to obey the Secretary's instruction manual:

" 'The individual selected to act in the capacity of [hearing officer] must not have been involved in any way with the determination in question and neither have advised nor given consultation on any request for payment which is a basis for the hearing. Since the hearings are of a nonadversary nature, be particularly responsive to the needs of unrepresented parties and protect the claimant's rights, even if the claimant is represented by counsel. The parties' interests must be safeguarded to the full extent of their rights; in like manner, the government's interest must be protected.

" 'The [hearing officer] should conduct the hearing with dignity and exercise necessary control and order. . . . The [hearing officer] must make independent and impartial decisions, write clear and concise statements of facts and law, secure facts from individuals without causing unnecessary friction, and be objective and free of any influence which might affect impartial judgment as to the facts, while being particularly patient with older persons and those with physical or mental impairments.

. . . . .

" 'The [hearing officer] must be cognizant of the informal nature of a Part B hearing . . . . The hearing is nonadversary in nature in that neither the carrier nor the Medicare Bureau is in opposition to the party but is interested only in seeing that a proper decision is made.' " App. 22, 31–32, quoting Dept. of HEW, Medicare Part B Carriers Manual, ch. XII, pp. 12–21, 12–29 (1980). Cf. *Richardson* v. *Perales*, 402 U. S. 389, 403 (1971) ("congressional plan" is that social security administrative system will operate essentially "as an adjudicator and not as an advocate or adversary").

B

Appellees further argued, and the District Court agreed, that due process requires an additional administrative or judicial review by a Government rather than a carrier-appointed hearing officer. Specifically, the District Court ruled that "[e]xisting Part B procedures might remain intact so long as aggrieved beneficiaries would be entitled to appeal carrier appointees' decisions to Part A administrative law judges."[12] 503 F. Supp., at 417. In reaching this conclusion, the District Court applied the familiar test prescribed in *Mathews* v. *Eldridge*, 424 U. S., at 335. See *supra*, at 193–195. We may assume that the District Court was correct in viewing the private interest in Part B payments as "considerable," though "not quite as precious as the right to receive welfare or social security benefits." 503 F. Supp., at 416. We likewise may assume, in considering the third *Mathews* factor, that the additional cost and inconvenience of providing administrative law judges would not be unduly burdensome.[13]

We focus narrowly on the second *Mathews* factor that considers the risk of erroneous decision and the probable value, if any, of the additional procedure. The District Court's reasoning on this point consisted only of this sentence:

> "In light of [appellees'] undisputed showing that carrier-appointed hearing officers receive little or no formal training and are not required to satisfy any threshold cri-

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[12] The claim determination and appeal process available for Part A claims differs from the Part B procedure. See generally 42 CFR part 405, subpart G (1980), as amended, 45 Fed. Reg. 73932–73933 (1980). See also *United States* v. *Erika, Inc.*, *post*, at 206–207, and nn. 8 and 9.

[13] No authoritative factual findings were made, and perhaps this conclusion would have been difficult to prove. It is known that in 1980 about 158 million Part B claims—up from 124 million in 1978—were filed. Even though the additional review would be available only for disputes in excess of $100, a small percentage of the number of claims would be large in terms of number of cases.

> teria such as having a law degree, it must be assumed that additional safeguards would reduce the risk of erroneous deprivation of Part B benefits." 503 F. Supp., at 416 (footnote omitted).

Again, the record does not support these conclusions. The Secretary has directed carriers to select as a hearing officer

> "'an attorney or other *qualified* individual with the ability to conduct formal hearings and with a general understanding of medical matters and terminology. The [hearing officer] must have a *thorough knowledge* of the Medicare program and the statutory authority and regulations upon which it is based, as well as rulings, policy statements, and general instructions pertinent to the Medicare Bureau.'" App. 22, quoting Dept. of HEW, Medicare Part B Carriers Manual, ch. VII, p. 12–21 (1980) (emphasis added).

The District Court did not identify any specific deficiencies in the Secretary's selection criteria. By definition, a "qualified" individual already possessing "ability" and "thorough knowledge" would not require further training. The court's further general concern that hearing officers "are not required to satisfy any threshold criteria" overlooks the Secretary's quoted regulation.[14] Moreover, the District Court apparently gave no weight to the qualifications of hearing officers about whom there is information in the record. Their qualifications tend to undermine rather than to support

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[14] The District Court's opinion may be read as requiring that hearing officers always be attorneys. Our cases, however, make clear that due process does not make such a uniform requirement. See *Vitek* v. *Jones*, 445 U. S. 480, 499 (1980) (POWELL, J., concurring in part); *Parham* v. *J. R.*, 442 U. S. 584, 607 (1979); *Morrissey* v. *Brewer*, 408 U. S. 471, 486, 489 (1972). Cf. *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970). Neither the District Court in its opinion nor the appellees before us make a particularized showing of the additional value of a law degree in the Part B context.

the contention that accuracy of Part B decisionmaking may suffer by reason of carrier appointment of unqualified hearing officers.[15]

"[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). We have considered appellees' claims in light of the strong presumption in favor of the validity of congressional action and consistently with this Court's recognition of "congressional solicitude for fair procedure . . . ." *Califano* v. *Yamasaki*, 442 U. S. 682, 693 (1979). Appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair or that different or additional procedures would reduce the risk of erroneous deprivation of Part B benefits.

IV

The judgment of the District Court is reversed, and the case is remanded for judgment to be entered for the Secretary.

So ordered.

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[15] The record contains information on nine hearing officers. Two were retired administrative law judges with 15 to 18 years of judging experience, five had extensive experience in medicine or medical insurance, one had been a practicing attorney for 20 years, and one was an attorney with 42 years' experience in the insurance industry who was self-employed as an insurance adjuster. Record, App. to Defendants' Reply to Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment 626, 661–662, 682–685.

UNITED STATES v. ERIKA, INC.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 80-1594. Argued March 1, 1982—Decided April 20, 1982

Part B of the Medicare program, the federally subsidized, voluntary health insurance system for persons 65 or older or who are disabled, supplements Part A, which covers institutional health costs such as hospital expenses, by insuring against a portion of medical expenses excluded from Part A. Under the statute, private insurance carriers are assigned the task of paying Part B claims. If the carrier determines that a claim meets Part B coverage criteria, the claim is paid out of federal funds. Disputed determinations are subject to review in a hearing by the carrier if the disputed amount is $100 or more. The statute also provides for a review by the Secretary of Health and Human Services of determinations of whether an individual is entitled to benefits under Part A or Part B, and of the determination of the amount of benefits under Part A. Persons dissatisfied with the Secretary's decision are granted the right to additional administrative review, together with the option of judicial review when the dispute relates to their eligibility to participate in either Part A or Part B or concerns the amount of Part A benefits. When respondent distributor of kidney dialysis supplies made sales covered by Part B, the purchasers assigned their Part B claims to respondent. Respondent in turn billed the private insurance carrier, who was required by contract to reimburse 80% of what it determined were "reasonable charges" for the supplies. The carrier interpreted the relevant statute and regulations to define "reasonable charges" to be the catalog price of the supplies as of July 1 of the preceding calendar year. When the carrier refused respondent's request to make adjustments in this method of reimbursement in order to reflect interim price increases, respondent sought review before one of the carrier's hearing officers, who upheld the carrier's decision. Respondent then brought an action against the United States in the Court of Claims, seeking reimbursement on the basis of its current charges. After ruling that the suit was within its jurisdiction under the Tucker Act, the Court of Claims held that the carrier's calculation of respondent's allowable charges erred in several respects, and remanded for redetermination of the charges.

Held: The Court of Claims has no jurisdiction to review determinations by private insurance carriers of the amount of benefits payable under Part B of the Medicare program. Pp. 206–211.

(a) In the context of the statute's precisely drawn provisions, the omission to authorize judicial review of determinations of the amount of Part B awards provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims. Pp. 206–208.

(b) The legislative history confirms that Congress intended to limit review of the Part B awards, which are generally smaller than Part A awards. Pp. 208–211.

225 Ct. Cl. 252, 634 F. 2d 580, and 225 Ct. Cl. 273, 647 F. 2d 129, reversed.

POWELL, J., delivered the opinion for a unanimous court.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Acting Solicitor General Wallace, Acting Assistant Attorney General Schiffer, David M. Cohen, Dwight D. Meier,* and *Robert P. Jaye.*

Stephen H. Oleskey argued the cause for respondent. With him on the brief was *Timothy H. Gailey.**

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the Court of Claims has jurisdiction to review determinations by private insurance carriers of the amount of benefits payable under Part B of the Medicare statute.

I

Part B of the Medicare program, 79 Stat. 301, as amended, 42 U. S. C. § 1395j *et seq.* (1976 ed. and Supp. IV), is a federally subsidized, voluntary health insurance system for persons who are 65 or older or who are disabled. The companion Part A Medicare program covers institutional health costs such as hospital expenses. Part B supplements Part A's coverage by insuring against a portion of some medical expenses, such as certain physician services and X-rays, that are excluded from the Part A program. Eligible individuals pay monthly premiums if they choose to enroll in Part B. These premiums, together with contributions from the Fed-

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**Frederick B. Bellamy* and *Alan G. Gilchrist* filed a brief for the American Academy of Family Physicians as *amicus curiae* urging affirmance.

eral Government, are deposited in the Federal Supplementary Medical Insurance Trust Fund that finances the Part B program. See §§ 1395j, 1395r, 1395s, 1395t, and 1395w (1976 ed. and Supp. IV).

The Secretary of Health and Human Services administers the Medicare program. "In order to provide for the administration of the benefits . . . with maximum efficiency and convenience for individuals entitled to benefits," the Secretary is authorized to assign the task of paying Part B claims from the Trust Fund to private insurance carriers experienced in such matters.[1] § 1395u. See H. R. Rep. No. 213, 89th Cong., 1st Sess., 46 (1965); S. Rep. No. 404, 89th Cong., 1st Sess., 53 (1965). After Part B enrollees receive medical care, they (or, after their assignment, their medical providers) bill the private insurance carrier.

If the carrier determines that a claim meets all Part B coverage criteria such as medical necessity and reasonable cost, the carrier pays the claim out of the federal funds. See 42 U. S. C. § 1395u; *Schweiker* v. *McClure*, *ante*, p. 188. If the carrier decides that reimbursement in full is not warranted, the statute and the regulations designate an appeal procedure available to dissatisfied claimants. All may request a "review determination," which is a *de novo* written review hearing before a carrier employee different from the one who initially decided the claim. Claimants who remain dissatisfied and whose appeal involves more than $100 then may petition for an oral hearing before a hearing officer designated by the carrier. See 42 U. S. C. § 1395u(b)(3)(C); 42 CFR § 405.820 (1980). Unless the carrier or the hearing officer decides to reopen the proceeding, the hearing officer's decision is "final and binding upon all parties to the hearing . . . ." § 405.835. Neither the statute nor the Secretary's regulations make further provision for review of hearing officer decisions.

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[1] For example, the private insurance carrier involved in this suit is the Prudential Insurance Company of America.

II

Respondent, a major distributor of kidney dialysis supplies, sold its products to institutions and individuals. About half of such sales were covered by the Part B program. Persons purchasing dialysis supplies assigned their Medicare Part B claims to respondent. See 42 U. S. C. § 426(e); § 426–1 (1976 ed., Supp. IV) (establishing Part B coverage for renal disease). Respondent in turn billed the Prudential Insurance Company of America, the private insurance carrier for the New Jersey area in which it is based. According to its contract with the Secretary, Prudential was required to reimburse 80% of what it determined to be a "reasonable charg[e]" for these supplies. See § 1395*l*(a) (1976 ed., Supp. IV).

Prudential interpreted the relevant statute and regulations to define the "reasonable charges" for respondent's products to be their catalog price as of July 1 of the *preceding* calendar year.[2] For example, Prudential reimbursed respondent's Part B invoices from July 1, 1975, to June 30, 1976, on the basis of prices contained in respondent's July 1, 1974, catalog.

Prudential began reimbursing respondent on this basis in 1974. Early in 1976 the respondent learned about the grounds for Prudential's partial reimbursement of its in-

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[2] Claimants' reimbursable "reasonable charge" cannot exceed the "prevailing charge" calculated for "the locality." 42 U. S. C. § 1395u(b)(3) (1976 ed. and Supp. IV). In an effort to control the extent to which the Medicare program contributes to the inflation of medical costs, the "prevailing charge" formula is based on typical local rates for the *preceding* year. See 42 CFR § 405.504(a)(2)(i) (1980) (defining "prevailing charge" as the fee that "would cover 75 percent of the customary charges made for similar services in the same locality during the calendar year *preceding* the start of the 12-month period (beginning July 1 of each year) in which the claim is submitted or the request for payment is made") (emphasis added). Prudential defined respondent's own catalog price as the relevant "prevailing charge" because respondent was virtually the only provider of dialysis supplies within Prudential's locality.

voices. At that time it requested Prudential to adjust past and future reimbursements to reflect price increases effective after July 1, 1974. Prudential agreed to adjust prospectively the basis for payment for the drug heparin, the price of which apparently had increased sharply. Cf. U. S. Dept. of HEW, Medicare Part B Carriers Manual § 5010.2 (1980) (permitting adjustments to customary charges in "highly unusual situations where equity clearly indicates that the increases are warranted"). But the carrier refused to make either retroactive adjustments for heparin or any adjustments at all for other products.[3]

Respondent sought review of this refusal before one of Prudential's hearing officers pursuant to 42 U. S. C. § 1395 u(b)(3)(C). The hearing officer affirmed Prudential's decision. Respondent then brought the instant action against the United States in the Court of Claims seeking reimbursement on the basis of its current charges, asserting that Prudential's refusal to set "reasonable charges" on the basis of respondent's interim price increases contravened the Fifth Amendment as well as the Social Security Act and applicable regulations. The Court of Claims ruled that respondent's suit was within the jurisdictional grant of the Tucker Act, 28 U. S. C. § 1491, which permits the Court of Claims to hear "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 225 Ct. Cl. 252, 256–262, 634 F. 2d 580, 584–588 (1980) (en banc), opinion clarified, 225 Ct. Cl. 273, 647 F. 2d 129 (1981).[4] On the merits, the court decided that Prudential's calculation of re-

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[3] Respondent claimed that its July 1, 1974, catalog contained a substantial printing error for one product. This claim has been settled and is no longer at issue.

[4] The court added: "The plaintiff also asserts we have jurisdiction under section 10(b) of the Administrative Procedure Act, 5 U. S. C. § 703. In view of our holding that we have jurisdiction under the Tucker Act, we find

spondent's maximum allowable charge erred in several respects. 225 Ct. Cl., at 262–268, 634 F. 2d, at 588–590. The court remanded the case to Prudential for redetermination of these matters.[5] We granted certiorari to determine whether the Court of Claims has jurisdiction over suits of this kind. 451 U. S. 982 (1981). We now reverse.

III

The United States argues that Congress, by enacting the Medicare statute, 42 U. S. C. § 1395j *et seq.* (1976 ed. and Supp. IV), specifically precluded review in the Court of Claims of adverse hearing officer determinations of the amount of Part B payments. We agree.[6]

Our lodestar is the language of the statute. Congress has specified in the Medicare statute that disputed carrier Part B determinations are to be subject to review in "a fair hearing

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it unnecessary to consider this additional basis of jurisdiction. *But cf. Califano* v. *Sanders*, 430 U. S. 99 (1977)." 225 Ct. Cl., at 256, n. 5, 634 F. 2d, at 585, n. 5.

Respondent's arguments were directed in large measure against the actions of Prudential. Prudential, however, was not made a party to this litigation. The Secretary's regulations specify that the Administrator of the Health Care Financing Administration "is the real party of interest in any litigation involving the administration of the [Medicare] program." 42 CFR § 421.5(b) (1980).

[5] The court found respondent's constitutional claims "insubstantial," citing *Califano* v. *Aznavorian*, 439 U. S. 170 (1978); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); and *Dandridge* v. *Williams*, 397 U. S. 471 (1970). 225 Ct. Cl., at 268, 634 F. 2d, at 591. One judge wrote separately to express regret regarding the "short shrift" that the majority gave these claims. *Id.*, at 272, 634 F. 2d, at 593. He reasoned that "Erika may have, probably has, made its constitutional allegations mostly to aid our jurisdiction, and we should not spurn this aid." *Id.*, at 272, 634 F. 2d, at 594 (Nichols, J., concurring). Respondent does not press these constitutional claims before us.

[6] As we find the language of the statute dispositive, we do not reach the Government's alternative contentions that 42 U. S. C. § 405(h) controls or that the respondent has failed to show that the United States unequivocally has waived sovereign immunity.

by the *carrier*, in any case where the amount in controversy is $100 or more . . . ." 42 U. S. C. § 1395u(b)(3)(C) (emphasis added).[7] See *Schweiker* v. *McClure*, *ante*, p. 188. Congress also provided explicitly for review by the *Secretary* of "determination[s] of whether an individual is *entitled* to benefits under part A or part B, and [of] the determination of the *amount* of benefits under *part A* . . . ." § 1395ff(a) (emphasis added). Individuals dissatisfied with the Secretary's decision on such matters are granted the right to additional administrative review,[8] together with a further option of judicial review,[9] in two instances only: when the dispute relates to their eligibility to participate in either Part A or Part B, and when the dispute concerns the amount of benefits to which they are entitled under Part A. § 1395ff(b).[10]

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[7] Although the statute in terms affords this right of review only to an "individual enrolled under [Part B]," 42 U. S. C. § 1395u(b)(3)(C), the Secretary's regulations make clear this right extends to *suppliers* of Part B services to whom individual beneficiaries have assigned their claims. 42 CFR § 405.801(a) (1980).

[8] See 42 U. S. C. § 405(b); 20 CFR part 404, subpart J (1981).

[9] See 42 U. S. C. § 405(g).

[10] "§ 1395ff. Determinations of Secretary

"(a) Entitlement to and amount of benefits

"The determination of whether an individual is entitled to benefits under part A or part B, and the determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

"(b) Appeal by individuals

"(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

"(A) whether he meets the conditions of section 426 or section 426a of this title [which set forth eligibility requirements to be satisfied before an individual is permitted to participate in Part A of the Medicare program], or

"(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of [the Medicare program] . . . , or,

"(C) the amount of the benefits under part A (including a determination where such amount is determined to be zero)

[Footnote 10 is continued on p. 208]

Section 1395ff thus distinguishes between two types of administrative decisions: eligibility determinations (that decide whether an individual is 65 or over or "disabled" within the meaning of the Medicare program) and amount determinations (that decide the amount of the Medicare payment to be made on a particular claim). Conspicuously, the statute fails to authorize further review for determinations of the amount of Part B awards. In the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims. See, *e. g.*, *Lehman* v. *Nakshian*, 453 U. S. 156, 162–163 (1981); *Fedorenko* v. *United States*, 449 U. S. 490, 512–513 (1981).

IV

The legislative history confirms this view and explains its logic. The Committee Reports accompanying the original enactment of the Medicare program stated that the supplemental payments under the Part B program generally were expected to be smaller than those under the primary Part A program. Apparently, it was for this reason that the proposed bill did not provide for judicial review of "a determination concerning the amount of benefits under [P]art B . . . ." S. Rep. No. 404, 89th Cong., 1st Sess., 55 (1965).[11]

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shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title."

[11] With respect to "Appeals" the Senate Committee Report stated:

"The committee's bill provides for the Secretary to make determinations, under both the hospital insurance plan [Part A] and the supplementary plan [Part B], as to whether individuals are entitled to [Part A] hospital insurance benefits or [Part B] supplementary medical insurance benefits and for hearings by the Secretary and judicial review where an individual is dissatisfied with the Secretary's determination. Hearings and judicial review are also provided for where an individual is dissatisfied with a determination as to the amount of benefits under the [Part A] hospital in-

This intent to limit the review of the generally smaller Part B awards was reiterated when Congress amended § 1395ff(b) in 1972.[12] When introducing this amendment, Senator Bennett stated that it was intended to clarify the intent of existing law, which "greatly restricted" the appealability of Medicare decisions "in order to avoid overloading the courts with quite minor matters." 118 Cong. Rec. 33992 (1972). The Senator explained that the amendment would assure that judicial review would be available as to questions of "eligibility

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surance plan if the amount in controversy is $1,000 or more. (Under the supplementary plan [Part B], carriers, not the Secretary, would review beneficiary complaints regarding the amount of benefits, and *the bill does not provide for judicial review of a determination concerning the amount of benefits under part B where claims will probably be for substantially smaller amounts than under part A.*) Hospitals, extended care facilities, and home health agencies would be entitled to hearing and judicial review if they are dissatisfied with the Secretary's determination regarding their eligibility to participate in the program. *It is intended that the remedies provided by these review procedures shall be exclusive.*" S. Rep. No. 404, 89th Cong., 1st Sess., 54–55 (1965) (emphasis added). See also H. R. Rep. No. 213, 89th Cong., 1st Sess., 47 (1965).

Congressional limitation of the amount of procedure available to Part B claimants must be understood in light of the magnitude of the Part B program. In 1980, for instance, 158 million Part B claims were processed. *Schweiker* v. *McClure*, *ante*, at 190.

[12] As originally enacted, this section provided:

"Any individual dissatisfied with any determination under subsection (a) of this section as to *entitlement under part A or part B, or as to amount of benefits under part A where the matter in controversy is $100 or more*, shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and, *in the case of a determination as to entitlement or as to amount of benefits where the amount in controversy is $1,000 or more*, to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title." 79 Stat. 330, as set forth in 42 U. S. C. § 1395ff(b) (1970 ed.) (emphasis added).

The 1972 amendment replaced the emphasized language, including the first word "entitlement," to create the current wording quoted in n. 10, *supra*.

to any benefits of medicare but not [as] to decisions on a claim for payment for a given service."[13] *Ibid.*

The Conference Committee advanced an identical explanation for this amendment:

> "CLARIFICATION OF MEDICARE APPEAL PROCEDURES
>
> "Amendment No. 561: The Senate amendment added a new section to the House bill which would make clear that there is no authorization for an appeal to the Secretary or for judicial review on matters solely involving amounts of benefits under Part B, and that insofar as Part A amounts are concerned, appeal is authorized only if the amount in controversy is $100 or more and judicial review only if the amount in controversy is $1,000 or more.
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> "The House recedes." H. R. Conf. Rep. No. 92–1605, p. 61 (1972).

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[13] Senator Bennett's entire opening statement was as follows:

". . . Mr. President, the purpose of the amendment is to make sure existing law, which gives the right of a person to go to court on the question of eligibility to receive welfare, is not interpreted to mean he can take the question of the Federal claim to court. If he did we would never have an end to it. This is to reconfirm the original intention of the law that the courts can determine only eligibility.

"The situations in which medicare decisions are appealable to the courts were intended in the original law to be greatly restricted in order to avoid overloading the courts with quite minor matters. The law refers to 'entitlement' as being an issue subject to court review and the word was intended to mean eligibility to any benefits of medicare but not to decisions on a claim for payment for a given service.

"If judicial review is made available where any claim is denied, as some court decisions have held, the resources of the Federal court system would be unduly taxed and little real value would be derived by the enrollees. The proposed amendment would merely clarify the original intent of the law and prevent the overloading of the courts with trivial matters because the intent is considered unclear." 118 Cong. Rec. 33992 (1972).

The Senate agreed to the amendment without further discussion. *Ibid.*

These expressions of legislative intent unambiguously support our reading of the statutory language. Respondent advances no persuasive evidence of contrary congressional will. In such circumstances, our task is at an end.[14]

The judgment of the Court of Claims is reversed.

So ordered.

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[14] In addition to its substantive money claim assertedly arising under the Medicare statute, respondent argues that it derives such a substantive claim from an implied-in-fact contract with the United States, or as a third-party beneficiary to Prudential's contract with the United States. These arguments fail because any such contracts with the United States necessarily would include the statutory preclusion of review of hearing officers' determinations regarding the amount of Part B benefits.

In response to questioning at oral argument, respondent's counsel answered that it was asserting a *constitutional* right to judicial review of Prudential's Part B determination. Tr. of Oral Arg. 39. Respondent, however, neither argued this ground in the Court of Claims, included it among the questions presented to this Court in its brief in opposition or in its brief on the merits, nor devoted any substantial briefing to it. We consequently do not address the issue. See this Court's Rules 34.2 and 22.1; cf. *Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U. S. 317, 330 (1967).

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL–CIO, ET AL. *v.* ALLIED INTERNATIONAL, INC.

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

No. 80–1663. Argued January 18, 1982—Decided April 20, 1982

Respondent is an American importer of Russian wood products and had contracts with an American shipper for shipment of the products from the Soviet Union to American ports. The shipper in turn employed a stevedoring company to unload its ships. The stevedore's employees were members of petitioner longshoremen's union (hereafter petitioner). Petitioner, as a protest against the Russian invasion of Afghanistan, refused to handle cargoes arriving from or destined for the Soviet Union. As a result respondent's shipments and business were disrupted completely. Respondent then brought an action in Federal District Court for damages under § 303 of the Labor Management Relations Act, claiming that petitioner's refusal to unload respondent's shipments constituted an illegal secondary boycott under § 8(b)(4)(B) of the National Labor Relations Act. Section 8(b)(4)(B) prohibits a labor union from engaging in activities designed to influence individuals employed by "any person engaged in commerce or in an industry affecting commerce," and from inducing such employees to refuse to handle goods with the object of forcing any person "to cease using, selling, handling, transporting, or otherwise dealing" in the products of, or "to cease doing business" with, another person. The District Court dismissed the complaint, holding that petitioner's boycott was a purely political, primary boycott of Russian goods and thus not within the scope of § 8(b)(4)(B). The Court of Appeals reversed.

Held: Petitioner's boycott was an illegal secondary boycott under § 8(b)(4)(B). Pp. 218–227.

(a) Petitioner's activity was "in commerce" and within the scope of the National Labor Relations Act. Its refusal to unload respondent's shipments in no way affected the maritime operations of foreign ships, was not aimed at altering the terms of employment of foreign crews, and did not seek to extend the bill of rights of American workers and employers to foreign seamen or shipowners. Accordingly, the longstanding tradition of restraint in applying United States laws to foreign ships is irrele-

vant. *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138; *Windward Shipping (London) Ltd.* v. *American Radio Assn.*, 415 U. S. 104; and *American Radio Assn. v. Mobile S.S. Assn.*, 419 U. S. 215, distinguished. Pp. 219–222.

(b) By its terms, § 8(b)(4)(B)'s prohibition against secondary boycotts applies to the facts of this case. Petitioner's sole complaint was with the Soviet Union's foreign and military policy, and however commendable its objectives might have been, the effect of its action was to impose a heavy burden on neutral employers. It is just such a burden that the secondary boycott provisions were designed to prevent. Pp. 222–224.

(c) That the specific purpose of petitioner's action was not to halt business between respondent, its shipper, and the stevedore, but to free union members from handling goods from an objectionable source, does not place the action outside the prohibition of secondary boycotts. When a purely secondary boycott reasonably can be expected to threaten neutral parties with ruin or substantial loss, the pressure on those parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless. P. 224.

(d) Neither is it a defense to the application of § 8(b)(4)(B) that the reason for petitioner's boycott was not a labor dispute with a primary employer but a political dispute with a foreign nation. Section 8(b)(4)(B) contains no exception for "political" secondary boycotts, and its legislative history does not indicate that political disputes should be excluded from its scope. Pp. 224–226.

(e) That respondent has alleged a violation of § 8(b)(4)(B) does not infringe the First Amendment rights of petitioner or its members. Conduct designed not to communicate but to coerce merits little consideration under that Amendment. Pp. 226–227.

640 F. 2d 1368, affirmed.

POWELL, J., delivered the opinion for a unanimous court.

Ernest L. Mathews, Jr., argued the cause for petitioners. With him on the briefs were *Thomas W. Gleason* and *Charles R. Goldburg*.

Duane R. Batista argued the cause for respondent. With him on the brief were *Danielle E. DeBenedictis*, *David M. Saltiel*, and *Steven R. Berger*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With

him on the brief were *Solicitor General Lee*, *Harriet S. Shapiro*, *Norton J. Come*, *Joseph E. Mayer*, and *James Holcomb*.*

JUSTICE POWELL delivered the opinion of the Court.

The question for our decision is whether a refusal by an American longshoremen's union to unload cargoes shipped from the Soviet Union is an illegal secondary boycott under § 8(b)(4) of the National Labor Relations Act (NLRA), 61 Stat. 141, as amended, 29 U. S. C. § 158(b)(4).

I

On January 9, 1980, Thomas Gleason, president of the International Longshoremen's Association (ILA), ordered ILA members to stop handling cargoes arriving from or destined for the Soviet Union. Gleason took this action to protest the Russian invasion of Afghanistan.[1] In obedience to the order,

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**J. Albert Woll* and *Laurence Gold* 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 *Kenneth C. McGuiness*, *Robert E. Williams*, *Allen A. Lauterbach*, and *C. David Mayfield* for the American Farm Bureau Federation; and by *Thomas P. Gies* for Occidental Chemical Co.

[1] The directive provided:

"In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

"This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

"The reason for this action should be apparent in light of international events that have affected relations between the U. S. and the Soviet Union.

longshoremen up and down the east and gulf coasts refused to service ships carrying Russian cargoes.[2]

Respondent Allied International, Inc. (Allied), is an American company that imports Russian wood products for resale in the United States. Allied contracts with Waterman Steamship Lines (Waterman), an American corporation operating ships of United States registry, for shipment of the wood from Leningrad to ports on the east and gulf coasts of the United States. Waterman, in turn, employs the stevedoring company of John T. Clark & Son of Boston, Inc. (Clark), to unload its ships docking in Boston. Under the terms of the collective-bargaining agreement between ILA Local 799 and the Boston Shipping Association, of which Clark is a member, Clark obtains its longshoring employees through the union hiring hall.[3]

As a result of the boycott, Allied's shipments were disrupted completely. Ultimately, Allied was forced to renegotiate its Russian contracts, substantially reducing its purchases and jeopardizing its ability to supply its own

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"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs." App. 10a–11a.

[2] Several lawsuits have resulted from the ILA's Russian boycott. See *Baldovin* v. *International Longshoremen's Assn.*, 626 F. 2d 445 (CA5 1980); *New Orleans S.S. Assn.* v. *General Longshore Workers, ILA*, 626 F. 2d 455 (CA5 1980), cert. granted *sub nom. Jacksonville Bulk Terminals, Inc.* v. *Longshoremen*, 450 U. S. 1029 (1981).

[3] Article 40 of the collective-bargaining agreement contains a broad no-strike, no-lockout clause:

"The Employers agree that there shall be no lockout or work stoppage by the Employers, and the Union agrees that there shall be no strike or work stoppage by the employees. The right of the employees not to cross a bona-fide picket line is recognized by the Employers." App. 29a.

customers. App. 24a–28a. On March 31, 1980, after union officals informed Allied that ILA members would continue to refuse to unload any Russian cargo, Allied brought this action in the United States District Court for the District of Massachusetts. Claiming that the boycott violated the prohibition against secondary boycotts in § 8(b)(4) of the NLRA, 29 U. S. C. § 158(b)(4),[4] Allied sued for damages under § 303 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 158, as amended, 29 U. S. C. § 187,[5] which creates a private damages remedy for the victims of secondary boycotts.[6]

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[4] Section 8(b) provides in relevant part:

"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ."

[5] Section 303 of the LMRA, 61 Stat. 158, as amended and as set forth in 29 U. S. C. § 187, provides in pertinent part:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

"(b) Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit."

[6] Allied also alleged that the ILA boycott violated the Sherman Act, 15 U. S. C. § 1, and amounted to a tortious interference with Allied's business relationships in violation of admiralty law. The Court of Appeals affirmed the District Court's dismissal of these claims, and they are not before us now. See 640 F. 2d 1368, 1379–1382 (CA1 1981).

At about the same time, Allied filed an unfair labor practice charge with the National Labor Relations Board under § 10(b) of the NLRA, 29 U. S. C. § 160(b).[7]

Finding that Allied had not alleged a violation of § 8(b)(4)(B), the District Court dismissed Allied's complaint. 492 F. Supp. 334 (1980). The court characterized the ILA boycott as a purely political, primary boycott of Russian goods.[8] So described, the boycott was not within the scope of § 8(b)(4).[9]

The Court of Appeals for the First Circuit reversed the dismissal of Allied's complaint and remanded for further proceedings. 640 F. 2d 1368 (1981). As an initial matter, and in agreement with the District Court, the court found that the effects of the ILA boycott were "in commerce" within the meaning of the NLRA as interpreted by a long line of deci-

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[7] On March 26, 1980, the Regional Director issued an unfair labor practice complaint against the ILA and filed a request for a preliminary injunction in Federal District Court. Finding that the ILA boycott was a political dispute outside the scope of § 8(b)(4)(B), the District Court denied the request for a preliminary injunction. *Walsh* v. *International Longshoremen's Assn.*, 488 F. Supp. 524 (Mass. 1980). The Court of Appeals affirmed on a different theory. *Walsh* v. *International Longshoremen's Assn.*, 630 F. 2d 864 (CA1 1980). It found that the denial of the Board's earlier request for injunctive relief against the boycott in *Baldovin* v. *International Longshoremen's Assn.*, Civ. No. 80–259 (SD Tex. Feb. 15, 1980), aff'd, 626 F. 2d 445 (CA5 1980), had preclusive effect.

[8] Allied's suit for damages was consolidated with *Walsh* v. *International Longshoremen's Assn.*, *supra*. In dismissing Allied's claim for damages, the District Court relied upon its characterization of the ILA boycott in *Walsh* as the law of the case. 492 F. Supp., at 336.

[9] "'The ILA had not induced a strike against Allied, Waterman, or Clark . . . ; nor does it seek to pressure those employers not to deal with one another. No picket lines have been established and no other employees have been prevented from work. . . . This is a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods. As such, the actions of the respondents may not be prohibited by §§ 8(b)(4)(i), (ii)(b).'" *Ibid.*, quoting *Walsh* v. *International Longshoremen's Assn.*, 488 F. Supp., at 530–531.

sions of this Court.[10] The court held further that the ILA boycott, as described in Allied's averments, was within § 8(b)(4)'s prohibition of secondary boycotts, despite its political purpose, and that resort to such behavior was not protected activity under the First Amendment.[11]

We granted certiorari to determine the coverage of the secondary boycott provisions of the NLRA in this setting. 454 U. S. 814 (1981). We affirm.

II

Our starting point in a case of this kind must be the language of the statute. By its exact terms the secondary boycott provisions of § 8(b)(4)(B) of the NLRA would appear to be aimed precisely at the sort of activity alleged in this case. Section 8(b)(4)(B) governs activities designed to influence individuals employed by "any person engaged in commerce or in an industry affecting commerce."[12] Certainly Allied, Wa-

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[10] In so holding, the court differed with the conclusion reached by the Court of Appeals for the Fifth Circuit in *Baldovin* v. *International Longshoremen's Assn., supra.*

[11] The NLRB reached the same conclusion in its decision upon the Regional Director's complaint against the ILA. See n. 7, *supra.* The Board held that the ILA's refusal to unload Allied's shipments was "in commerce" and amounted to a secondary boycott in violation of §§ 8(b)(4)(i) and (ii)(B). The Board issued a cease-and-desist order to Local 799 requiring it to unload Allied's shipments. *International Longshoremen's Assn., AFL–CIO (Allied International, Inc.)*, 257 N. L. R. B. 1075 (1981). Petitions to review the Board's decision and order were filed by both the ILA and Allied and are now pending before the United States Court of Appeals for the District of Columbia Circuit.

[12] The terms "commerce" and "affecting commerce" are defined in §§ 2(6) and (7), 29 U. S. C. §§ 152(6) and (7), as amended by the LMRA, as follows:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or

terman, and Clark were engaged "in commerce," and Allied alleges that the effect of the ILA action was to obstruct commerce up and down the east and gulf coasts.[13] Just as plainly, it would appear that the ILA boycott fell within § 8(b)(4)(B)'s prohibition of secondary boycotts. Allied alleges that by inducing members of the union to refuse to handle Russian cargoes, the ILA boycott was designed to force Allied, Waterman, and Clark "to cease doing business" with one another and "to cease using, selling, handling, transporting, or otherwise dealing in" Russian products.

Notwithstanding the language of the statute, petitioners argue that their conduct was not "in commerce" as our decisions have interpreted that term. They argue as well that even if the ILA activity were within the jurisdictional scope of § 8(b)(4), the boycott was not the sort of secondary boycott Congress intended to proscribe. We address these arguments in turn.

A

In a line of cases beginning with *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957),[14] the Court has held

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between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

[13] "At first blush, it might appear too plain for discussion that the ILA's refusal to unload Allied's goods affects both commerce and a person engaged in commerce. Allied, Waterman and Clark are American companies and the ILA is an American union. All engage regularly in business affecting the transportation of goods among the several states. Indeed, the instant dispute arose when the ILA's actions allegedly impeded Allied's ability to move its wood products from Boston to other ports along the East coast, and Allied contends that the ILA continues to frustrate its ability to transport its goods into this country." 640 F. 2d, at 1371.

[14] See *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963); *Incres S.S. Co.* v. *Maritime Workers*, 372 U. S. 24 (1963); *Longshoremen* v. *Ariadne*

that the "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce'" as this term is used in the NLRA.[15] Thus, in *Benz* the Court held that picketing by an American union in support of striking foreign crewmembers of a foreign-flag vessel was not governed by the Act. Relying upon the legislative history of the NLRA and the longstanding principles of comity in the treatment of foreign vessels, the Court held that the labor laws were not designed "to resolve labor disputes between nationals of other countries operating ships under foreign laws." *Id.*, at 143.[16]

More recently in *Windward Shipping, Ltd.* v. *American Radio Assn.*, 415 U. S. 104 (1974), and *American Radio Assn.* v. *Mobile S.S. Assn.*, 419 U. S. 215 (1974), the Court again identified the limits to the jurisdictional reach of the labor laws in the context of foreign vessels. In *Windward*, American maritime unions picketed foreign-flag vessels to call attention to the lower wages paid to foreign seamen and to the adverse effect of these lower wages on American seamen. Finding that the picketing was designed to raise the operating costs of foreign vessels and that it had "more than a negligible impact on the 'maritime operations' of these for-

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Co., 397 U. S. 195 (1970); *Windward Shipping, Ltd.* v. *American Radio Assn.*, 415 U. S. 104 (1974); *American Radio Assn.* v. *Mobile S.S. Assn.*, 419 U. S. 215 (1974).

[15] *Incres S.S. Co.* v. *Maritime Workers, supra*, at 27. The Court noted in a later case that the "term 'in commerce,' as used in the LMRA, is obviously not self-defining." *Windward Shipping, Ltd.* v. *American Radio Assn., supra*, at 112.

[16] The Court adhered to a similar approach in the companion cases of *McCulloch* v. *Sociedad Nacional, supra*, and *Incres S.S. Co.* v. *Maritime Workers, supra.* In *McCulloch* the Court held that the National Labor Relations Board did not have jurisdiction to determine the union representation of a foreign crew aboard a foreign vessel. In *Incres* the Court held that organizational picketing by an American union seeking to organize foreign seamen on a foreign-flag vessel also was outside the Board's jurisdiction.

eign ships," 415 U. S., at 114, the Court held that the union's activity was not "in commerce" under the labor laws. *Id.*, at 115.

Facing the identical activity by maritime unions in *Mobile*, the Court reached the same conclusion. The complainants in *Mobile* were not foreign shipowners, as in *Windward*, but parties feeling the secondary effects of the union's protest—American stevedoring companies and an American shipper. The Court held that this change in complaining parties did not alter the jurisdictional reach of the Act. The *Benz* line of cases did not permit "a bifurcated view of the effects of a single group of pickets at a single site." *Mobile*, *supra*, at 222. The refusal of American stevedores to cross the picket lines "was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." 419 U. S., at 224.

Applying the principles developed in these cases to the circumstances here, we find that the ILA's activity was "in commerce" and within the scope of the NLRA. Unlike the situation in every case from *Benz* through *Mobile*, the ILA's refusal to unload Allied's shipments in no way affected the maritime operations of foreign ships. The boycott here did not aim at altering the terms of employment of foreign crews on foreign-flag vessels. It did not seek to extend the bill of rights developed for American workers and American employers to foreign seamen and foreign shipowners. The longstanding tradition of restraint in applying the laws of this country to ships of a foreign country—a tradition that lies at the heart of *Benz* and every subsequent decision—therefore is irrelevant to this case.[17] As the Court of Appeals ex-

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[17] Jurisdiction in the NLRA over the ILA boycott is consistent with two further considerations. The ILA boycott is a national boycott affecting ports throughout the United States. Were the effects of this boycott not "in commerce," complaining parties such as Allied could seek relief in state courts. The possibility of conflicting decisions by a multitude of state

plained, this drama was "played out by an all-American cast." 640 F. 2d, at 1374. "[A]n American union has ordered its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer." *Id.*, at 1372. In these circumstances, the clear language of the statute needs no further explication.

B

The secondary boycott provisions in § 8(b)(4)(B) prohibit a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person.[18] By its terms the statutory prohibition applies to the undisputed facts of this case. The ILA has no dispute with Allied, Waterman, or Clark. It does not seek any labor objective from these employers.[19] Its sole com-

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courts frustrates one of the basic purposes of the NLRA—to establish a uniform national labor policy. Moreover, the ILA boycott commenced just a few days after President Carter ordered a boycott on exports to the Soviet Union. It differed in significant respects from that embargo. See 16 Weekly Comp. of Pres. Doc. 42 (1980). On February 16, 1980, the Legal Adviser of the State Department informed the Attorney General "that the Department of State believes that the action of the ILA conflicts with significant U. S. foreign policy interests." Supplementary Memorandum in Support of Motion for Preliminary Injunction, Attachment A. Federal jurisdiction is supported by the national interests affected by the ILA boycott. See *International Longshoremen's Assn., AFL–CIO (Allied International, Inc.)*, 257 N. L. R. B., at 1077 ("this case presents the novel situation of a labor union establishing a national boycott contravening a Federal policy").

[18] In *Carpenters* v. *NLRB*, 357 U. S. 93, 98 (1958), the Court described the elements of a § 8(b)(4) violation as threefold: "Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person."

[19] "We think it plain that the ILA was not engaged in primary activity and that the boycott against Allied's goods was 'calculated to satisfy union objectives elsewhere.' The ILA concedes it has no dispute with Clark, Waterman or Allied, and there is no suggestion that it seeks to affect the labor relations of any of these employers. It is also plain that

plaint is with the foreign and military policy of the Soviet Union. As understandable and even commendable as the ILA's ultimate objectives may be, the certain effect of its action is to impose a heavy burden on neutral employers. And it is just such a burden, as well as widening of industrial strife, that the secondary boycott provisions were designed to prevent.[20] As the NLRB explained in ruling upon the Regional Director's complaint against the ILA:

> "It is difficult to imagine a situation that falls more squarely within the scope of Section 8(b)(4) than the one before us today. Here, the Union's sole dispute is with the USSR over its invasion of Afghanistan. Allied, Waterman, and Clark have nothing to do with this dispute. Yet the Union's actions in furtherance of its disagreement with Soviet foreign policy have brought direct economic pressure on all three parties and have resulted in a substantial cessation of business. Thus, the conduct al-

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these 'unoffending employers' have been embroiled in a 'controversy not their own' as a result of union action which 'reasonably could be expected' to 'threaten a neutral party with ruin or substantial loss.'" 640 F. 2d, at 1377.

[20] Justice Frankfurter explained that Congress "aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers." *Carpenters* v. *NLRB*, *supra*, at 100.

The Court frequently has described the purpose of the secondary boycott provisions as twofold: the preservation of the right of labor organizations to place pressure on employers with whom there is a primary dispute as well as the protection of neutral employers and employees from the labor disputes of others. See, *e. g.*, *NLRB* v. *Denver Building Trades Council*, 341 U. S. 675, 692 (1951) (noting the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own"). In the circumstances of this case, however, only the second of these objectives has any relevance. The ILA had no dispute with Allied, Waterman, or Clark. See n. 19, *supra*.

leged in this case is precisely the type of conduct Congress intended the National Labor Relations Act to regulate." *International Longshoremen's Assn., AFL–CIO (Allied International, Inc.)*, 257 N. L. R. B. 1075, 1078–1079 (1981) (footnote omitted).

Nor can it be argued that the ILA's action was outside of the prohibition on secondary boycotts because its object was not to halt business between Allied, Clark, and Waterman with respect to Russian goods, but simply to free ILA members from the morally repugnant duty of handling Russian goods. Such an argument misses the point. Undoubtedly many secondary boycotts have the object of freeing employees from handling goods from an objectionable source. Nonetheless, when a purely secondary boycott "reasonably can be expected to threaten neutral parties with ruin or substantial loss," *NLRB* v. *Retail Store Employees*, 447 U. S. 607, 614 (1980), the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless.[21] The union must take responsibility for the "foreseeable consequences" of its conduct. *Id.*, at 614, n. 9; see *NLRB* v. *Operating Engineers*, 400 U. S. 297, 304–305 (1971). Here the union was fully aware of the losses it was inflicting upon Allied. It is undisputed that Allied officials endeavored to persuade ILA leaders to allow it to fulfill its Russian contracts. On the basis of the record before it, the Court of Appeals correctly concluded that Allied had alleged a violation of § 8(b)(4).[22]

Neither is it a defense to the application of § 8(b)(4) that the reason for the ILA boycott was not a labor dispute with a primary employer but a political dispute with a foreign nation.

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[21] "It is not necessary to find that the *sole* object" of the boycott was the disruption of business of neutral parties. *NLRB* v. *Denver Building Trades Council*, *supra*, at 689.

[22] As both the Court of Appeals and the NLRB noted, such a result is particularly appropriate in this case since it is not even arguable that Allied was feeling the secondary effects of a *primary* dispute protected by the Act. See 640 F. 2d, at 1376, n. 6; 257 N. L. R. B., at 1082. We are not faced in this case with the often difficult task of characterizing union

Section 8(b)(4) contains no such limitation. In the plainest of language it prohibits "forcing . . . any person to cease . . . handling . . . the products of any other producer . . . or to cease doing business with any other person." The legislative history does not indicate that political disputes should be excluded from the scope of § 8(b)(4). The prohibition was drafted broadly to protect neutral parties, "the helpless victims of quarrels that do not concern them at all." H. R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947). Despite criticism from President Truman as well as from some legislators that the secondary boycott provision was too sweeping, the Congress refused to narrow its scope. Recognizing that "[i]llegal boycotts take many forms," *id.*, at 24, Congress intended its prohibition to reach broadly.[23]

We would create a large and undefinable exception to the statute if we accepted the argument that "political" boycotts are exempt from the secondary boycott provision. The distinction between labor and political objectives would be difficult to draw in many cases. In the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision purposefully drafted in broadest terms.

We agree with the Court of Appeals that it is "more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in

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activity as either protected primary or prohibited secondary activity. See *Electrical Workers* v. *NLRB*, 366 U. S. 667, 673–674 (1961).

[23] Responding to the claim that there were "good secondary boycotts and bad secondary boycotts," Senator Taft stated: "Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 93 Cong. Rec. 4198 (1947).

In *NLRB* v. *Fruit Packers*, 377 U. S. 58, 63 (1964), the Court concluded that Congress did not intend to bar "*all* peaceful *consumer picketing* at secondary sites" (emphasis added).

aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity." 640 F. 2d, at 1378. In light of the statutory language and purpose, we decline to create a far-reaching exemption from the statutory provision for "political" secondary boycotts.[24]

III

Application of § 8(b)(4) to the ILA's activity in this case will not infringe upon the First Amendment rights of the ILA and its members. We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment. See, *e. g.*, *NLRB* v. *Retail Store Employees*, *supra*, at 616; *American Radio Assn.* v. *Mobile S.S. Assn.*, 419 U. S., at 229–231. Cf. *NLRB* v. *Fruit Packers*, 377 U. S. 58, 63 (1964).[25] It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment.[26] The labor laws reflect a careful balancing of interests. See *NLRB* v. *Retail Store Employees*,

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[24] Cf. *Plumbers & Pipefitters* v. *Plumbers & Pipefitters*, 452 U. S. 615 (1981) (rejecting view that § 301(a) of the LMRA applies only to disputes between local and parent unions concerning labor-management relations).

[25] In *Electrical Workers* v. *NLRB*, 341 U. S. 694, 705 (1951), the Court held: "The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgement of free speech. The inducement or encouragement in the instant case took the form of picketing . . . . [W]e recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise" (footnote omitted).

[26] Cf. *NLRB* v. *Retail Store Employees*, 447 U. S. 607, 619 (1980) ("The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea") (STEVENS, J., concurring); *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968) ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same

447 U. S., at 617 (BLACKMUN, J., concurring). There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others.

The judgment of the Court of Appeals is

Affirmed.

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course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

LARSON, COMMISSIONER OF SECURITIES, MINNESOTA DEPARTMENT OF COMMERCE, ET AL. *v.* VALENTE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1666. Argued December 9, 1981—Decided April 21, 1982

A section (§ 309.515, subd. 1(b)) of Minnesota's charitable solicitations Act provides that only those religious organizations that receive more than half of their total contributions from members or affiliated organizations are exempt from the registration and reporting requirements of the Act. The individual appellees, claiming to be followers of the tenets of appellee Unification Church (later joined as a plaintiff) brought suit in Federal District Court seeking a declaration that the statute on its face and as applied to them violated, *inter alia*, the Establishment Clause of the First Amendment, and also seeking injunctive relief. After obtaining a preliminary injunction, appellees moved for summary judgment. Upon finding that the "overbreadth" doctrine gave appellees standing to challenge the statute, the Magistrate to whom the action had been transferred held that the application of the statute to religious organizations violated the Establishment Clause, and therefore recommended declaratory and permanent injunctive relief. The District Court, accepting this recommendation, entered summary judgment for appellees. The Court of Appeals affirmed on both the standing issue and on the merits. But the court, disagreeing with the District Court's conclusion that appellees and others should enjoy the religious-organization exemption from the Act merely by claiming to be such organizations, held that proof of religious-organization status was required in order to gain the exemption, and left the question of appellees' status "open . . . for further development." Accordingly, the court vacated the District Court's judgment and remanded for entry of a modified injunction and further proceedings.

Held:

1. Appellees have Art. III standing to raise their Establishment Clause claims. The State attempted to use § 309.515, subd. 1(b)'s fifty per cent rule to compel the Unification Church to register and report under the Act. The fact that the fifty per cent rule only applies to religious organizations compels the conclusion that, at least for purposes of this suit challenging that application, appellee Unification Church is a religious organization within the meaning of the Act. The controversy be-

tween the parties is not rendered any less concrete by the fact that appellants, in the course of this litigation, have changed their position to contend that the Unification Church is not a religious organization within the meaning of the Act and that therefore it would not be entitled to an exemption under § 309.515, subd. 1(b) even if the fifty per cent rule were declared unconstitutional. This is so because the threatened application of § 309.515, subd. 1(b), and its fifty per cent rule to appellees amounts to a distinct and palpable injury to them, in that it disables them from soliciting contributions in Minnesota unless they comply with the registration and reporting requirements of the Act. Moreover, there is a causal connection between the claimed injury and the challenged conduct. The fact that appellees have not yet shown an entitlement to a permanent injunction barring the State from subjecting them to the Act's registration and reporting requirements does not detract from the palpability of the particular and discrete injury caused to appellees. Pp. 238–244.

2. Section 309.515, subd. 1(b), in setting up precisely the sort of official denominational preference forbidden by the First Amendment, violates the Establishment Clause. Pp. 244–255.

(a) Since the challenged statute grants denominational preferences, it must be treated as suspect, and strict scrutiny must be applied in adjudging its constitutionality. Pp. 244–246.

(b) Assuming, *arguendo*, that appellants' asserted interest in preventing fraudulent solicitations is a "compelling" interest, appellants have nevertheless failed to demonstrate that § 309.515, subd. 1(b)'s fifty per cent rule is "closely fitted" to that interest. Appellants' argument to the contrary is based on three premises: (1) that members of a religious organization can and will exercise supervision and control over the solicitation activities of the organization when membership contributions exceed fifty per cent; (2) that membership control, assuming its existence, is an adequate safeguard against abusive solicitations of the public; and (3) that the need for public disclosure rises in proportion with the *percentage* of nonmember contributions. There is no substantial support in the record for any of these premises. Pp. 246–251.

(c) Where the principal effect of § 309.515, subd. 1(b)'s fifty per cent rule is to impose the Act's registration and reporting requirements on some religious organizations but not on others, the "risk of politicizing religion" inhering in the statute is obvious. Pp. 251–255.

637 F. 2d 562, affirmed.

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. 256. WHITE, J., filed a dissenting opinion, in

which REHNQUIST, J., joined, *post*, p. 258. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 264.

Larry Salustro, Special Assistant Attorney General of Minnesota, argued the cause for appellants. With him on the briefs were *Warren Spannaus*, Attorney General, *pro se*, and *William P. Marshall*, Special Assistant Attorney General.

Barry A. Fisher argued the cause for appellees. With him on the brief were *David Grosz* and *Robert C. Moest*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The principal question presented by this appeal is whether a Minnesota statute, imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers, discriminates against such organizations in violation of the Establishment Clause of the First Amendment.[1]

I

Appellants are John R. Larson, Commissioner of Securities, and Warren Spannaus, Attorney General, of the State of Minnesota. They are, by virtue of their offices, responsible for the implementation and enforcement of the Minnesota charitable solicitations Act, Minn. Stat. §§309.50–309.61 (1969 and Supp. 1982). This Act, in effect since 1961, provides for a system of registration and disclosure respecting

*Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* and *Bruce J. Ennis* for the American Civil Liberties Union et al.; by *Nathan Z. Dershowitz* for the American Jewish Congress; by *Lee Boothby* for the Americans United for Separation of Church and State Fund, Inc.; by *Robert L. Toms* for the Center for Law and Religious Freedom of the Christian Legal Society; by *Robert W. Nixon* for the General Conference of Seventh-Day Adventists et al.; and by the Greater Minneapolis Association of Evangelicals.

[1] The Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." It is applied to the States by the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

charitable organizations, and is designed to protect the contributing public and charitable beneficiaries against fraudulent practices in the solicitation of contributions for purportedly charitable purposes. A charitable organization subject to the Act must register with the Minnesota Department of Commerce before it may solicit contributions within the State. § 309.52. With certain specified exceptions, all charitable organizations registering under § 309.52 must file an extensive annual report with the Department, detailing, *inter alia*, their total receipts and income from all sources, their costs of management, fundraising, and public education, and their transfers of property or funds out of the State, along with a description of the recipients and purposes of those transfers. § 309.53. The Department is authorized by the Act to deny or withdraw the registration of any charitable organization if the Department finds that it would be in "the public interest" to do so and if the organization is found to have engaged in fraudulent, deceptive, or dishonest practices. § 309.532, subd. 1 (Supp. 1982). Further, a charitable organization is deemed ineligible to maintain its registration under the Act if it expends or agrees to expend an "unreasonable amount" for management, general, and fundraising costs, with those costs being presumed unreasonable if they exceed thirty per cent of the organization's total income and revenue. § 309.555, subd. 1a (Supp. 1982).

From 1961 until 1978, all "religious organizations" were exempted from the requirements of the Act.[2] But effective March 29, 1978, the Minnesota Legislature amended the Act so as to include a "fifty per cent rule" in the exemption provision covering religious organizations. § 309.515, subd. 1(b). This fifty per cent rule provided that only those religious organizations that received more than half of their total con-

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[2] Section 309.51, subd. 1(a) (1969), repealed in 1973, provided in pertinent part:

"[S]ections 309.50 to 309.61 shall not apply to any group or association serving a bona fide religious purpose when the solicitation is connected

tributions from members or affiliated organizations would remain exempt from the registration and reporting requirements of the Act. 1978 Minn. Laws, ch. 601, § 5.[3]

Shortly after the enactment of § 309.515, subd. 1(b), the Department notified appellee Holy Spirit Association for the Unification of World Christianity (Unification Church) that it was required to register under the Act because of the newly enacted provision.[4] Appellees Valente, Barber, Haft, and Korman, claiming to be followers of the tenets of the Unifica-

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with such a religious purpose, nor shall such sections apply when the solicitation for such a purpose is conducted for the benefit of such a group or association . . . ."

Between 1973 and 1978, § 309.515, subd. 1, provided in pertinent part: "[S]ections 309.52 and 309.53 shall not apply to . . . :

* * * * *

"(b) Any group or association serving a bona fide religious purpose when the solicitation is connected with such a religious purpose, nor shall such sections apply when the solicitation for such a purpose is conducted for the benefit of such a group or association by any other person with the consent of such group or association. . . ."

[3] The amended exemption provision read in relevant part:

"309.515 Exemptions

"Subdivision 1. . . . [S]ections 309.52 and 309.53 shall not apply to . . . :

* * * * *

"(b) A religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2). A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention is exempt from the requirements of sections 309.52 and 309.53. The term 'member' shall not include those persons who are granted a membership upon making a contribution as a result of a solicitation."

[4] This notice "discussed the application of the amendments expanding the scope of the charities law to religious organizations, explained the registration procedure, enclosed the proper forms, and sought [appellees'] compliance with the law." Affidavit of Susan E. Fortney, Legal Assistant, Staff of Attorney General of Minnesota, Nov. 2, 1978. The notice also threat-

tion Church, responded by bringing the present action in the United States District Court for the District of Minnesota. Appellees sought a declaration that the Act, on its face and as applied to them through § 309.515, subd. 1(b)'s fifty per cent rule, constituted an abridgment of their First Amendment rights of expression and free exercise of religion, as well as a denial of their right to equal protection of the laws, guaranteed by the Fourteenth Amendment;[5] appellees also sought

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ened legal action against the Church if it failed to comply. The notice read in pertinent part as follows:

"During the recent Minnesota legislative session, a bill was passed which changes the registration and reporting requirements for charitable organizations which solicit funds in Minnesota. One significant change was in the religious exemption which previously exempted from registering and reporting any organization serving a bona fide religious purpose.

"Minn. Stat. § 309.515 as found in chapter 601 of the 1978 Session Laws provides that the religious exemption now applies to religious groups or societies which receive more than half of its contributions in the accounting year last ended from persons who are members of the organization or from a parent organization or affiliated organization. In other terms, a religious organization which solicits more than half its funds from non-members must register and report according to the provisions of the Minnesota Charitable Solicitation Law.

"From the nature of your solicitation it appears that Holy Spirit Association for the Unification of World Christianity must complete a Charitable Organization Registration Statement and submit it to the Minnesota Department of Commerce. The Charitable Organization Registration Statement must be accompanied with a financial statement for the fiscal year last ended.

"I am enclosing the proper forms and an information sheet for your use. Please be advised that the proper forms must be on file with the Department of Commerce by September 30, 1978, or we will consider taking legal action to ensure your compliance." Affidavit of Susan E. Fortney, *supra*, Exhibit A.

[5] Appellees' complaint stated in pertinent part that the "application of the statutes to itinerant missionaries whose Churches are not established in Minnesota, but not to Churches with substantial local membership, constitutes an unequal application of the law." App. A–5. The focus of this allegation was plainly the fifty per cent rule of § 309.515, subd. 1(b).

temporary and permanent injunctive relief. Appellee Unification Church was later joined as a plaintiff by stipulation of the parties, and the action was transferred to a United States Magistrate.

After obtaining a preliminary injunction,[6] appellees moved for summary judgment. Appellees' evidentiary support for this motion included a "declaration" of appellee Haft, which described in some detail the origin, "religious principles," and practices of the Unification Church. App. A–7—A–14. The declaration stated that among the activities emphasized by the Church were "door-to-door and public-place proselytizing and solicitation of funds to support the Church," *id.*, at A–8, and that the application of the Act to the Church through § 309.515, subd. 1(b)'s fifty per cent rule would deny its members their "religious freedom," *id.*, at A–14. Appellees also argued that by discriminating among religious organizations, § 309.515, subd. 1(b)'s fifty per cent rule violated the Establishment Clause.

Appellants replied that the Act did not infringe appellees' freedom to exercise their religious beliefs. Appellants sought to distinguish the present case from *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), where this Court invalidated a municipal ordinance that had required the licensing of Jehovah's Witnesses who solicited donations in exchange for

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[6] Appellants responded to appellees' motion for a preliminary injunction with a motion to dismiss. App. to Juris. Statement A–38. They disputed appellees' claims on the merits, and also challenged appellees' standing to raise their Establishment Clause claims, arguing that the Unification Church was not a religion within the meaning of that Clause. *Id.*, at A–44—A–45. The Magistrate made findings of fact that the Unification Church was a California nonprofit religious corporation, and that it had been granted tax exempt religious organization status by the United States Internal Revenue Service and the State of Minnesota. *Id.*, at A–37. These findings were later incorporated into the Magistrate's report and recommendation on the motion for summary judgment. *Id.*, at A–21. He declined, however, to rule on the issue of the religious status of the Church. *Id.*, at A–47.

religious literature, by arguing that unlike the activities of the petitioners in *Murdock*, appellees' solicitations bore no substantial relationship to any religious expression, and that they were therefore outside the protection of the First Amendment.[7] Appellants also contended that the Act did not violate the Establishment Clause. Finally, appellants argued that appellees were not entitled to challenge the Act until they had demonstrated that the Unification Church was a religion and that its fundraising activities were a religious practice.

The Magistrate determined, however, that it was not necessary for him to resolve the questions of whether the Unification Church was a religion, and whether appellees' activities were religiously motivated, in order to reach the merits of appellees' claims. Rather, he found that the "overbreadth" doctrine gave appellees standing to challenge the Act's constitutionality. On the merits, the Magistrate held that the Act was facially unconstitutional with respect to religious organizations, and was therefore entirely void as to such organizations, because § 309.515, subd. 1(b)'s fifty per cent rule failed the second of the three Establishment Clause "tests" set forth by this Court in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971).[8] The Magistrate also held on due

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[7] Appellants asserted that the central issue in the case was "whether [appellees'] fund raising practices constitute expression of religious beliefs within the protection of the First Amendment." Defendants' Objections to Report and Recommendations of Magistrate Robert Renner in No. Civ. 4–78–453 (DC Minn.), p. 2. Appellants argued that appellees' fundraising activities were not a form of religious expression; they provided evidentiary support for this argument in the form of numerous affidavits of persons claiming to be former members of the Unification Church, who asserted that they had been encouraged to engage in fundraising practices that were both fraudulent and unrelated to any religious purpose.

[8] That second test requires that the "principal or primary effect" of the challenged statute "be one that neither advances nor inhibits religion." 403 U. S., at 612. The Magistrate found that § 309.515, subd. 1(b)'s fifty per cent rule violated that requirement "in that it inhibit[ed] religious orga-

process grounds that certain provisions of the Act were unconstitutional as applied to any groups or persons claiming the religious-organization exemption from the Act. The Magistrate therefore recommended, *inter alia*, that appellees be granted the declarative and permanent injunctive relief that they had sought—namely, a declaration that the Act was unconstitutional as applied to religious organizations and their members, and an injunction against enforcement of the Act as to any religious organization. Accepting these recommendations, the District Court entered summary judgment in favor of appellees on these issues.[9]

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. 637 F. 2d 562 (1981). On the issue of standing, the Court of Appeals affirmed the District Court's application of the overbreadth doctrine, citing *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 634 (1980), for

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nizations which receive[d] more than half of their contributions from non-members, and thereby enhance[d] religious organizations which receive[d] less than half from non-members." App. to Juris. Statement A–24.

[9] The District Court's judgment provided:

"1. The Minnesota Charitable Solicitations Act, Minn. Stat. § 309.50 *et seq.*, is unconstitutional as applied to religious organizations and members thereof;

"2. The Act is constitutional as applied to non-religious organizations and members thereof;

"3. Sections 309.534, subd. 1(a), and 309.581 of the Act is *[sic]* unconstitutional as applied to persons claiming to be religious organizations or members thereof;

"4. The constitutionality of the application of section 309.532 [relating to denial, suspension, and revocation of licenses issued under the Act] to [appellees] and others whose claims to a religious exemption are challenged by the State is a nonjusticiable issue;

"5. [Appellant Larson] is permanently enjoined from enforcing the Act as to any and all religious organizations;

"6. [Appellant Larson] is permanently enjoined from utilizing sections 309.534, subd. 1(a), and 309.581 to enforce the Act as against [appellees] and other persons claiming to be religious organizations or members thereof." *Id.*, at A–18—A–19.

the proposition that "a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." 637 F. 2d, at 564–565. On the merits, the Court of Appeals affirmed the District Court's holding that the "inexplicable religious classification" embodied in the fifty per cent rule of § 309.515, subd. 1(b), violated the Establishment Clause.[10] *Id.*, at 565–570. Applying the Minnesota rule of severability, the Court of Appeals also held that § 309.515, subd. 1(b), as a whole should not be stricken from the Act, but rather that the fifty per cent rule should be stricken from § 309.515, subd. 1(b). *Id.*, at 570. But the court disagreed with the District Court's conclusion that appellees and others should enjoy the religious-organization exemption from the Act merely by claiming to be such organizations: The court held that proof of religious-organization status was required in order to gain the exemption, and left the question of appellees' status "open . . . for further development." *Id.*, at 570–571. The Court of Appeals accordingly vacated the judgment of the District Court and remanded the action for entry of a modified injunction and for further appropriate proceedings. *Id.*, at 571.[11] We noted probable jurisdiction. 452 U. S. 904 (1981).

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[10] The Court of Appeals supported this conclusion on grounds broader than those of the District Court. Whereas the District Court had found § 309.515, subd. 1(b)'s fifty per cent rule to violate only the second of the *Lemon* tests, the Court of Appeals found the rule to violate the first of those tests as well. 637 F. 2d, at 567–568. The first *Lemon* test provides that "the statute must have a secular legislative purpose." 403 U. S., at 612.

[11] The Court of Appeals summarized its holdings as follows:

"[W]e agree with the district court's holding that [appellees] have standing to challenge the classification made in the exemption section of the Act, as it pertains to religious organizations; we agree with the court's invalidation of the classification made in that section; we agree that the exemption section should apply to all religious organizations, subject to possible legislative revision; we disagree with the conclusion that no part of the Act may

II

Appellants argue that appellees are not entitled to be heard on their Establishment Clause claims. Their rationale for this argument has shifted, however, as this litigation has progressed. Appellants' position in the courts below was that the Unification Church was not a religion, and more importantly that appellees' solicitations were not connected with any religious purpose. From these premises appellants concluded that appellees were not entitled to raise their Establishment Clause claims until they had demonstrated that their activities were within the protection of that Clause. The courts below rejected this conclusion, instead applying the overbreadth doctrine in order to allow appellees to raise their Establishment Clause claims. In this Court, appellants have taken an entirely new tack. They now argue that the Unification Church is not a "religious organization" within the meaning of Minnesota's charitable solicitations Act, and that the Church therefore would not be entitled to an exemption under § 309.515, subd. 1(b), even if the fifty per cent rule were declared unconstitutional. From this new premise appellants conclude that the courts below erred in invalidating § 309.515, subd. 1(b)'s fifty per cent rule without first requiring appellees to demonstrate that they would have been able to maintain their exempt status but for that rule, and thus that its adoption had caused them injury in fact. We have considered both of appellants' rationales, and hold that neither of them has merit.

"The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure

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be applied to religious organizations, but leave open questions of construction and validity for further development, including the application of the Act to charitable organizations; and we disagree with the conclusion that [appellees] and others claiming the religious exemption should automatically enjoy such exemption, but leave open the question of [appellees'] status for further development." 637 F. 2d, at 571.

that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 72 (1978), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). This requirement of a "personal stake" must consist of "a 'distinct and palpable injury . . .' to the plaintiff," *Duke Power Co.*, *supra*, at 72, quoting *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), and "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co.*, *supra*, at 72, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261 (1977). Application of these constitutional standards to the record before us and the factual findings of the District Court convince us that the Art. III requirements for standing are plainly met by appellees.

Appellants argue in this Court that the Unification Church is not a "religious organization" within the meaning of the Act, and therefore that appellees cannot demonstrate injury in fact. We note at the outset, however, that in the years before 1978 the Act contained a general exemption provision for all religious organizations, and that during those years the Unification Church was not required by the State to register and report under the Act. It was only in 1978, shortly after the addition of the fifty per cent rule to the religious-organization exemption, that the State first attempted to impose the requirements of the Act upon the Unification Church. And when the State made this attempt, it deliberately chose to do so in express and exclusive reliance upon the newly enacted fifty per cent rule of § 309.515, subd. 1(b). See n. 4, *supra*.[12] The present suit was initiated by appellees in direct response to that attempt by the State to force the Church's registration. It is thus plain that appellants'

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[12] JUSTICE REHNQUIST's dissent suggests, *post*, at 265–266, and n. 2, that our interpretation of the State's grounds for application of the Act to appellees is erroneous. But the letter quoted in n. 4, *supra*, speaks for itself,

stated rationale for the application of the Act to appellees was that § 309.515, subd. 1(b), *did* apply to the Unification Church.[13] But § 309.515, subd. 1(b), by its terms applies only to religious organizations. It follows, therefore, that an essential premise of the State's attempt to require the Unification Church to register under the Act by virtue of the fifty per cent rule in § 309.515, subd. 1(b), is that the Church *is* a religious organization. It is logically untenable for the State to take the position that the Church is not such an organization, because that position destroys an essential premise of the exercise of statutory authority at issue in this suit.

In the courts below, the State joined issue precisely on the premise that the fifty per cent rule of § 309.515, subd. 1(b), was sufficient authority in itself to compel appellees' registration. The adoption of that premise precludes the position

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and we reject the novel suggestion that the contents of such a notification of official enforcement action may be ignored by this Court depending upon the state official who signs the notice.

[13] The Department's attempt to apply the Act to appellees by means of § 309.515, subd. 1(b), was consistent with the expectation, evident in the legislative history of § 309.515, subd. 1(b), that that provision's fifty per cent rule would be applied to the Unification Church in order to deny it continued exemption from the requirements of the Act. See *infra*, at 253–255.

JUSTICE REHNQUIST's dissent suggests, *post*, at 264, that "the Act applies to appellees not by virtue of the 'fifty percent rule,' but by virtue of § 309.52." This suggestion misses the point. Section 309.52 announces the Act's general registration requirement for charitable organizations. In 1978, the State sought to compel the Church to register and report under the Act, relying upon § 309.515, subd. 1(b). The State might have chosen to rely upon some other provision, *e. g.*, § 309.515, subd. 1(a)(1), which exempts charitable organizations receiving less than $10,000 annually from the public. Instead the State chose to rely upon § 309.515, subd. 1(b). Thus if the Act applies to appellees, it of course does so by the combined effect of § 309.52 and § 309.515, subd. 1(b). In this attenuated sense the Act does apply to appellees "by virtue of § 309.52." But nevertheless the State sought to impose the requirements of the Act upon appellees by only one means out of the several available to it, and that means was § 309.515, subd. 1(b).

that the Church is not a religious organization. And it remains entirely clear that if we were to uphold the constitutionality of the fifty per cent rule, the State would, without more, insist upon the Church's registration. In this Court, the State has changed its position, and purports to find independent bases for denying the Church an exemption from the Act. Considering the development of this case in the courts below, and recognizing the premise inherent in the State's attempt to apply the fifty per cent rule to appellees, we do not think that the State's change of position renders the controversy between these parties any less concrete. The fact that appellants chose to apply § 309.515, subd. 1(b), and its fifty per cent rule as the sole statutory authority requiring the Church to register under the Act compels the conclusion that, at least for purposes of this suit challenging that State application, the Church is indeed a religious organization within the meaning of the Act.

With respect to the question of injury in fact, we again take as the starting point of our analysis the fact that the State attempted to use § 309.515, subd. 1(b)'s fifty per cent rule in order to compel the Unification Church to register and report under the Act. That attempted use of the fifty per cent rule as the State's instrument of compulsion necessarily gives appellees standing to challenge the constitutional validity of the rule. The threatened application of § 309.515, subd. 1(b), and its fifty per cent rule to the Church surely amounts to a distinct and palpable injury to appellees: It disables them from soliciting contributions in the State of Minnesota unless the Church complies with registration and reporting requirements that are hardly *de minimis*.[14] Just as surely, there is a fairly traceable causal connection between the claimed injury and the challenged conduct—here, between the claimed disabling and the threatened application of § 309.515, subd. 1(b), and its fifty per cent rule.

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[14] See *supra*, at 230–231; n. 29, *infra*.

Of course, the Church cannot be assured of a continued religious-organization exemption even in the absence of the fifty per cent rule. See n. 30, *infra*. Appellees have not yet shown an entitlement to the entirety of the broad injunctive relief that they sought in the District Court—namely, a permanent injunction barring the State from subjecting the Church to the registration and reporting requirements of the Act. But that fact by no means detracts from the palpability of the particular and discrete injury caused to appellees by the State's threatened application of § 309.515, subd. 1(b)'s fifty per cent rule. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 261–262. The Church may indeed be compelled, ultimately, to register under the Act on some ground other than the fifty per cent rule, and while this fact does affect the nature of the relief that can properly be granted to appellees on the present record, it does not deprive this Court of jurisdiction to hear the present case. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977). In sum, contrary to appellants' suggestion, appellees have clearly demonstrated injury in fact.

JUSTICE REHNQUIST's dissent attacks appellees' Art. III standing by arguing that appellees "have failed to show that a favorable decision of this Court will redress the injuries of which they complain." *Post*, at 270. This argument follows naturally from the dissent's premise that the only meaningful relief that can be given to appellees is a total exemption from the requirements of the Act. See *post*, at 264, 265, 270. But the argument, like the premise, is incorrect. This litigation began after the State attempted to compel the Church to register and report under the Act solely on the authority of § 309.515, subd. 1(b)'s fifty per cent rule. If that rule is declared unconstitutional, as appellees have requested, then the Church cannot be required to register and report under the Act by virtue of that rule. Since that rule was the sole basis for the State's attempt to compel registration that gave

rise to the present suit, a discrete injury of which appellees now complain will indeed be completely redressed by a favorable decision of this Court.

Furthermore, if the fifty per cent rule of § 309.515, subd. 1(b), is declared unconstitutional, then the Church cannot be compelled to register and report under the Act unless the Church is determined not to be a religious organization. And as the Court of Appeals below observed:

> "[A] considerable burden is on the state, in questioning a claim of a religious nature. Strict or narrow construction of a statutory exemption for religious organizations is not favored. *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127, 129 (D. C. Cir. 1957, Burger, J.)." 637 F. 2d, at 570.

At the very least, then, a declaration that § 309.515, subd. 1(b)'s fifty per cent rule is unconstitutional would put the State to the task of demonstrating that the Unification Church is not a religious organization within the meaning of the Act—and such a task is surely more burdensome than that of demonstrating that the Church's proportion of nonmember contributions exceeds fifty per cent. Thus appellees will be given substantial and meaningful relief by a favorable decision of this Court.[15]

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[15] In reaching the conclusion that appellees' claims would not be redressed by an affirmance of the decision below, JUSTICE REHNQUIST's dissent reveals a draconic interpretation of the redressability requirement that is justified by neither precedent nor principle. The dissent appears to assume that in order to establish redressability, appellees must show that they are *certain*, ultimately, to receive a religious-organization exemption from the registration and reporting requirements of the Act—in other words, that there is no other means by which the State can compel appellees to register and report under the Act. We decline to impose that burden upon litigants. As this Court has recognized, "the relevant inquiry is whether . . . the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 38 (1976) (emphasis added); accord, *Arlington Heights*

Since we conclude that appellees have established Art. III standing, we turn to the merits of the case.[16]

III

A

The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. Before the Revolution, religious establishments of differing denominations were common throughout the Colonies.[17] But the Revolutionary generation emphatically disclaimed that European legacy, and "applied the logic of secular liberty to the condition of religion and the churches."[18] If Parliament had lacked the authority to tax unrepresented colonists, then by the same token the newly independent States should be powerless to tax their citizens for the support of a denomination to which they did not belong.[19] The

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v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 262 (1977). In other words, a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury. Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 280–281, n. 14 (1978) (opinion of POWELL, J.)

[16] Appellants contended below that appellees were not entitled to raise their Establishment Clause claims until they had demonstrated that their activities were within the protection of that Clause. The courts below applied the overbreadth doctrine to reject this contention, and appellants argue that those courts erred in doing so. We have no need to address these matters. Appellees have made a sufficiently strong demonstration that the Church is a religion to overcome any prudential standing obstacles to consideration of their Establishment Clause claim.

[17] See S. Cobb, The Rise of Religious Liberty in America: A History 67–453 (1970); L. Pfeffer, Church, State, and Freedom 71–90 (rev. ed. 1967).

[18] B. Bailyn, The Ideological Origins of the American Revolution 265 (1967).

[19] For example, according to John Adams, colonial Massachusetts possessed "the most mild and equitable establishment of religion that was known in the world, if indeed [it] could be called an establishment." Quoted *id.*, at 248. But Baptists in Massachusetts chafed under any form of establishment, and Revolutionary pamphleteer John Allen expressed

force of this reasoning led to the abolition of most denominational establishments at the state level by the 1780's,[20] and led ultimately to the inclusion of the Establishment Clause in the First Amendment in 1791.[21]

This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. Madison once noted: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects."[22] Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations. As Justice Jackson noted in another context, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority

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their views to the members of the General Court of Massachusetts in his declamation, The American Alarm, or the Bostonian Plea, for the Rights and Liberties of the People:

"You tell your [colonial] governor that the Parliament of England have no right to tax the Americans . . . because they are not the representatives of America; and will you dare to tax the Baptists for a religion they deny? Are you gentlemen their representatives before GOD, to answer for their souls and consciences any more than the representatives of England are the representatives of America? . . . [I]f it be just in the General Court to take away my sacred and spiritual rights and liberties of conscience and my property with it, then it is surely right and just in the British Parliament to take away by power and force my civil rights and property without my consent; this reasoning, gentlemen, I think is plain." Quoted *id.*, at 267–268.

[20] See Pfeffer, *supra*, at 104–119.

[21] *Id.*, at 125–127.

[22] The Federalist No. 51, p. 326 (H. Lodge ed. 1908).

must be imposed generally." *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 112 (1949) (concurring opinion).

Since *Everson* v. *Board of Education*, 330 U. S. 1 (1947), this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which aid one religion" or that "prefer one religion over another." *Id.*, at 15. This principle of denominational neutrality has been restated on many occasions. In *Zorach* v. *Clauson*, 343 U. S. 306 (1952), we said that "[t]he government must be neutral when it comes to competition between sects." *Id.*, at 314. In *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), we stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion . . . . The State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." *Id.*, at 104, 106, citing *Abington School District* v. *Schempp*, 374 U. S. 203, 225 (1963). And Justice Goldberg cogently articulated the relationship between the Establishment Clause and the Free Exercise Clause when he said that "[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." *Abington School District, supra*, at 305. In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.

B

The fifty per cent rule of § 309.515, subd. 1(b), clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents.[23] Consequently,

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[23] Appellants urge that § 309.515, subd. 1(b), does not grant such preferences, but is merely "a law based upon secular criteria which may not identically affect all religious organizations." Brief for Appellants 20. They accordingly cite *McGowan* v. *Maryland*, 366 U. S. 420 (1961), and cases following *Everson* v. *Board of Education*, 330 U. S. 1 (1947), for the propo-

that rule must be invalidated unless it is justified by a compelling governmental interest, cf. *Widmar* v. *Vincent*, 454 U. S. 263, 269–270 (1981), and unless it is closely fitted to further that interest, *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116–117 (1943). With that standard of review in mind, we turn to an examination of the governmental interest asserted by appellants.

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sition that a statute's "disparate impact among religious organizations is constitutionally permissible when such distinctions result from application of secular criteria." Brief for Appellants 26. We reject the argument. Section 309.515, subd. 1(b), is not simply a facially neutral statute, the provisions of which happen to have a "disparate impact" upon different religious organizations. On the contrary, § 309.515, subd. 1(b), makes explicit and deliberate distinctions between different religious organizations. We agree with the Court of Appeals' observation that the provision effectively distinguishes between "well-established churches" that have "achieved strong but not total financial support from their members," on the one hand, and "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members," on the other hand. 637 F. 2d, at 566. This fundamental difference between § 309.515, subd. 1(b), and the statutes involved in the "disparate impact" cases cited by appellants renders those cases wholly inapplicable here.

Appellants also argue that reversal of the Court of Appeals is required by *Gillette* v. *United States*, 401 U. S. 437 (1971). In that case we rejected an Establishment Clause attack upon § 6(j) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456(j) (1964 ed., Supp. V), which afforded "conscientious objector" status to any person who, "by reason of religious training and belief," was "conscientiously opposed to participation in war in any form." 401 U. S., at 441. *Gillette* is readily distinguishable from the present case. Section 6(j) "focused on individual conscientious belief, not on sectarian affiliation." *Id.*, at 454. Under § 6(j), conscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic, despite the distinction drawn by the latter's church between "just" and "unjust" wars, see St. Thomas Aquinas, Summa Theologica, Second Part, Part II, Question 40, Arts. 1, 4; St. Augustine, City of God, Book XIX, Ch. 7. As we noted in *Gillette*, the "critical weakness of petitioners' establishment claim" arose "from the fact that § 6(j), on its face, simply [did] not discriminate on the basis of religious affiliation." 401 U. S., at 450. In contrast, the statute challenged in the case before us focuses precisely and solely upon religious organizations.

Appellants assert, and we acknowledge, that the State of Minnesota has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity, and that this interest retains importance when the solicitation is conducted by a religious organization. We thus agree with the Court of Appeals, 637 F. 2d, at 567, that the Act, "viewed as a whole, has a valid secular purpose," and we will therefore assume, *arguendo*, that the Act generally is addressed to a sufficiently "compelling" governmental interest. But our inquiry must focus more narrowly, upon the distinctions drawn by § 309.515, subd. 1(b), itself: Appellants must demonstrate that the challenged fifty per cent rule is closely fitted to further the interest that it assertedly serves.

Appellants argue that § 309.515, subd. 1(b)'s distinction between contributions solicited from members and from nonmembers is eminently sensible. They urge that members are reasonably assumed to have significant control over the solicitation of contributions from themselves to their organization, and over the expenditure of the funds that they contribute, as well. Further, appellants note that as a matter of Minnesota law, members of organizations have greater access than nonmembers to the financial records of the organization. Appellants conclude:

> "Where the safeguards of membership funding do not exist, the need for public disclosure is obvious. . . .
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> ". . . As public contributions increase as a percentage of total contributions, the need for public disclosure increases. . . . The particular point at which public disclosure should be required . . . is a determination for the legislature. In this case, the Act's 'majority' distinction is a compelling point, since it is at this point that the organization becomes predominantly public-funded." Brief for Appellants 29.

We reject the argument, for it wholly fails to justify the only aspect of § 309.515, subd. 1(b), under attack—the selective fifty per cent rule. Appellants' argument is based on three distinct premises: that members of a religious organiza-

tion can and will exercise supervision and control over the organization's solicitation activities when membership contributions exceed fifty per cent; that membership control, assuming its existence, is an adequate safeguard against abusive solicitations of the public by the organization; and that the need for public disclosure rises in proportion with the *percentage* of nonmember contributions. Acceptance of all three of these premises is necessary to appellants' conclusion, but we find no substantial support for any of them in the record.

Regarding the first premise, there is simply nothing suggested that would justify the assumption that a religious organization will be supervised and controlled by its members simply because they contribute more than half of the organization's solicited income. Even were we able to accept appellants' doubtful assumption that members will *supervise* their religious organization under such circumstances,[24] the record before us is wholly barren of support for appellants' further assumption that members will effectively *control* the organization if they contribute more than half of its solicited income. Appellants have offered no evidence whatever that members of religious organizations exempted

[24] In support of their assumption of such supervision, appellants cite Minn. Stat. § 317.28(2) (1969), which allows any member of a domestic nonprofit corporation to "inspect all books and records for any proper purpose at any reasonable time." But this provision applies only to domestic nonprofit corporations; appellants have made no showing that religious organizations incorporated in other States operate under an analogous constraint. Further, in Minnesota even domestic religious organizations need not be organized as nonprofit corporations—they may also choose to organize under Minn. Stat., ch. 315, governing "Religious Associations," which has no provision analogous to § 317.28(2). Moreover, even as to the religious organizations to which it applies, § 317.28(2) obviously does not ensure that any member of a religious organization will actually take advantage of the supervision permitted by that provision. And finally, since § 317.28(2) applies irrespective of the percentage of membership contributions, it cannot provide any justification at all for the fifty per cent rule in § 309.515, subd. 1(b). In sum, appellants' assumption of membership supervision is purely conjectural.

by § 309.515, subd. 1(b)'s fifty per cent rule in fact control their organizations. Indeed, the legislative history of § 309.515, subd. 1(b), indicates precisely to the contrary.[25] In short, the first premise of appellants' argument has no merit.

Nor do appellants offer any stronger justification for their second premise—that membership control is an adequate safeguard against abusive solicitations of the public by the organization. This premise runs directly contrary to the central thesis of the entire Minnesota charitable solicitations Act—namely, that charitable organizations soliciting contributions from the public cannot be relied upon to regulate themselves, and that state regulation is accordingly necessary.[26] Appellants offer nothing to suggest why religious organizations should be treated any differently in this respect. And even if we were to assume that the members of religious organizations have some incentive, absent in nonreligious organizations, to protect the interests of nonmembers solicited by the organization, appellants' premise would still

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[25] An early draft of that provision allowed an exemption from the Act only for a religious organization that solicited "substantially more than half of the contributions it received . . . from persons *who have a right to vote as a member* of the organization." Minn. H. 1246, 1977–1978 Sess., § 4 (read Apr. 6, 1977). The italicized language was later amended to read, "who are members." Attachment to Minutes of Meeting of Commerce and Economic Development Committee, Jan. 24, 1978. Since § 309.515, subd. 1(b), as enacted deliberately omits membership voting rights as a requirement for a religious organization's exemption, it clearly permits religious organizations that are not subject to control by their membership to be exempted from the Act. Of course, even if § 309.515, subd. 1(b), exempted only those religious organizations with membership voting rights, the provision obviously would not ensure that the membership actually exercised its voting rights so as to control the organization in any effective manner.

[26] This thesis is evident in the Act's treatment of nonreligious organizations that might solicit within the State: With exceptions not relevant here, such organizations are exempted from the registration and reporting requirements of the Act only if their solicitations of the public are *de minimis*, § 309.515, subds. 1(a)(1), (f), or if they are subject to independent state regulation, § 309.515, subd. 1(c).

fail to justify the fifty per cent rule: Appellants offer no reason why the members of religious organizations exempted under § 309.515, subd. 1(b)'s fifty per cent rule should have any *greater* incentive to protect nonmembers than the members of nonexempted religious organizations have. Thus we also reject appellants' second premise as without merit.

Finally, we find appellants' third premise—that the need for public disclosure rises in proportion with the *percentage* of nonmember contributions—also without merit. The flaw in appellants' reasoning here may be illustrated by the following example. Church A raises $10 million, 20 per cent from nonmembers. Church B raises $50,000, 60 per cent from nonmembers. Appellants would argue that although the public contributed $2 million to Church A and only $30,000 to Church B, there is less need for public disclosure with respect to Church A than with respect to Church B. We disagree; the need for public disclosure more plausibly rises in proportion with the *absolute amount*, rather than with the *percentage*, of nonmember contributions.[27] The State of Minnesota has itself adopted this view elsewhere in § 309.515: With qualifications not relevant here, charitable organizations that receive annual nonmember contributions of less than $10,000 are exempted from the registration and reporting requirements of the Act. § 309.515, subd. 1(a).

We accordingly conclude that appellants have failed to demonstrate that the fifty per cent rule in § 309.515, subd. 1(b), is "closely fitted" to further a "compelling governmental interest."

C

In *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), we announced three "tests" that a statute must pass in order to avoid the prohibition of the Establishment Clause.

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[27] We do not suggest, however, that an exemption provision based upon the absolute amount of nonmember contributions would necessarily satisfy the standard set by the Establishment Clause for laws granting denominational preferences.

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz* [v. *Tax Comm'n*, 397 U. S. 664, 674 (1970)]." *Id.*, at 612–613.

As our citations of *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970), indicated, the *Lemon* v. *Kurtzman* "tests" are intended to apply to laws affording a uniform benefit to *all* religions,[28] and not to provisions, like § 309.515, subd. 1(b)'s fifty per cent rule, that discriminate *among* religions. Although application of the *Lemon* tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny to § 309.515, subd. 1(b)'s fifty per cent rule. The Court of Appeals found that rule to be invalid under the first two *Lemon* tests. We view the third of those tests as most directly implicated in the present case. Justice Harlan well described the problems of entanglement in his separate opinion in *Walz*, where he observed that governmental involvement in programs concerning religion

> "may be so direct or in such degree as to engender a risk of politicizing religion. . . . [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded

[28] *Allen* involved a state law requiring local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including those in parochial schools. 392 U. S., at 238. *Walz* examined a state law granting property tax exemptions to religious organizations for religious properties used solely for religious worship. 397 U. S., at 666. And in *Lemon* itself, the challenged state laws provided aid to church-related elementary and secondary schools. 403 U. S., at 606.

> against. . . . [G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation." 397 U. S., at 695.

The Minnesota statute challenged here is illustrative of this danger. By their "very nature," the distinctions drawn by § 309.515, subd. 1(b), and its fifty per cent rule "engender a risk of politicizing religion"—a risk, indeed, that has already been substantially realized.

It is plain that the principal effect of the fifty per cent rule in § 309.515, subd. 1(b), is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. It is also plain that, as the Court of Appeals noted, "[t]he benefit conferred [by exemption] constitutes a substantial advantage; the burden of compliance with the Act is certainly not *de minimis*." 637 F. 2d, at 568.[29] We do not suggest that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly. But this statute does not operate evenhandedly, nor was it designed to do so: The fifty per

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[29] The registration statement required by § 309.52 calls for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the registering organization. The organization must disclose the "[g]eneral purposes for which contributions . . . will be used," the "[b]oard, group or individual having final discretion as to the distribution and use of contributions received," and "[s]uch other information as the department may . . . require"—and these are only three of sixteen enumerated items of information required by the registration statement. The annual report required by § 309.53 is even more burdensome and intrusive. It must disclose "[t]otal receipts and total income from all sources," the cost of "management," "fund raising," and "public education," and a list of "[f]unds or properties transferred out of state, with explanation as to recipient and purpose," to name only a few. Further, a religious organization that must register under the Act may have its registration withdrawn at any time if the Department or the Attorney General concludes that the religious organization is spending "an unreasonable amount" for management, general, and fund-raising costs. § 309.555.

cent rule of § 309.515, subd. 1(b), effects the *selective* legislative imposition of burdens and advantages upon particular denominations. The "risk of politicizing religion" that inheres in such legislation is obvious, and indeed is confirmed by the provision's legislative history. For the history of § 309.515, subd. 1(b)'s fifty per cent rule demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others. For example, the second sentence of an early draft of § 309.515, subd. 1(b), read: "A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention *that elects and controls the governing board of the religious society or organization* is exempt from the requirements of . . . Sections 309.52 and 309.53." Minn. H. 1246, 1977–1978 Sess., § 4 (read Apr. 6, 1978). The legislative history discloses that the legislators perceived that the italicized language would bring a Roman Catholic Archdiocese within the Act, that the legislators did not want the amendment to have that effect, and that an amendment deleting the italicized clause was passed in committee for the sole purpose of exempting the Archdiocese from the provisions of the Act. Transcript of Legislative Discussions of § 309.515, subd. 1(b), as set forth in Declaration of Charles C. Hunter (on file in this Court) 8–9. On the other hand, there were certain religious organizations that the legislators did not want to exempt from the Act. One State Senator explained that the fifty per cent rule was "an attempt to deal with the religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in . . . our state." *Id.*, at 13. Another Senator said, "what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations." *Id.*, at 14. Still another Senator, who ap-

parently had mixed feelings about the proposed provision, stated, "I'm not sure why we're so hot to regulate the Moonies anyway." *Id.*, at 16.

In short, the fifty per cent rule's capacity—indeed, its express design—to burden or favor selected religious denominations led the Minnesota Legislature to discuss the characteristics of various sects with a view towards "religious gerrymandering," *Gillette* v. *United States*, 401 U. S. 437, 452 (1971). As THE CHIEF JUSTICE stated in *Lemon*, 403 U. S., at 620: "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction . . . of churches."

IV

In sum, we conclude that the fifty per cent rule of § 309.515, subd. 1(b), is not closely fitted to the furtherance of any compelling governmental interest asserted by appellants, and that the provision therefore violates the Establishment Clause. Indeed, we think that § 309.515, subd. 1(b)'s fifty per cent rule sets up precisely the sort of official denominational preference that the Framers of the First Amendment forbade. Accordingly, we hold that appellees cannot be compelled to register and report under the Act on the strength of that provision.[30]

The judgment of the Court of Appeals is

Affirmed.

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[30] In so holding, we by no means suggest that the State of Minnesota must in all events allow appellees to remain exempt from the provisions of the charitable solicitations Act. We agree with the Court of Appeals that appellees and others claiming the benefits of the religious-organization exemption should not automatically enjoy those benefits. 637 F. 2d, at 571. Rather, in order to receive them, appellees may be required by the State to prove that the Unification Church is a religious organization within the meaning of the Act. Nothing in our opinion suggests that appellants could not attempt to compel the Unification Church to register under the Act as

JUSTICE STEVENS, concurring.

As the Court points out, *ante*, at 243, invalidation of the 50-percent rule would require the State to shoulder the considerable burden of demonstrating that the Unification Church is not a religious organization if the State persists in its attempt to require the Church to register and file financial statements. The burden is considerable because the record already establishes a prima facie case that the Church is a religious organization,[1] and because a strict construction of a statutory exemption for religious organizations is disfavored and may give rise to constitutional questions.[2] JUSTICE REHNQUIST therefore is plainly wrong when he asserts in dissent that "invalidation of the fifty percent rule will have absolutely no effect on the Association's obligation to register and report as a *charitable organization* under the Act." *Post*, at 267, n. 3 (emphasis in original). The 50-percent rule has caused appellees a significant injury in fact because it has

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a charitable organization not entitled to the religious-organization exemption, and put the Church to the proof of its bona fides as a religious organization. Further, nothing in our opinion disables the State from denying exemption from the Act, or from refusing registration and licensing under the Act, to persons or organizations proved to have engaged in frauds upon the public. See § 309.515, subd. 3. We simply hold that because the fifty per cent rule of § 309.515, subd. 1(b), violates the Establishment Clause, appellees cannot be compelled to register and report under the Act on the strength of that provision.

[1] The Church has been incorporated in California as a religious corporation and has been treated as a religious organization for tax purposes by the Federal Government and by the State of Minnesota. App. to Juris. Statement A–37. The Church was treated as a religious organization by the State prior to the enactment of the 50-percent rule in 1978. According to the Magistrate, the appellees "have submitted substantial, although not uncontroverted, evidence of the religious nature of the Unification Church and of their solicitations." *Id.*, at A–23; see *id.*, at A–47.

[2] See *Washington Ethical Society* v. *District of Columbia*, 101 U. S. App. D.C. 371, 373, 249 F. 2d 127, 129 (1957) (Burger, J.) ("To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to the majority beliefs might well raise constitutional issues").

substituted a simple method of imposing registration and reporting requirements for a more burdensome and less certain method of accomplishing that result. I therefore agree with the Court's conclusion that the appellees have standing to challenge the 50-percent rule in this case.

The more difficult question for me is whether the Court's policy of avoiding the premature adjudication of constitutional issues[3] counsels postponement of any decision on the validity of the 50-percent rule until after the Unification Church's status as a religious organization within the meaning of the Minnesota statute is finally resolved. My difficulty stems from the fact that the trial and resolution of the statutory issue will certainly generate additional constitutional questions.[4] Therefore, it is clear that at least one decision of constitutional moment is inevitable.[5] Under these circumstances, it seems to me that reaching the merits is consistent with our "policy of strict necessity in disposing of constitutional issues," *Rescue Army* v. *Municipal Court*, 331

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[3] See generally *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–574; *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (Brandeis, J., concurring). I have no reservations about the wisdom or importance of this policy. See, *e. g.*, *California ex rel. Cooper* v. *Mitchell Brothers' Santa Ana Theater*, 454 U. S. 90, 94 (STEVENS, J., dissenting); *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105; *University of California Regents* v. *Bakke*, 438 U. S. 265, 411–412 (opinion of STEVENS, J.).

[4] Even if we were to conclude that the constitutional standards for resolving the statutory issue were perfectly clear, there is nevertheless an important interest in avoiding litigation of issues relating to church doctrine. See *United States* v. *Lee*, 455 U. S. 252, 263, n. 2 (STEVENS, J., concurring in judgment). Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490.

[5] Even if the District Court should find that the Church is not a religious organization, I believe that it is fair to assume that the Church would challenge that conclusion in this Court. I recognize that it is also possible that ultimately we may be required to confront both constitutional problems, but that possibility is present whether we dismiss the appeal pending resolution of the Church's status or we decide now the validity of the 50-percent rule.

U. S. 549, 568. Moreover, a resolution of the question that has been fully considered by the District Court and by the Court of Appeals and that has been fully briefed and argued in this Court is surely consistent with the orderly administration of justice.

I agree with the Court's resolution of the Establishment Clause issue. Accordingly, I join the Court's opinion.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

I concur in the dissent of JUSTICE REHNQUIST with respect to standing. I also dissent on the merits.

I

It will be helpful first to indicate what occurred in the lower courts and what the Court now proposes to do. Based on two reports of a Magistrate, the District Court held unconstitutional the Minnesota limitation denying an exemption to religious organizations receiving less than 50 percent of their funding from their own members. The Magistrate recommended this action on the ground that the limitation could not pass muster under the second criterion set down in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), for identifying an unconstitutional establishment of religion—that the principal or primary effect of the statute is one that neither enhances nor inhibits religion. The 50-percent limitation failed this test because it subjected some churches to far more rigorous requirements than others, the effect being to "severely inhibit plaintiff's religious activities." App. to Juris. Statement A–63. This created a preference offensive to the Establishment Clause. *Id.*, at A–33.[1] The Magistrate relied on the inhibiting effect of the 50-percent rule without ref-

[1] The Magistrate also recommended, and the District Court agreed, that all of the registration provisions applicable to religious organizations be enjoined as prior restraints offensive to the First Amendment. App. to Juris. Statement A–33. The Court of Appeals did not agree in this respect.

erence to whether or not it was the principal or primary effect of the limitation. In any event, the Magistrate recommended, and the District Court agreed, that the exemption from registration be extended to all religious organizations.

The Court of Appeals agreed with the District Court that the 50-percent rule violated the Establishment Clause. Its ruling, however, was on the ground that the limitation failed to satisfy the first *Lemon* criterion—that the statute have a secular rather than a religious purpose. The court conceded that the Act as a whole had the valid secular purpose of preventing fraudulent or deceptive practices in the solicitation of funds in the name of charity. The court also thought freeing certain organizations from regulation served a valid purpose because for those organizations public disclosure of funding would not significantly enhance the availability of information to contributors. Patriotic and fraternal societies that limit solicitation to voting members and certain charitable organizations that do not solicit in excess of $10,000 annually from the public fell into this category. But the court found no sound secular legislative purpose for the 50-percent limitation with respect to religious organizations because it "appears to be designed to shield favored sects, while continuing to burden other sects." 637 F. 2d 562, 567. The challenged provision, the Court of Appeals said, "expressly separates two classes of religious organizations and makes the separation for no valid secular purpose that has been suggested by defendants. Inexplicable disparate treatment will not generally be attributed to accident; it seems much more likely that at some stage of the legislative process special solicitude for particular religious organizations affected the choice of statutory language. The resulting discrimination is constitutionally invidious." *Id.*, at 568. The Court of Appeals went on to say that if it were necessary to apply the second part of the *Lemon* test, the provision would also fail to survive that examination because it advantaged some organizations and disadvantaged others.

In this Court, the case is given still another treatment. The *Lemon* v. *Kurtzman* tests are put aside because they are applicable only to laws affording uniform benefit to all religions, not to provisions that discriminate among religions. Rather, in cases of denominational preference, the Court says that "our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Ante*, at 246. The Court then invalidates the challenged limitation.

It does so by first declaring that the 50-percent rule makes explicit and deliberate distinctions between different religious organizations. The State's submission that the 50-percent limitation is a law based on secular criteria which happens not to have an identical effect on all religious organizations is rejected. The Court then holds that the challenged rule is not closely fitted to serve any compelling state interest and rejects each of the reasons submitted by the State to demonstrate that the distinction between contributions solicited from members and from nonmembers is a sensible one. Among others, the Court rejects the proposition that membership control is an adequate safeguard against deceptive solicitations of the public. The ultimate conclusion is that the exemption provision violates the Establishment Clause.

II

I have several difficulties with this disposition of the case. First, the Court employs a legal standard wholly different from that applied in the courts below. The premise for the Court's standard is that the challenged provision is a deliberate and explicit legislative preference for some religious denominations over others. But there was no such finding in the District Court. That court proceeded under the second *Lemon* test and then relied only on the disparate impact of the provision. There was no finding of a discriminatory or preferential legislative purpose. If this case is to be judged by a standard not employed by the courts below and if the

new standard involves factual issues or even mixed questions of law and fact that have not been addressed by the District Court, the Court should not itself purport to make these factual determinations. It should remand to the District Court.

In this respect, it is no answer to say that the Court of Appeals appeared to find, although rather tentatively, that the state legislature had acted out of intentional denominational preferences. That court was no more entitled to supply the missing factual predicate for a different legal standard than is this Court. It is worth noting that none of the Court of Appeals' judges on the panel in this case is a resident of Minnesota.

Second, apparently realizing its lack of competence to judge the purposes of the Minnesota Legislature other than by the words it used, the Court disposes in a footnote of the State's claim that the 50-percent rule is a neutral, secular criterion that has disparate impact among religious organizations. The limitation, it is said, "is not simply a facially neutral statute" but one that makes "explicit and deliberate distinctions between different religious organizations." *Ante*, at 247, n. 23. The rule itself, however, names no churches or denominations that are entitled to or denied the exemption. It neither qualifies nor disqualifies a church based on the kind or variety of its religious belief. Some religions will qualify and some will not, but this depends on the source of their contributions, not on their brand of religion.

To say that the rule on its face represents an explicit and deliberate preference for some religious beliefs over others is not credible. The Court offers no support for this assertion other than to agree with the Court of Appeals that the limitation might burden the less well organized denominations. This conclusion, itself, is a product of assumption and speculation. It is contrary to what the State insists is readily evident from a list of those charitable organizations that have registered under the Act and of those that are exempt. It is claimed that both categories include not only well-estab-

lished, but also not so well-established, organizations. The Court appears to concede that the Minnesota law at issue does not constitute an establishment of religion merely because it has a disparate impact. An intentional preference must be expressed. To find that intention on the face of the provision at issue here seems to me to be patently wrong.

Third, I cannot join the Court's easy rejection of the State's submission that a valid secular purpose justifies basing the exemption on the percentage of external funding. Like the Court of Appeals, the majority accepts the prevention of fraudulent solicitation as a valid, even compelling, secular interest. Hence, charities, including religious organizations, may be required to register if the State chooses to insist. But here the State has excused those classes of charities it thought had adequate substitute safeguards or for some other reason had reduced the risk which is being guarded against. Among those exempted are various patriotic and fraternal organizations that depend only on their members for contributions. The Court of Appeals did not question the validity of this exemption because of the built-in safeguards of membership funding. The Court of Appeals, however, would not extend the same reasoning to permit the State to exempt religious organizations receiving more than half of their contributions from their members while denying exemption to those who rely on the public to a greater extent. This Court, preferring its own judgment of the realities of fundraising by religious organizations to that of the state legislature, also rejects the State's submission that organizations depending on their members for more than half of their funds do not pose the same degree of danger as other religious organizations. In the course of doing so, the Court expressly disagrees with the notion that members in general can be relied upon to control their organizations.[2]

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[2] This observation would appear to call into question the exemption of charitable organizations raising all of their funds from their members: since

I do not share the Court's view of our omniscience. The State has the same interest in requiring registration by organizations soliciting most of their funds from the public as it would have in requiring any charitable organization to register, including a religious organization, if it wants to solicit funds. And if the State determines that its interest in preventing fraud does not extend to those who do not raise a majority of their funds from the public, its interest in imposing the requirement on others is not thereby reduced in the least. Furthermore, as the State suggests, the legislature thought it made good sense, and the courts, including this one, should not so readily disagree.

Fourth, and finally, the Court agrees with the Court of Appeals and the District Court that the exemption must be extended to all religious organizations. The Court of Appeals noted that the exemption provision, so construed, could be said to prefer religious organizations over nonreligious organizations and hence amount to an establishment of religion. Nevertheless, the Court of Appeals did not further address the question, and the Court says nothing of it now. Arguably, however, there is a more evident secular reason for exempting religious organizations who rely on their members to a great extent than there is to exempt all religious organizations, including those who raise all or nearly all of their funds from the public.

Without an adequate factual basis, the majority concludes that the provision in question deliberately prefers some religious denominations to others. Without an adequate factual basis, it rejects the justifications offered by the State. It reaches its conclusions by applying a legal standard different from that considered by either of the courts below.

I would reverse the judgment of the Court of Appeals.

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members cannot be relied upon to control their organization's fundraising activities so as to prevent fraud, why should those organizations be entitled to an exemption when others are not?

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

From the earliest days of the Republic it has been recognized that "[t]his Court is without power to give advisory opinions. *Hayburn's Case*, 2 Dall. 409 [(1792)]." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). The logical corollary of this limitation has been the Court's "long . . . considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision." *Ibid.* (citations omitted). Such fundamental principles notwithstanding, the Court today delivers what is at best an advisory constitutional pronouncement. The advisory character of the pronouncement is all but conceded by the Court itself, when it acknowledges in the closing footnote of its opinion that appellees must still "prove that the Unification Church is a religious organization within the meaning of the Act" before they can avail themselves of the Court's extension of the exemption contained in the Minnesota statute. Because I find the Court's standing analysis wholly unconvincing, I respectfully dissent.

I

Part II of the Court's opinion concludes that appellees have standing to challenge § 309.515, subd. 1(b), of the Minnesota Charitable Solicitations Act (Act), because they have "plainly met" the case-or-controversy requirements of Art. III. *Ante*, at 239. This conclusion is wrong. Its error can best be demonstrated by first reviewing three factual aspects of the case which are either misstated or disregarded in the Court's opinion.

First, the Act applies to appellees not by virtue of the "fifty percent rule," but by virtue of § 309.52. That provision requires "charitable organizations" to register with the Securities and Real Estate Division of the Minnesota Department of Commerce. The Holy Spirit Association for the

Unification of World Christianity (Association) constitutes such a "charitable organization" because it "engages in or purports to engage in solicitation" for a "religious . . . purpose." § 309.50, subds. 3 and 4 (Supp. 1982). Only after an organization is brought within the coverage of the Act by § 309.52 does the question of exemption arise. The exemption provided by the fifty percent rule of § 309.515, subd. 1(b), one of several exemptions within the Act, applies only to "religious organizations." Thus, unless the Association is a "religious organization" within the meaning of the Act, the fifty percent rule has absolutely nothing to do with the Association's duty to register and report as a "charitable organization" soliciting funds in Minnesota. This more-than-semantic distinction apparently is misunderstood by the Court, for it repeatedly asserts that the Association is required to register "under the Act *by virtue of* the fifty per cent rule in § 309.515, subd. 1(b)." *Ante*, at 240 (emphasis added).[1]

Second, the State's effort to enforce the Act against the Association was based upon the Association's status as a "charitable organization" within the meaning of § 309.52. The State initially sought registration from the Association by letter: "From the nature of your solicitation it appears that [the Association] must complete a Charitable Organization Registration Statement and submit it to the Minnesota Department of Commerce." Exhibit A to Affidavit of Susan

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[1] The examples of this error by the Court are numerous. The Court speaks of the Act "as applied to [appellees] *through* § 309.515, subd. 1(b)'s fifty per cent rule," *ante*, at 233 (emphasis added), "the application of the Act to the Church *through* § 309.515, subd. 1(b)'s fifty per cent rule," *ante*, at 234 (emphasis added), the State's attempt to enforce the Act against the appellees "in express and exclusive reliance upon the newly enacted fifty per cent rule of § 309.515, subd. 1(b)," *ante*, at 239, and the State's "attemp[t] to use § 309.515, subd. 1(b)'s fifty per cent rule in order to compel the Unification Church to register and report under the Act," *ante*, at 241. In addition, the Court holds that because the fifty percent rule is unconstitutional, the "appellees cannot be compelled to register and report under the Act *on the strength of that provision*," *ante*, at 255 (emphasis added).

E. Fortney, Legal Assistant, Staff of Attorney General of Minnesota, Nov. 2, 1978 (Fortney Affidavit). When the Association failed to register within the allotted time, the State commenced "routine enforcement procedures," Fortney Affidavit, at 2, by filing a complaint in Minnesota state court. The complaint alleges that "charitable organizations" are required by § 309.52 to register with the State, that the Association comes within the § 309.50, subd. 4, definition of "charitable organizations," and that "[t]he [Association] has failed to file a registration statement and financial information with the Minnesota Department of Commerce, resulting in a violation of Minn. Stat. § 309.52." Exhibit F to Fortney Affidavit, at 3.[2] This complaint, which never once mentions the fifty percent rule of § 309.515, subd. 1(b), nor characterizes the Association as a "religious organization," is still pending in Minnesota District Court, having been stayed by stipulation of the parties to this lawsuit. Because today's decision does nothing to impair the statutory basis of the complaint, or the State's reason for filing it, the State may proceed with its enforcement action before the ink on this Court's judgment is dry.[3]

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[2] The Court errs when it concludes that the basis for the State's enforcement action was the fifty percent rule of § 309.515, subd. 1(b). See *ante*, at 232, 241. The Court bases this conclusion on a letter to the Association from Legal Assistant Fortney which referred to the fifty percent rule while informing the Association of its obligation to register under the Act. See *ante*, at 232–233, n. 4. The Court apparently concludes from this letter that it was the fifty percent rule which motivated the State to seek registration from the Association. Certainly the imprecise implications of a letter from a Legal Assistant in the Attorney General's Office do not establish the motive behind the State's enforcement action. More importantly, the reason for the State's action was expressly alleged in the enforcement complaint: the Association is a charitable organization soliciting funds in Minnesota. See Exhibit F to Fortney Affidavit. Even if the State had been motivated by the narrowing of the religious organization exemption, however, that would not alter the legal basis for enforcement of the statute against appellees or the analysis of appellees' standing before this Court.

[3] It is not surprising that the Court's opinion never once mentions this enforcement complaint. That the complaint is pending in the Minnesota

Third, appellees have never proved, and the lower courts have never found, that the Association is a "religious organization" for purposes of the fifty percent rule. The District Court expressly declined to make such a finding—"This court is not presently in a position to rule whether the [Association] is, in fact, a religious organization within the Act," App. to Juris. Statement A–47—and the Court of Appeals was content to decide the case despite the presence of this "'unresolved factual dispute concerning the true character of [appellees'] organization,'" 637 F. 2d 562, 565 (CA8 1981) (quoting *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 633 (1980)). The absence of such a finding is significant, for it is by no means clear that the Association would constitute a "religious organization" for purposes of the § 309.515, subd. 1(b), exemption. The appellees' assertion in the District Court that their actions were religious was "directly contradict[ed]" by a "heavy testimonial barrage against the [Association's] claim that it is a religion." App. to Juris. Statement A–46.[4]

District Court, and that it relies entirely upon the Association's status as a "charitable organization" within the meaning of § 309.52, altogether refute the Court's assertion that the fifty percent "rule was the sole basis for the State's attempt to compel registration," and the consequent conclusion that invalidation of the rule will mean that "the Church cannot be required to register and report under the Act." *Ante*, at 242. As has already been demonstrated, invalidation of the fifty percent rule will have absolutely no effect on the Association's obligation to register and report as a *charitable organization* under the Act. See *supra*, at 265–266. Indeed, the Court's decision today will not even require the State to amend its complaint before proceeding with its enforcement action.

[4] Apparently forgetting that our role does not include finding facts, the Court finds itself "compel[led]" to conclude that "the Church is indeed a religious organization within the meaning of the Act." *Ante*, at 241. The Court's compulsion to disregard its purely appellate function is caused not by evidence adduced in the District Court, but by the faulty premise which underlies the Court's entire standing analysis: that "appellants chose to apply § 309.515, subd. 1(b), and its fifty per cent rule as the sole statutory authority requiring the Church to register under the Act." *Ibid.* The

II

The Court's opinion recognizes that the proper standing of appellees in this case is a constitutional prerequisite to the exercise of our Art. III power. See *ante*, at 238–239. To invoke that power, appellees must satisfy Art. III's case-or-controversy requirement by showing that they have a personal stake in the outcome of the controversy, consisting of a distinct and palpable injury. *Ibid.* See also *Glad-*

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utter error of that premise has already been demonstrated. See *supra*, at 264–265. But even if one accepts the premise that the State acted because it considered the Association to be a "religious organization" for purposes of the fifty percent rule, that premise cannot properly lead to the conclusion that the Association is *in fact* such an organization. Factual determinations of that sort are to be made by state courts construing the Minnesota statute, not by attorneys in the Minnesota Attorney General's office. And if the Court is saying that the Attorney General has "admitted" by its enforcement action that the Association is a "religious organization" within the meaning of the Act, it has ventured into a realm of state evidentiary law in which it has no competence and no business. It is worth noting that even the Court of Appeals did not take such liberties with the record. It held that the "'bare assertion . . . without the production of any evidence . . . is simply not sufficient to sustain [an] assertion that [the Unification Church] is a religious organization.'" 637 F. 2d 562, 570 (CA8 1981) (quoting *United States* v. *Berg*, 636 F. 2d 203, 205 (CA8 1980)).

Even more questionable than this finding of fact is the judicial wizardry by which the Court shifts the state-created burden of proof. The Court concludes, without citation to supporting authority, that "a declaration that § 309.515, subd. 1(b)'s fifty percent rule is unconstitutional would put the *State* to the task of demonstrating that the Unification Church is *not* a religious organization within the meaning of the Act." *Ante*, at 243 (emphasis added). This conclusion directly conflicts with the Minnesota statute, which requires registration and reporting under the Act if the State demonstrates that an organization is "charitable" within the meaning of § 309.52. See *supra*, at 265–266. It then becomes incumbent on the organization to show that it qualifies for one of the Act's several exemptions—in this case to show that it is a "religious organization" within the meaning of § 309.515, subd. 1(b). The Court cannot change this state regulatory scheme by judicial fiat, and does so only in a transparent attempt to manufacture redressability where none exists. See *infra*, at 269–271.

stone, *Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 72 (1978). I do not disagree with the Court's conclusion that the threatened application of the Act to appellees constitutes injury in fact.

But injury in fact is not the only requirement of Art. III. The appellees must also show that their injury "fairly can be traced to the challenged action of the defendant." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41 (1976). The Court purports to find such causation by use of the following sophism: "there is a fairly traceable causal connection between the claimed injury and the challenged conduct—here, between the claimed disabling and the threatened application of § 309.515, subd. 1(b), and its fifty per cent rule." *Ante*, at 241.

As was demonstrated above, the statute and the State require the Association to register because it is a "charitable organization" under § 309.52, not because of the fifty percent requirement contained in the exemption for religious organizations. Indeed, at this point in the litigation the fifty percent rule is entirely inapplicable to appellees because they have not shown that the Association is a "religious organization." Therefore, any injury to appellees resulting from the registration and reporting requirements is *caused* by § 309.52, not, as the Court concludes, by "the . . . threatened application of § 309.515, subd. 1(b)'s fifty per cent rule." *Ante*, at 242. Having failed to establish that the fifty percent rule is causally connected to their injury, appellees at this point lack standing to challenge it.

The error of the Court's analysis is even more clearly demonstrated by a closely related and equally essential requirement of Art. III. In addition to demonstrating an injury which is caused by the challenged provision, appellees must show "that the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co.* v. *Carolina Environmental Study Group*, *supra*, at 74. The importance

of redressability, an aspect of standing which has been recognized repeatedly by this Court,[5] is of constitutional dimension:

> "[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 38.

Appellees have failed to show that a favorable decision of this Court will redress the injuries of which they complain. By affirming the decision of the Court of Appeals, the Court today extends the exemption of § 309.515, subd. 1(b), to all "religious organizations" soliciting funds in Minnesota. See 637 F. 2d, at 569–570. But because appellees have not shown that the Association is a "religious organization" under that provision, they have not shown that they will be entitled to this newly expanded exemption.[6] This uncertainty is expressly recognized by the Court:

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[5] See *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U. S. 464, 472 (1981); *Watt* v. *Energy Action Educational Foundation*, 454 U. S. 151, 161 (1981); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 100 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S., at 74, 75, n. 20; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 262 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 504, 507–508 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 618 (1973).

[6] The Court attempts to finesse this fact by stating: "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Ante*, at 244, n. 15 (emphasis in original). True though this statement may be, appellees have failed to demonstrate that a favorable decision in this Court will relieve *any* injury. The Court's decision does not alter the statutuory requirement that the As-

> "We agree with the Court of Appeals that appellees and others claiming the benefits of the religious-organization exemption should not automatically enjoy those benefits. Rather, in order to receive them, appellees may be required by the State to prove that the Unification Church is a religious organization within the meaning of the Act." *Ante*, at 255, n. 30 (citation omitted).[7]

If the appellees fail in this proof—a distinct possibility given the State's "heavy testimonial barrage against [the Association's] claim that it is a religion," App. to Juris. Statement A–46—this Court will have rendered a purely advisory opinion. In so doing, it will have struck down a state statute at the behest of a party without standing, contrary to the undeviating teaching of the cases previously cited. Those cases, I believe, require remand for a determination of whether the Association is a "religious organization" as that term is used in the Minnesota statute.

III

There can be no doubt about the impropriety of the Court's action this day. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor*

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sociation register under the Act, and expands an exemption from which appellees can benefit *only* when they prove that the Association is a "religious organization" within the meaning of the Act.

[7] At another point in its opinion, the Court acknowledges:

"Of course, the Church cannot be assured of a continued religious-organization exemption even in the absence of the fifty per cent rule. . . . But that fact by no means detracts from the palpability of [appellees' injury.]" *Ante*, at 242 (citation omitted).

I agree that the uncertainty as to whether this decision will benefit appellees does not detract from the "palpability" of their injury. As shown in the text, however, it detracts totally from their ability to demonstrate the essential Art. III requirements of causation and redressability.

Service, Inc. v. *McLaughlin*, 323 U. S. 101, 105 (1944). Nowhere does this doctrine have more force than in cases such as this one, where the defect is a possible lack of Art. III jurisdiction due to want of standing on the part of the party which seeks the adjudication.

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of [legislative Acts] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair* v. *United States*, 250 U. S. 273, 279 (1919), quoted in *Ashwander* v. *TVA*, 297 U. S. 288, 341 (1936) (Brandeis, J., concurring).

The existence of injury in fact does not alone suffice to establish such an interest. "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 39.

IV

In sum, the Court errs when it finds that appellees have standing to challenge the constitutionality of § 309.515, subd. 1(b). Although injured to be sure, appellees have not demonstrated that their injury was caused by the fifty percent rule or will be redressed by its invalidation. This is not to say that appellees can never prove causation or redressability, only that they have not done so at this point. The case should be remanded to permit such proof. Until such time as the requirements of Art. III clearly have been satisfied, this Court should refrain from rendering significant constitutional decisions.

PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC. *v.* SWINT ET AL.

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

No. 80–1190. Argued January 19, 1982—Decided April 27, 1982*

Respondent black employees brought suit in Federal District Court against petitioners, their employer and certain unions, alleging that Title VII of the Civil Rights Act of 1964 was violated by a seniority system maintained by petitioners. The District Court found that the differences in terms, conditions, or privileges of employment resulting from the seniority system "are 'not the result of an intention to discriminate' because of race or color" and held, therefore, that the system satisfied the requirements of § 703(h) of the Act. That section provides that it shall not be an unlawful employment practice for an employer to apply different compensation standards or different terms, conditions, or privileges of employment "pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race." The Court of Appeals reversed, holding that the differences in treatment of employees under the seniority system resulted from an intent to discriminate and thus violated § 703(h). Although recognizing that Federal Rule of Civil Procedure 52(a) requires that a District Court's findings of fact not be set aside unless clearly erroneous, the Court of Appeals concluded that a finding of discrimination or nondiscrimination under § 703(h) was a finding of "ultimate fact" that the court would review by making "an independent determination of [the] allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous."

Held: The Court of Appeals erred in the course of its review of the District Court's judgment. Pp. 276–293.

(a) Under § 703(h), a showing of a disparate impact alone is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination. Absent a discriminatory purpose, the operation of a seniority system is not an unlawful employment practice even if the system has some discriminatory consequences. Pp. 276–277.

(b) Rule 52(a) does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts. While the Rule

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*Together with No. 80–1193, *United Steelworkers of America, AFL–CIO, et al.* v. *Swint et al.*, also on certiorari to the same court.

does not apply to conclusions of law, here the District Court was not faulted for applying an erroneous definition of intentional discrimination. Rather, it was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race for purposes of § 703(h). That question is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Pp. 285–290.

(c) While the Court of Appeals correctly stated the controlling clearly-erroneous standard of Rule 52(a), its conclusion that the challenged seniority system was unprotected by § 703(h) was the product of the court's improper independent consideration of the totality of the circumstances it found in the record. When the Court of Appeals concluded that the District Court had erred in failing to consider certain relevant evidence, it improperly made its own determination based on such evidence. When a district court's finding as to discriminatory intent under § 703(h) is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance. Pp. 290–293.

624 F. 2d 525, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a statement concurring in part, *post*, p. 293. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined except as to Part I, *post*, p. 293.

Michael H. Gottesman argued the cause for petitioners. With him on the briefs for petitioners in No. 80–1193 were *Robert M. Weinberg*, *Laurence Gold*, *Jerome A. Cooper*, *Bernard Kleiman*, and *Carl B. Frankel*. *Samuel H. Burr* and *C. V. Stelzenmuller* filed briefs for petitioner in No. 80–1190.

Elaine Jones argued the cause for respondents. With her on the brief were *Jack Greenberg*, *James M. Nabrit III*, *Patrick O. Patterson*, *Judith Reed*, *Barry L. Goldstein*, and *C. Lani Gunier*.†

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†*Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Jessica Dunsay Silver*, *Marie E. Klimesz*, *Con-*

JUSTICE WHITE delivered the opinion of the Court.

Respondents were black employees at the Bessemer, Ala., plant of petitioner Pullman-Standard (the Company), a manufacturer of railway freight cars and parts. They brought suit against the Company and the union petitioners—the United Steelworkers of America, AFL–CIO–CLC, and its Local 1466 (collectively USW)—alleging violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), and 42 U. S. C. § 1981.[1] As they come here, these cases involve only the validity, under Title VII, of a seniority system maintained by the Company and USW. The District Court found "that the differences in terms, conditions or privileges of employment resulting [from the seniority system] are 'not the result of an intention to discriminate' because of race or color," App. to Pet. for Cert. in No. 80–1190, p. A–147 (hereinafter App.), and held, therefore, that the system satisfied the requirements of § 703(h) of the Act. The Court of Appeals for the Fifth Circuit reversed:

> "Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U. S. C. 2000e–2(h)." 624 F. 2d 525, 533–534 (1980).

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stance L. Dupre, *Philip B. Sklover*, and *Vella M. Fink* filed a brief for the United States et al. as *amici curiae* urging affirmance.

Robert E. Williams and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae*.

[1] In their original complaint, besides challenging the seniority system discussed in this opinion, plaintiffs also alleged discrimination in job assignments and promotions and the failure to post publicly a list of changes in assignments. These were all brought as "class" issues. Two charges of individual discrimination were also brought. The Court of Appeals held that the Company had violated Title VII in making job assignments and in selecting foremen. In granting certiorari, we declined to review those aspects of the decision.

We granted the petitions for certiorari filed by USW and by the Company, 451 U. S. 906 (1981), limited to the first question presented in each petition: whether a court of appeals is bound by the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the bona fides of the seniority system. We conclude that the Court of Appeals erred in the course of its review and accordingly reverse its judgment and remand for further proceedings.

I

Title VII is a broad remedial measure, designed "to assure equality of employment opportunities." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). The Act was designed to bar not only overt employment discrimination, "but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). "Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters* v. *United States*, 431 U. S. 324, 349 (1977) (hereinafter *Teamsters*). The Act's treatment of seniority systems, however, establishes an exception to these general principles. Section 703(h), 78 Stat. 257, as set forth in 42 U. S. C. § 2000e–2(h), provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race."

Under this section, a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 82 (1977), we summarized the effect of § 703(h) as follows: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." Thus, any challenge to a seniority system under Title VII will require a trial on the issue of discriminatory intent: Was the system adopted because of its racially discriminatory impact?

This is precisely what happened in these cases. Following our decision in *Teamsters*, the District Court held a new trial on the limited question of whether the seniority system was "instituted or maintained contrary to Section 703(h) of the new Civil Rights Act of 1964." App. A–125.[2] That court concluded, as we noted above and will discuss below, that the system was adopted and maintained for purposes wholly independent of any discriminatory intent. The Court of Appeals for the Fifth Circuit reversed.

II

Petitioners submit that the Court of Appeals failed to comply with the command of Rule 52(a) that the findings of fact of a district court may not be set aside unless clearly erroneous. We first describe the findings of the District Court and the Court of Appeals.

Certain facts are common ground for both the District Court and the Court of Appeals. The Company's Bessemer plant was unionized in the early 1940's. Both before and after unionization, the plant was divided into a number of different operational departments.[3] USW sought to represent

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[2] The procedural history of these cases is rather complex. The original complaint was filed in 1971. Since that time the case has been tried three times and has twice been reviewed by the Court of Appeals.

[3] In 1941, prior to unionization, the Bessemer plant was divided into 20

all production and maintenance employees at the plant and was elected in 1941 as the bargaining representative of a bargaining unit consisting of most of these employees. At that same time, IAM became the bargaining representative of a unit consisting of five departments.[4] Between 1941 and 1944, IAM ceded certain workers in its bargaining unit to USW. As a result of this transfer, the IAM bargaining unit became all white.

Throughout the period of representation by USW, the plant was approximately half black. Prior to 1965, the Company openly pursued a racially discriminatory policy of job assignments. Most departments contained more than one job category and as a result most departments were racially mixed. There were no lines of progression or promotion within departments.

The seniority system at issue here was adopted in 1954.[5] Under that agreement, seniority was measured by length of continuous service in a particular department.[6] Seniority was originally exercised only for purposes of layoffs and hirings within particular departments. In 1956, seniority was formally recognized for promotional purposes as well. Again, however, seniority, with limited exceptions, was only exercised within departments; employees transferring to

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departments. By 1954, there were 28 departments—26 USW units and 2 International Association of Machinists and Aerospace Workers (IAM) units. The departments remained essentially unchanged after 1954.

[4] The International Brotherhood of Electrical Workers (IBEW) gained representation status for two small departments. The IBEW unit was all white. IBEW, however was decertified in 1946 and its members were reabsorbed into a department represented by USW.

[5] A departmental seniority system was part of the initial collective-bargaining agreement between the Company and USW in 1942. Between 1947 and 1954, however, the seniority system changed from one based on departments to one based upon particular occupations within departments. In 1954, the system went back to a departmental base.

[6] The only exceptions, until 1972 (see n. 7, *infra*), were for employees transferring at the request of the Company or for those electing transfer in lieu of layoff.

new departments forfeited their seniority. This seniority system remained virtually unchanged until after this suit was brought in 1971.[7]

The District Court approached the question of discriminatory intent in the manner suggested by the Fifth Circuit in *James* v. *Stockham Valves & Fittings Co.*, 559 F. 2d 310 (1977). There, the Court of Appeals stated that under *Teamsters* "the totality of the circumstances in the development and maintenance of the system is relevant to examining that issue." 559 F. 2d, at 352. There were, in its view, however, four particular factors that a court should focus on.[8]

First, a court must determine whether the system "operates to discourage all employees equally from transferring between seniority units." *Ibid.* The District Court held that the system here "was facially neutral and . . . was applied equally to all races and ethnic groups." App. A–132. Although there were charges of racial discrimination in its application, the court held that these were "not substantiated by the evidence." *Id.*, at A–133. It concluded that the system "applied equally and uniformly to all employees, black and white, and that, given the approximately equal number

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[7] In 1972, the Company entered into an agreement with the Department of Labor to bring its employment practices into compliance with Executive Order No. 11246, 3 CFR 339 (1964–1965 Comp.). This provided an exception to the departmental limit on seniority, allowing certain black employees to make interdepartmental transfers without any loss of seniority.

[8] The Fifth Circuit relied upon the following passage in *Teamsters*, 431 U. S., at 355–356:

"The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into non-line-driver jobs, it does so for all. . . . The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that that seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose."

This passage was of course not meant to be an exhaustive list of all the factors that a district court might or should consider in making a finding of discriminatory intent.

of employees of the two groups, it was quantitatively neutral as well." *Id.*, at A–134.[9]

Second, a court must examine the rationality of the departmental structure, upon which the seniority system relies, in light of the general industry practice. *James*, *supra*, at 352. The District Court found that linking seniority to "departmental age" was "the modal form of agreements generally, as well as with manufacturers of railroad equipment in particular." App. A–137. Furthermore, it found the basic arrangement of departments at the plant to be rationally related to the nature of the work and to be "consistent with practices which were . . . generally followed at other unionized plants throughout the country." *Id.*, at A–136—A–137. While questions could be raised about the necessity of certain departmental divisions, it found that all of the challenged lines of division grew out of historical circumstances at the plant that were unrelated to racial discrimination.[10] Although unionization did produce an all-white IAM bargaining unit, it found that USW "cannot be charged with racial bias in its response to the IAM situation. [USW] sought to represent all workers, black and white, in the plant." *Id.*, at A–145. Nor could the Company be charged with any racial discrimination that may have existed in IAM:

> "The company properly took a 'hands-off' approach towards the establishment of the election units . . . . It bargained with those unions which were afforded repre-

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[9] The court specifically declined to make any finding on whether the no-transfer provision of the seniority system had a greater relative effect on blacks than on whites, because of qualitative differences in the departments in which they were concentrated. It believed that such an inquiry would have been inconsistent with the earlier Fifth Circuit opinion in this case.

[10] In particular, the court focused on the history of the unionization process at the plant and found certain of the departmental divisions to be based on the evolving relationship between USW and IAM.

sentational status by the NLRB and did so without any discriminatory animus." *Id.*, at A–146.

Third, a court had to consider "whether the seniority system had its genesis in racial discrimination," *James*, *supra*, at 352, by which it meant the relationship between the system and other racially discriminatory practices. Although finding ample discrimination by the Company in its employment practices and some discriminatory practices by the union,[11] the District Court concluded that the seniority system was in no way related to the discriminatory practices:

> "The seniority system . . . had its genesis . . . at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of colorblind objectives of a union which—unlike most structures and institutions of the era—was not an arm of a segregated society. Nor did it foster the discrimination . . . which was being practiced by custom in the plant." App. A–144.

Finally, a court must consider "whether the system was negotiated and has been maintained free from any illegal purpose." *James*, *supra*, at 352. Stating that it had "carefully considered the detailed record of negotiation sessions and contracts which span a period of some thirty-five years," App. A–146, the court found that the system was untainted by any discriminatory purpose. Thus, although the District

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[11] With respect to USW, the District Court found that "[u]nion meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated." App. A–142. It also found, however, that "[w]hile possessing some of the trappings taken from an otherwise segregated society, the USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations." *Id.*, at A–143.

Court focused on particular factors in carrying out the analysis required by § 703(h), it also looked to the entire record and to the "totality of the system under attack." *Id.*, at A–147.

The Court of Appeals addressed each of the four factors of the *James* test and reached the opposite conclusion. First, it held that the District Court erred in putting aside qualitative differences between the departments in which blacks were concentrated and those dominated by whites, in considering whether the system applied "equally" to whites and blacks.[12] This is a purported correction of a legal standard under which the evidence is to be evaluated.

Second, it rejected the District Court's conclusion that the structure of departments was rational, in line with industry practice, and did not reflect any discriminatory intent. Its discussion is brief but focuses on the role of IAM and certain characteristics unique to the Bessemer plant. The court concluded:

> "The record evidence, generally, indicates arbitrary creation of the departments by the company since unionization and an attendant adverse affect *[sic]* on black workers. The individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice, are indicative of attempts to maintain one-race departments." 624 F. 2d, at 532.

In reaching this conclusion, the Court of Appeals did not purport to be correcting a legal error, nor did it refer to or expressly apply the clearly-erroneous standard.

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[12] It does not appear to us that the District Court actually found a qualitative difference but held it to be irrelevant. The relevant passage of the District Court opinion read as follows: "By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could . . . attempt to measure the relative effect of the no-transfer rule on white and black employees . . . . It may well be that a somewhat greater impact was felt by blacks than whites although . . . this conclusion is by no means certain." *Id.*, at A–134.

Third, in considering the "genesis" of the system, the Court of Appeals held that the District Court erred in holding that the motives of IAM were not relevant.[13] This was the correction of a legal error on the part of the District Court in excluding relevant evidence. The court did not stop there, however. It went on to hold that IAM was acting out of discriminatory intent—an issue specifically not reached by the District Court—and that "considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." *Ibid.*

Fourth, despite this conclusion under the third *James* factor the Court of Appeals then recited, but did not expressly set aside or find clearly erroneous, the District Court's findings with respect to the negotiation and maintenance of the seniority system.

The court then announced that "[h]aving carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is 'bona fide' within the meaning of § 703(h) of Title VII, we reject the district court's finding." 624 F. 2d, at 533. Elaborating on its disagreement, the Court of Appeals stated:

> "An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made. There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I. A. M. in 1941 was to exclude black workers from its bargaining unit.

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[13] The original complaint in this case did not mention IAM. Prior to the first trial, respondents sought and received leave to amend their complaint to add IAM as a Rule 19 defendant, "insofar as the relief requested may involve or infringe upon the provisions of such Union's collective bargaining agreement with the Company." Order of the District Court, June 4, 1974 (App. 29).

> That goal was ultimately reached when maneuvers by the I. A. M. and U. S. W. resulted in an all-white I. A. M. unit. The U. S. W., in the interest of increased membership, acquiesced in the discrimination while succeeding in significantly segregating the departments within its own unit.
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> "The district court might have reached a different conclusion had it given the I. A. M.'s role in the creation and establishment of the seniority system its due consideration." *Ibid.* (footnote omitted).

Having rejected the District Court's finding, the court made its own findings as to whether the USW seniority system was protected by § 703(h):

> "We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U. S. W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U. S. C. § 2000e–2(h)." *Id.*, at 533–534.

In connection with its assertion that it was convinced that a mistake had been made, the Court of Appeals, in a footnote, referred to the clearly-erroneous standard of Rule 52(a). *Id.*, at 533, n. 6.[14] It pointed out, however, that if findings

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[14] In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), this Court characterized the clearly-erroneous standard as follows:

"are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand." *Ibid.* Finally, quoting from *East* v. *Romine, Inc.*, 518 F. 2d 332, 339 (CA5 1975), the Court of Appeals repeated the following view of its appellate function in Title VII cases where purposeful discrimination is at issue:

> "'Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U. S. C. A. § 2000e–2(a). As such, a finding of discrimination or non-discrimination is a finding of ultimate fact. [Cites omitted.] In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.'" 624 F. 2d, at 533, n. 6.

III

Pointing to the above statement of the Court of Appeals and to similar statements in other Title VII cases coming from that court,[15] petitioners submit that the Court of Ap-

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"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We note that the Court of Appeals quoted this passage at the conclusion of its analysis of the District Court opinion. *Supra*, at 283.

[15] See *Jackson* v. *City of Killeen*, 654 F. 2d 1181, 1184 (1981); *Payne* v. *McLemore's Wholesale & Retail Stores*, 654 F. 2d 1130, 1147 (1981); *Wilkins* v. *University of Houston*, 654 F. 2d 388, 390 (1981); *Lindsey* v. *Mississippi Research & Development Center*, 652 F. 2d 488, 492 (1981); *Rohde* v. *K. O. Steel Castings, Inc.*, 649 F. 2d 317, 320 (1981); *Joshi* v. *Florida State University*, 646 F. 2d 981, 986 (1981); *Phillips* v. *Joint Legislative Committee*, 637 F. 2d 1014, 1024 (1981); *Danner* v. *United States Civil Service Comm'n*, 635 F. 2d 427, 430–431 (1981); *Thompson* v. *Leland Police Dept.*, 633 F. 2d 1111, 1112 (1980); *Crawford* v. *Western Electric Co.*, 614 F. 2d 1300, 1311 (1980); *Burdine* v. *Texas Dept. of Community Af-*

peals made an independent determination of discriminatory purpose, the "ultimate fact" in this case, and that this was error under Rule 52(a). We agree with petitioners that if the Court of Appeals followed what seems to be the accepted rule in that Circuit, its judgment must be reversed.[16]

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fairs, 608 F. 2d 563, 566 (1979); *Williams* v. *Tallahassee Motors, Inc.*, 607 F. 2d 689, 690 (1979); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F. 2d 1374, 1382 (1978); *Causey* v. *Ford Motor Co.*, 516 F. 2d 416, 420–421 (1975); *East* v. *Romine, Inc.*, 518 F. 2d 332, 338–339 (1975).

[16] There is some indication in the opinions of the Court of Appeals for the Fifth Circuit (see n. 15, *supra*) that the Circuit rule with respect to "ultimate facts" is only another way of stating a standard of review with respect to mixed questions of law and fact—the ultimate "fact" is the statutory, legally determinative consideration (here, intentional discrimination) which is or is not satisfied by subsidiary facts admitted or found by the trier of fact. As indicated in the text, however, the question of intentional discrimination under § 703(h) is a pure question of fact. Furthermore, the Court of Appeals' opinion in this case appears to address the issue as a question of fact unmixed with legal considerations.

At the same time, this Court has on occasion itself indicated that findings on "ultimate facts" are independently reviewable. In *Baumgartner* v. *United States*, 322 U. S. 665 (1944), the issue was whether or not the findings of the two lower courts satisfied the clear-and-convincing standard of proof necessary to sustain a denaturalization decree. The Court held that the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could independently assess. The Court referred to the finding as one of "ultimate" fact, which in that case involved an appraisal of the strength of the entire body of evidence. The Court said that the significance of the clear-and-convincing proof standard "would be lost" if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts not open to review here." *Id.*, at 671.

The Fifth Circuit's rule on appellate consideration of "ultimate facts" has its roots in this discussion in *Baumgartner*. In *Galena Oaks Corp.* v. *Scofield*, 218 F. 2d 217 (CA5 1954), in which the question was whether the gain derived from the sale of a number of houses was to be treated as capital gain or ordinary income, the Court of Appeals relied directly on *Baumgartner* in holding that this was an issue of "ultimate fact" that an appellate

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

The Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination.[17] It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a

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court may review free of the clearly-erroneous rule. *Causey* v. *Ford Motor Co.*, *supra*, at 421, relying on *Galena Oaks Corp.* v. *Scofield*, *supra*, said that "although discrimination *vel non* is essentially a question of fact, it is, at the same time, the ultimate issue for resolution in this case" and as such, was deemed to be independently reviewable. The passage from *East* v. *Romine, Inc.*, *supra*, at 339, which was repeated in the cases before us now, *supra*, at 285, rested on the opinion in *Causey* v. *Ford Motor Co.*

Whatever *Baumgartner* may have meant by its discussion of "ultimate facts," it surely did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a). *Baumgartner*'s discussion of "ultimate facts" referred not to pure findings of fact—as we find discriminatory intent to be in this context—but to findings that "clearly impl[y] the application of standards of law." 322 U. S., at 671.

[17] As we noted above, the Court of Appeals did at certain points purport to correct what it viewed as legal errors on the part of the District Court. The presence of such legal errors may justify a remand by the Court of Appeals to the District Court for additional factfinding under the correct legal standard. *Infra*, at 291–292.

pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact.

The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. See *Baumgartner* v. *United States*, 322 U. S. 665, 671 (1944). Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion. For the reasons that follow, however, we have little doubt about the factual nature of § 703(h)'s requirement that a seniority system be free of an intent to discriminate.

Treating issues of intent as factual matters for the trier of fact is commonplace. In *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 534 (1979), the principal question was whether the defendants had intentionally maintained a racially segregated school system at a specified time in the past. We recognized that issue as essentially factual, subject to the clearly-erroneous rule. In *Commissioner* v. *Duberstein*, 363 U. S. 278 (1960), the Court held that the principal criterion for identifying a gift under the applicable provision of the Internal Revenue Code was the intent or motive of the donor—"one that inquires what the basic reason for his conduct was in fact." *Id.*, at 286. Resolution of that issue determined the ultimate issue of whether a gift had been made. Both issues were held to be questions of fact subject to the clearly-erroneous rule. In *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341 (1949), an antitrust case, the Court referred to "[f]indings as to the design, motive and intent with which men act" as peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52.

Justice Black's dissent in *Yellow Cab* suggested a contrary approach. Relying on *United States* v. *Griffith*, 334 U. S.

100 (1948), he argued that it is not always necessary to prove "specific intent" to restrain trade; it is enough if a restraint is the result or consequence of a defendant's conduct or business arrangements. Such an approach, however, is specifically precluded by § 703(h) in Title VII cases challenging seniority systems. Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate. It would make no sense, therefore, to say that the intent to discriminate required by § 703(h) may be presumed from such an impact. As § 703(h) was construed in *Teamsters*, there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system. That finding appears to us to be a pure question of fact.

This is not to say that discriminatory impact is not part of the evidence to be considered by the trial court in reaching a finding on whether there was such a discriminatory intent as a factual matter.[18] We do assert, however, that under § 703(h) discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent.[19] Discrimi-

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[18] See, *e. g.*, *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 580 (1978): "Proof that [an employer's] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided."

[19] We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—*i. e.*, questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority

natory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Insofar as the Fifth Circuit assumed otherwise, it erred.

IV

Respondents do not directly defend the Fifth Circuit rule that a trial court's finding on discriminatory intent is not subject to the clearly-erroneous standard of Rule 52(a).[20] Rather, among other things, they submit that the Court of Appeals recognized and, where appropriate, properly applied Rule 52(a) in setting aside the findings of the District Court. This position has force, but for two reasons it is not persuasive.

First, although the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a), the acknowledgment came late in the court's opinion. The court had not expressly referred to or applied Rule 52(a) in the course of disagreeing with the District Court's resolution of the factual issues deemed relevant under *James* v. *Stockham*

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in the Circuits on both sides of this question. Compare *United States ex rel. Johnson* v. *Johnson*, 531 F. 2d 169, 174, n. 12 (CA3 1976); *Stafos* v. *Jarvis*, 477 F. 2d 369, 372 (CA10 1973); and *Johnson* v. *Salisbury*, 448 F. 2d 374, 377 (CA6 1971), with *Rogers* v. *Bates*, 431 F. 2d 16, 18 (CA8 1970); and *Pennsylvania Casualty Co.* v. *McCoy*, 167 F. 2d 132, 133 (CA5 1948). There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court, *e. g.*, *Bogardus* v. *Commissioner*, 302 U. S. 34, 39 (1937); *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 491 (1937); *Helvering* v. *Rankin*, 295 U. S. 123, 131 (1935). But cf., *Commissioner* v. *Duberstein*, 363 U. S. 278, 289 (1960); *Commissioner* v. *Heininger*, 320 U. S. 467, 475 (1943).

[20] Neither does the dissent contend that Rule 52(a) is inapplicable to findings of discriminatory intent. Rather, it contends, that the Rule was properly applied by the Court of Appeals.

Valves & Fittings Co., 559 F. 2d 310 (1977).[21] Furthermore, the paragraph in which the court finally concludes that the USW seniority system is unprotected by § 703(h) strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record.

Second and more fundamentally, when the court stated that it was convinced that a mistake had been made, it then identified not only the mistake but also the source of that mistake. The mistake of the District Court was that on the record there could be no doubt about the existence of a discriminatory purpose. The source of the mistake was the District Court's failure to recognize the relevance of the racial purposes of IAM. Had the District Court "given the I. A. M.'s role in the creation and establishment of the seniority system its due consideration," it "might have reached a different conclusion." *Supra*, at 284.

When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:

> "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance

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[21] In particular, in regard to the second *James* factor—whether the departmental structure was rational or in line with industry practice—the Court of Appeals did not focus on the evidentiary basis for any particular finding of the District Court. It appeared to make an independent examination of the record and arrive at its own conclusion contrary to that of the District Court. Likewise, in dealing with the genesis of the seniority system and whether or not the negotiation or maintenance of the system was tainted with racial discrimination, the Court of Appeals, while identifying what it thought was legal error in failing to consider the racial practices and intentions of IAM, did not otherwise overturn any of the District Court's findings as clearly erroneous.

> this factual dispute which had not been considered by the District Court." *DeMarco* v. *United States*, 415 U. S. 449, 450, n. (1974).[22]

Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley* v. *Southern Pacific Co.*, 419 U. S. 318, 331–332 (1974). All of this is elementary. Yet the Court of Appeals, after holding that the District Court had failed to consider relevant evidence and indicating that the District Court might have come to a different conclusion had it considered that evidence, failed to remand for further proceedings as to the intent of IAM and the significance, if any, of such a finding with respect to the intent of USW itself. Instead, the Court of Appeals made its own determination as to the motives of IAM, found that USW had acquiesced in the IAM conduct, and apparently concluded that the foregoing was sufficient to remove the system from the protection of § 703(h).[23]

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[22] See 5A J. Moore & J. Lucas, Moore's Federal Practice § 52.06[2] (1982) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made"); *Rule* v. *International Assn. of Bridge Workers*, 568 F. 2d 558, 568 (CA8 1978); *Chicano Police Officer's Assn.* v. *Stover*, 552 F. 2d 918, 921 (CA10 1977); *O'Neal* v. *Gresham*, 519 F. 2d 803, 805 (CA4 1975); *Burch* v. *International Assn. of Machinists & Aerospace Workers, AFL–CIO*, 433 F. 2d 561 (CA5 1970); *General Electric Credit Corp.* v. *Robbins*, 414 F. 2d 208 (CA8 1969).

[23] IAM's discriminatory motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in these cases. A discriminatory intent on the part of IAM, therefore, does not control the outcome of these cases. Neither does the fact, if true, that USW acquiesced in racially discriminatory conduct on the part of IAM. Such acquiescence is not the equivalent of a discriminatory purpose on the part of USW.

Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. As we have previously said, however, the premise for this conclusion is infirm: whether an ultimate fact or not, discriminatory intent under § 703(h) is a factual matter subject to the clearly-erroneous standard of Rule 52(a). It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance.

Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, concurring in part.

Except to the extent that the Court's preliminary comments on the burden of sustaining "any challenge to a seniority system under Title VII," *ante*, at 277, are inconsistent with the views I expressed separately in *American Tobacco Co.* v. *Patterson*, *ante*, p. 86, I join the Court's opinion.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins except as to Part I, dissenting.

In 1971, a group of Negro employees at Pullman-Standard's Bessemer, Ala., plant brought this class action against Pullman-Standard, the United Steelworkers of America and its Local 1466 (USW), and the International Association of Machinists and its Local 372 (IAM). The plaintiffs alleged, *inter alia*, that the departmental seniority system negotiated

by both unions discriminated against Negroes in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), and the Civil Rights Act of 1866, 42 U. S. C. § 1981. In 1974, the District Court for the Northern District of Alabama concluded that the seniority system did not operate to discriminate against Negroes. A unanimous panel of the Fifth Circuit reversed. The court ruled that the District Court had committed several errors of law, including failure to give proper weight to the role of the IAM, and had relied on patently inaccurate factual conclusions. *Swint* v. *Pullman-Standard*, 539 F. 2d 77, 95–96 (1976). On remand, the District Court again ruled that the seniority system was immune from attack under Title VII, this time finding that respondents had failed to show discriminatory intent as required by this Court's decision in *Teamsters* v. *United States*, 431 U. S. 324 (1977). *Ante*, at 275. The Fifth Circuit again unanimously rejected the conclusion of the District Court. 624 F. 2d 525 (1980). The majority now reverses the Fifth Circuit's second unanimous decision on the ground that the Court of Appeals did not pay sufficient homage to the "clearly erroneous" rule, Fed. Rule Civ. Proc. 52(a), in concluding that the seniority system at Pullman-Standard was the product of intentional discrimination against Negroes. Because I cannot agree with the premise of the majority's decision to remand these cases for yet another trial, or with its application of that premise to the facts of this case, I respectfully dissent.

I

The majority premises its holding on the assumption that "'absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.'" *Ante*, at 277, quoting *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 82 (1977). As I have previously indicated, I do not find anything in the relevant statutory language or legislative

history to support the proposition that § 703(h) of Title VII immunizes a seniority system that perpetuates past discrimination, as the system at issue here clearly does, simply because the plaintiffs are unable to demonstrate to this Court's satisfaction that the system was adopted or maintained for an invidious purpose. See *Teamsters* v. *United States*, *supra*, at 377–394 (opinion of MARSHALL, J.). In my opinion, placing such a burden on plaintiffs who challenge seniority systems with admitted discriminatory impact, a burden never before imposed in civil suits brought under Title VII, frustrates the clearly expressed will of Congress and effectively "freeze[s] an entire generation of Negro employees into discriminatory patterns that existed before the Act." *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 516 (ED Va. 1968) (Butzner, J.).

II

Even if I were to accept this Court's decision to impose this novel burden on Title VII plaintiffs, I would still be unable to concur in its conclusion that the Fifth Circuit's decision should be reversed for failing to abide by Rule 52(a). The majority asserts that the Court of Appeals in this action ignored the clearly-erroneous rule and made an independent determination of discriminatory purpose. I disagree. In my view, the court below followed well-established legal principles both in rejecting the District Court's finding of no discriminatory purpose and in concluding that a finding of such a purpose was compelled by all of the relevant evidence.

The majority concedes, as it must, that the "Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a)." *Ante*, at 290. In a footnote to its opinion, the Court of Appeals plainly states that findings of fact may be overturned only if they are either "clearly erroneous" or "made under an erroneous view of controlling legal principles." 624 F. 2d, at 533, n. 6. Furthermore, as the majority notes, *ante*, at 283, the Court of Appeals justified its decision to reject the District Court's finding that the senior-

ity system was not the result of purposeful discrimination by stating: "An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the *definite and firm conviction that a mistake has been made.*" 624 F. 2d, at 533 (emphasis added; footnote omitted).[1] I frankly am at a loss to understand how the Court of Appeals could have expressed its conclusion that the District Court's finding on the issue of intent was clearly erroneous with any more precision or clarity.

The majority rejects the Court of Appeals' clear articulation and implementation of the clearly-erroneous rule on the apparent ground that in the course of correctly setting forth the requirements of Rule 52(a), the court also included the following quotation from its prior decision in *East* v. *Romine, Inc.*, 518 F. 2d 332, 339 (1975):

> "'Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U. S. C. A. § 2000e–2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. [Cites omitted]. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.'" 624 F. 2d, at 533, n. 6.

The only question presented by this case, therefore, is whether this reference to *East* v. *Romine, Inc.*, should be read as negating the Court of Appeals' unambiguous ac-

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[1] As the majority acknowledges, *ante*, at 284–285, n. 14, this Court stated in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), that a finding of fact is clearly erroneous if "the reviewing court on the entire evidence is left with *the definite and firm conviction that a mistake has been committed*" (emphasis added).

knowledgment of the "controlling standard of Rule 52." *Ante*, at 290. The majority bases its affirmative answer to that question on two factors. First, the majority contends that the Court of Appeals must not have properly respected the clearly-erroneous rule because its acknowledgment that Rule 52(a) supplied the controlling standard "came late in the court's opinion." *Ante*, at 290. Second, the Court of Appeals "identified not only the mistake" that it felt had been made, "but also the source of that mistake." *Ante*, at 291. If the Court of Appeals had really been applying the clearly-erroneous rule, it should have abided by the "usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." *Ante*, at 293.

Neither of these arguments justifies the majority's conclusion that these cases must be remanded for a fourth trial on the merits. I am aware of no rule of decision embraced by this or any other court that places dispositive weight on whether an accurate statement of controlling principle appears "early" or late in a court's opinion. Nor does the majority suggest a basis for this unique rule of interpretation. So long as a court acknowledges the proper legal standard, I should think it irrelevant whether it chooses to set forth that standard at the beginning or at the end of its opinion. The heart of the majority's argument, therefore, is that the failure to remand the action to the District Court after rejecting its conclusion that the seniority system was "bona fide" within the meaning of § 703(h) indicates that the Court of Appeals did not properly follow the clearly-erroneous rule. Before addressing this issue, however, it is necessary to examine the nature of the finding of "intent" required by this Court in *Teamsters*, the procedure that courts of appeals should follow in reviewing a district court's finding on intent, and the extent to which the court below adhered to that procedure in this case.

The District Court examined the four factors approved by the Fifth Circuit in *James* v. *Stockham Valves & Fittings*

Co., 559 F. 2d 310 (1977), cert. denied, 434 U. S. 1034 (1978), to determine whether the departmental seniority system at Pullman-Standard was adopted or maintained for a discriminatory purpose. Although indicating that these four factors are not the only way to demonstrate the existence of discriminatory intent,[2] the Court today implicitly acknowledges that proof of these factors satisfies the requirements of *Teamsters*.[3] In particular, the majority agrees that a finding of discriminatory intent sufficient to satisfy *Teamsters* can be based on circumstantial evidence, including evidence of discriminatory impact. See *ante*, at 289; see also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266, 267 (1977).

Given the nature of this factual inquiry, the court of appeals must first determine whether the district court applied correct legal principles and therefore *considered* all of the legally relevant evidence presented by the parties. This, as the majority acknowledges, is a "legal" function that the court of appeals must perform in the first instance. *Ante*, at 282, 283. Second, the court of appeals must determine whether the district court's finding with respect to intent is *supported* by all of the legally relevant evidence. This, the Court holds today, is generally a factual determination limited by the dictates of Rule 52(a). Finally, if the court of appeals sets aside the district court's finding with respect to intent, either because that finding is clearly erroneous or because it is based on an erroneous legal standard, it may determine, in the interest of judicial economy, whether the le-

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[2] Contrary to the majority's suggestion, *ante*, at 279, n. 8, I find nothing in the Fifth Circuit's decision in *James* v. *Stockham Valves & Fittings Co.* to imply that these factors constitute the only relevant criteria for determining discriminatory intent.

[3] This conclusion would seem to be compelled since, as the majority notes, the *James* factors are nothing more than a summary of the criteria examined by this Court in *Teamsters*, 431 U. S., at 355–356.

gally relevant evidence presented to the district court "permits only one resolution of the factual issue." *Ante*, at 292. If only one conclusion is possible, the reviewing court is free to find the existence of the fact in question as a matter of law. See *Bigelow* v. *Virginia*, 421 U. S. 809, 826–827 (1975); *Levin* v. *Mississippi River Fuel Corp.*, 386 U. S. 162, 170 (1967).

A common-sense reading of the opinion below demonstrates that the Court of Appeals followed precisely this course in examining the issue of discriminatory intent. Even the majority concedes that the Court of Appeals determined that the District Court committed "legal error" by failing to consider all of the relevant evidence in resolving the first and the third *James* factors. *Ante*, at 282, 283. With respect to the first *James* factor—whether the system inhibits all employees equally from transferring between seniority units—the District Court found that the departmental system "locked" both Negro and white workers into departments by discouraging transfers. The District Court acknowledged that Negroes might suffer a greater impact because the company's previous discriminatory policy of openly maintaining "Negro" jobs and "white" jobs had caused Negroes to be concentrated in less desirable positions. The District Court concluded, however, that this differential impact was irrelevant in determining whether the seniority system operated neutrally. The Court of Appeals properly held that the District Court erred in failing to consider the fact that the departmental system locked Negroes into less desirable jobs.

Similarly, as for the third *James* factor—whether the seniority system had its genesis in racial discrimination—the District Court rejected respondents' argument that the motives of the IAM were relevant. It concluded that the USW could not be charged with the racial bias of the IAM. The Court of Appeals held that this conclusion was erroneous because the "motives and intent of the I. A. M. in 1941 and 1942

are significant in consideration of whether the seniority system has its genesis in racial discrimination." 624 F. 2d, at 532.[4]

As the majority acknowledges, where findings of fact "'are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand.'" *Ante*, at 285, quoting 624 F. 2d, at 533, n. 6; see also *Kelley* v. *Southern Pacific Co.*, 419 U. S. 318, 323 (1974); *United States* v. *General Motors Corp.*, 384 U. S. 127, 141, n. 16 (1966); *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 194, n. 9 (1963); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960); *Rowe* v. *General Motors Corp.*, 457 F. 2d 348, 356, n. 15 (CA5 1972). Having found that the District Court's findings as to the first and third *James* factors were made under an erroneous view of controlling legal principles, the Court of Appeals was *compelled* to set aside those findings free of the requirements of the clearly-erroneous rule.[5] But once these two findings were set aside, the District Court's conclusion that the departmental system was bona fide within the meaning of § 703(h) also had to be rejected, since that conclusion was based at least in part on its erroneous determinations concerning the first and the third *James* factors.

At the very least, therefore, the Court of Appeals was entitled to remand this action to the District Court for the pur-

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[4] As the majority indicates in a footnote, *ante*, at 292, n. 23, the discriminatory motive of the IAM is "relevant . . . to the extent that it may shed light on the purpose of USW or the Company in creating and maintaining the separate seniority system at issue in this case." I do not read the Court of Appeals opinion in this action as holding anything more than that if the USW participated in establishing a system that was designed for the purpose of perpetuating past discrimination, the third *James* factor would be satisfied. Given that the IAM is a party to this litigation, its participation in the creation of the seniority system can hardly be deemed irrelevant.

[5] It is therefore irrelevant that the Court of Appeals did not specifically hold that the District Court's other factual findings were clearly erroneous.

pose of reexamining the bona fides of the seniority system under proper legal standards. However, as we have often noted, in some cases a remand is inappropriate where the facts on the record are susceptible to only one reasonable interpretation. See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 534–537 (1979); *Bigelow* v. *Virginia*, *supra*, at 826–827. In such cases, "[e]ffective judicial administration" requires that the court of appeals draw the inescapable factual conclusion itself, rather than remand the case to the district court for further needless proceedings. *Levin* v. *Mississippi River Fuel Corp.*, 386 U. S., at 170. Such action is particularly appropriate where the court of appeals is in as good a position to evaluate the record evidence as the district court. The major premise behind the deference to trial courts expressed in Rule 52(a) is that findings of fact "depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341 (1949); see also *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 332 (1952). Indeed Rule 52(a) expressly acknowledges the importance of this factor by stating that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Consequently, this Court has been especially reluctant to resolve factual issues which depend on the credibility of witnesses. See generally *United States* v. *Oregon State Medical Society*, *supra*, at 332.

In the cases before the Court today this usual deference is not required because the District Court's findings of fact were entirely based on documentary evidence.[6] As we

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[6] Only two witnesses testified during the brief hearing that the District Court conducted on the question whether the seniority system at Pullman-Standard was immune under § 703(h). Both of these witnesses were longtime Negro employees of Pullman-Standard who testified on behalf of *respondents* concerning racial segregation at the plant and by the USW. There is no indication in the District Court's opinion that it relied upon the

noted in *United States* v. *General Motors Corp.*, *supra*, at 141, n. 16, "the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) . . . , plays only a restricted role [in] a 'paper case.'" See also *Jennings* v. *General Medical Corp.*, 604 F. 2d 1300, 1305 (CA10 1979) ("When the findings of a trial court are based on documentary, rather than oral evidence, they do not carry the same weight on appellate review"); *Orvis* v. *Higgins*, 180 F. 2d 537, 539 (CA2 1950).[7]

I believe that the Court of Appeals correctly determined that a finding of discriminatory intent was compelled by the documentary record presented to the District Court. With respect to three of the four *James* factors, the Court of Appeals found overwhelming evidence of discriminatory intent. First, in ruling that the District Court erred by not acknowledging the legal significance of the fact that the seniority system locked Negroes into the least remunerative jobs in the company, the Court of Appeals determined that such disproportionate impact demonstrated that the system did not "'operat[e] to discourage all employees equally from transferring between seniority units.'" 624 F. 2d, at 530, quoting

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testimony of these two witnesses in concluding that the system was bona fide within the meaning of § 703(h). The remainder of the record before the District Court consisted entirely of 139 exhibits submitted by respondents, the company, and the unions concerning the development and maintenance of the seniority system from 1940 through the 1970's.

[7] This is not to say that the clearly-erroneous rule does not apply to "document" cases. See *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 194, n. 9 (1963). However, "when the decision of the court below rests upon an incorrect reading of an undisputed document, [the appellate] court is free to substitute its own reading of the document." *Eutectic Corp.* v. *Metco, Inc.*, 579 F. 2d 1, 5 (CA2 1978). See also *McKensie* v. *Sea Land Service*, 551 F. 2d 91 (CA5 1977); *Best Medium Pub. Co.* v. *National Insider, Inc.*, 385 F. 2d 384 (CA7 1967), cert. denied, 390 U. S. 955 (1968); *United States ex rel. Binion* v. *O'Brien*, 273 F. 2d 495 (CA3 1959), cert. denied, 363 U. S. 812 (1960).

James v. *Stockham Valves & Fittings Co.*, 559 F. 2d, at 352. Second, noting that "[n]o credible explanation ha[d] been advanced to sufficiently justify" the existence of two separate Die and Tool Departments and two separate Maintenance Departments, a condition not found at any other Pullman-Standard plant, or the creation of all-white and all-Negro departments at the time of unionization and in subsequent years, the Court of Appeals concluded that the second *James* factor had not been satisfied.[8] 624 F. 2d, at 533. Finally, with respect to the third *James* factor the Court of Appeals found that once the role of the IAM was properly recognized, it was "crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter." 624 F. 2d, at 532.[9]

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[8] Although the majority is correct in stating that the Court of Appeals did not "refer to or *expressly* apply the clearly-erroneous standard" in reaching this conclusion, *ante*, at 282 (emphasis added), the appellate court's adherence to the requirements of Rule 52(a) is nevertheless apparent from the following statement:

"The record evidence indicates that a significant number of one-race departments were established upon unionization at Pullman-Standard, and during the next twenty five years, one-race departments were carved out of previously mixed departments. The establishment and maintenance of the segregated departments appear to be based on *no other considerations than the objective to separate the races*." 624 F. 2d, at 531 (emphasis added).

In my opinion, this statement is sufficient to satisfy the requirements of Rule 52(a), particularly in light of the Court of Appeals' general acknowledgment that it was bound by the clearly-erroneous rule. See *supra*, at 296–297.

[9] Whether or not the Court of Appeals expressly ruled on the fourth *James* factor is irrelevant. As the Court of Appeals clearly stated, its conclusion was based on "the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard." 624 F. 2d, at 533; see also *id.*, at 532 ("It is crystal clear that considerations of race permeated the negotiation and the adoption of the seniority system in 1941 and subsequent negotiations thereafter"), and *id.*,

After reviewing all of the relevant record evidence presented to the District Court, the Court of Appeals concluded: "There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose." *Id.*, at 533. Because I fail to see how the Court of Appeals erred in carrying out its appellate function, I respectfully dissent from the majority's decision to prolong respondents' 11-year quest for the vindication of their rights by requiring yet another trial.

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at 533 ("We consider significant in our decision . . . conditions of racial discrimination which affected the negotiation and renegotiation of the system . . ."). Even assuming that the District Court was correct in concluding that the system had been *maintained* free of any illegal purpose, the Court of Appeals was entitled to conclude that discriminatory intent had been demonstrated on the basis of other relevant evidence.

WEINBERGER, SECRETARY OF DEFENSE, ET AL. *v.* ROMERO-BARCELO ET AL.

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

No. 80–1990. Argued February 23, 1982—Decided April 27, 1982

The Navy, in the course of using an island off the Puerto Rico coast for air-to-ground weapons training, has discharged ordnance into the waters surrounding the island, when pilots missed land targets and accidentally bombed the waters or intentionally bombed water targets. Respondents sued in Federal District Court to enjoin the Navy's operations, alleging violation of, *inter alia*, the Federal Water Pollution Control Act (FWPCA). The District Court, while finding that the discharges have not harmed the quality of the water, held that the Navy had violated the FWPCA by discharging ordnance into the waters without first obtaining a permit from the Environmental Protection Agency, and ordered the Navy to apply for a permit but refused to enjoin the operations pending consideration of the permit application. The Court of Appeals vacated and remanded with instructions to order the Navy to cease the violation until it obtained a permit, holding that the FWPCA withdrew the District Court's equitable discretion to order relief other than an immediate prohibitory injunction.

Held: The FWPCA does not foreclose completely the exercise of a district court's discretion, but, rather than requiring the court to issue an injunction for any and all statutory violations, permits the court to order relief it considers necessary to secure prompt compliance with the Act, which relief can include, but is not limited to, an order of immediate cessation. Pp. 311–320.

(a) The grant of jurisdiction to a court to ensure compliance with a statute does not suggest an absolute duty to grant injunctive relief under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. Pp. 311–313.

(b) Here, an injunction is not the only means of ensuring compliance, *TVA* v. *Hill*, 437 U. S. 153, distinguished, since the FWPCA provides, for example, for fines and criminal penalties. While the FWPCA's purpose in preserving the integrity of the Nation's waters is to be achieved by compliance with the Act, including compliance with the permit requirements, in this case the discharge of the ordnance has not polluted

the waters, and, although the District Court refused to enjoin the discharge, it neither ignored the statutory violation nor undercut the purpose and function of the permit system. The FWPCA's prohibition against discharge of pollutants can be overcome by the very permit the Navy was ordered to seek. Pp. 313–316.

(c) The statutory scheme as a whole contemplates the exercise of discretion and balancing of equities, and suggests that Congress did not intend to deny courts the discretion to rely on remedies other than an immediate prohibitory injunction. Pp. 316–318.

(d) The provision of the FWPCA permitting the President to exempt federal facilities from compliance with the permit requirements does not indicate congressional intent to limit the court's discretion. The Act permits the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve *compliance* with the Act, whereas the exemption permits *noncompliance* by federal agencies in extraordinary circumstances. Pp. 318–319.

(e) Nor does the legislative history suggest that Congress intended to deny courts their traditional equitable discretion. P. 319.

643 F. 2d 835, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 321. STEVENS, J., filed a dissenting opinion, *post*, p. 322.

Elinor H. Stillman argued the cause for petitioners. On the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Liotta*, *Edward J. Shawaker*, *Anne S. Almy*, *Thomas E. Flynn*, and *Richard M. Cornelius*.

John A. Hodges argued the cause for respondents. With him on the brief were *Hector Reichard de Cardona*, Secretary of Justice of Puerto Rico, *Gerardo A. Carlo*, *Timothy L. Harker*, and *Lawrence White*.

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Federal Water Pollution Control Act (FWPCA or Act), 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. IV), requires a district court to enjoin immediately all discharges of pollut-

ants that do not comply with the Act's permit requirements or whether the district court retains discretion to order other relief to achieve compliance. The Court of Appeals for the First Circuit held that the Act withdrew the courts' equitable discretion. *Romero-Barcelo* v. *Brown*, 643 F. 2d 835 (1981). We reverse.

I

For many years, the Navy has used Vieques Island, a small island off the Puerto Rico coast, for weapons training. Currently all Atlantic Fleet vessels assigned to the Mediterranean Sea and the Indian Ocean are required to complete their training at Vieques because it permits a full range of exercises under conditions similar to combat. During air-to-ground training, however, pilots sometimes miss land-based targets, and ordnance falls into the sea. That is, accidental bombings of the navigable waters and, occasionally, intentional bombings of water targets occur. The District Court found that these discharges have not harmed the quality of the water.

In 1978, respondents, who include the Governor of Puerto Rico and residents of the island, sued to enjoin the Navy's operations on the island. Their complaint alleged violations of numerous federal environmental statutes and various other Acts.[1] After an extensive hearing, the District Court found

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[1] The complaint charged the Navy with violations of the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.* (1976 ed. and Supp. IV); the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. IV); the Clean Air Act Amendments of 1977, 42 U. S. C. § 7401 *et seq.* (1976 ed., Supp. IV); the Noise Control Act of 1972, 42 U. S. C. § 4901 *et seq.;* the Resource Conservation and Recovery Act of 1976, 42 U. S. C. § 6901 *et seq.;* the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.;* the National Historic Preservation Act of 1966, 16 U. S. C. § 470 *et seq.;* the Coastal Zone Management Act of 1972, 16 U. S. C. § 1451 *et seq.;* the Marine Mammal Protection Act of 1972, 16 U. S. C. § 1361 *et seq.* (1976 ed. and Supp. IV); the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 401 *et seq.;* various Amendments

that under the explicit terms of the Act, the Navy had violated the Act by discharging ordnance into the waters surrounding the island without first obtaining a permit from the Environmental Protection Agency (EPA).[2] *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646 (PR 1979).

Under the FWPCA, the "discharge of any pollutant" requires a National Pollutant Discharge Elimination System (NPDES) permit. 33 U. S. C. §§ 1311(a), 1323(a) (1976 ed. and Supp. IV). The term "discharge of any pollutant" is defined as

> "any addition of any *pollutant* to the waters of the contiguous zone or the ocean from any *point source* other than a vessel or other floating craft." 33 U. S. C. § 1362(12) (emphasis added).

Pollutant, in turn, means

> "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, *munitions*, chemical wastes, biological materials, radioactive materials, heat, wrecked

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to the United States Constitution, congressional and Presidential directives concerning cessation of Navy operations on the neighboring island of Culebra, and Puerto Rico law.

[2] The District Court also found that the Navy had violated the National Environmental Policy Act (NEPA) by failing to file an Environmental Impact Statement (EIS) or a reviewable environmental record to support a decision not to file such a statement, *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 705 (PR 1979), and had failed to nominate historic sites to the National Register as required under the National Historic Preservation Act. *Ibid.* It ordered the Navy to nominate such sites and to file an EIS. *Id.*, at 708. The Court of Appeals remanded issues under the Endangered Species Act and the National Historic Preservation Act to the District Court for further consideration. *Romero-Barcelo* v. *Brown*, 643 F. 2d 835, 858, 860, 862 (1981). It vacated the order involving NEPA and remanded with orders to dismiss because the Navy had filed an EIS in the interim. *Id.*, at 862. Only the issue involving the FWPCA is before this Court.

> or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." 33 U. S. C. § 1362(6) (emphasis added).

And, under the Act, a "point source" is

> "any discernible, confined and discrete *conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or *vessel* or other *floating craft from which pollutants are or may be discharged*. . . ." 33 U. S. C. § 1362(14) (1976 ed., Supp. IV) (emphasis added).

Under the FWPCA, the EPA may not issue an NPDES permit without state certification that the permit conforms to state water quality standards. A State has the authority to deny certification of the permit application or attach conditions to the final permit. 33 U. S. C. § 1341.

As the District Court construed the FWPCA, the release of ordnance from aircraft or from ships into navigable waters is a discharge of pollutants, even though the EPA, which administers the Act, had not promulgated any regulations setting effluent levels or providing for the issuance of an NPDES permit for this category of pollutants.[3] Recognizing that violations of the Act "must be cured," 478 F. Supp., at 707, the District Court ordered the Navy to apply for an NPDES permit. It refused, however, to enjoin Navy operations pend-

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[3] The EPA issues effluent limitations for categories and classes of point sources. See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977); 40 CFR part 400 *et seq.* (1981). In a situation somewhat similar to that before us, the Secretary of the Interior has, under the Migratory Bird Treaty Act, 16 U. S. C. § 703 *et seq.* (1976 ed. and Supp. IV), regulated deposit of shot into water by duck hunters who miss their targets. *National Rifle Assn.* v. *Kleppe*, 425 F. Supp. 1101 (DC 1976), affirmance order, 187 U. S. App. D. C. 240, 571 F. 2d 674 (1978).

ing consideration of the permit application. It explained that the Navy's "technical violations" were not causing any "appreciable harm" to the environment.[4] *Id.*, at 706. Moreover, because of the importance of the island as a training center, "the granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation."[5] *Id.*, at 707. The District Court concluded that an injunction was not necessary to ensure suitably prompt compliance by the Navy. To support this conclusion, it emphasized an equity court's traditionally broad discretion in deciding appropriate relief and quoted from the classic description of injunctive relief in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944): "The historic injunctive process was designed to deter, not to punish."

The Court of Appeals for the First Circuit vacated the District Court's order and remanded with instructions that the court order the Navy to cease the violation until it obtained a permit. 643 F. 2d 835 (1981). Relying on *TVA* v. *Hill*, 437 U. S. 153 (1978), in which this Court held that an imminent violation of the Endangered Species Act required injunctive relief, the Court of Appeals concluded that the District Court

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[4] The District Court wrote:

"In fact, if anything, these waters are as aesthetically acceptable as any to be found anywhere, and Plaintiff's witnesses unanimously testified as to their being the best fishing grounds in Vieques." 478 F. Supp., at 667. "[I]f the truth be said, the control of large areas of Vieques [by the Navy] probably constitutes a positive factor in its over all ecology. The very fact that there are in the Navy zones modest numbers of various marine species which are practically non-existent in the civilian sector of Vieques or in the main island of Puerto Rico, is an eloquent example of *res ipsa loquitur*." *Id.*, at 682 (footnote omitted).

[5] The District Court also took into consideration the delay by plaintiffs in asserting their claims. It concluded that although laches should not totally bar the claims, it did strongly militate against the granting of injunctive relief. *Id.*, at 707.

erred in undertaking a traditional balancing of the parties' competing interests. "Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit." 643 F. 2d, at 861. The court suggested that if the order would interfere significantly with military preparedness, the Navy should request that the President grant it an exemption from the requirements in the interest of national security."[6]

Because this case posed an important question regarding the power of the federal courts to grant or withhold equitable relief for violations of the FWPCA, we granted certiorari, 454 U. S. 813 (1981). We now reverse.

II

It goes without saying that an injunction is an equitable remedy. It "is not a remedy which issues as of course," *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 337–338 (1933), or "to restrain an act the injurious consequences of which are merely trifling." *Consolidated Canal*

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[6] Title 33 U. S. C. § 1323(a) (1976 ed., Supp. IV) provides, in relevant part:

"The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . . No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

Co. v. *Mesa Canal Co.*, 177 U. S. 296, 302 (1900). An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh* v. *Looney*, 248 U. S. 453, 456 (1919). The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 61 (1975); *Sampson* v. *Murray*, 415 U. S. 61, 88 (1974); *Beacon Theaters, Inc.* v. *Westover*, 359 U. S. 500, 506–507 (1959); *Hecht Co.* v. *Bowles*, *supra*, at 329.

Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a "nice adjustment and reconciliation" between the competing claims, *Hecht Co.* v. *Bowles*, *supra*, at 329. In such cases, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus* v. *United States*, 321 U. S. 414, 440 (1944). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co.* v. *Bowles*, *supra*, at 329.

In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 500 (1941). Thus, the Court has noted that "[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," and that "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the

plaintiff." *Yakus* v. *United States*, *supra*, at 440 (footnote omitted). The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. *TVA* v. *Hill*, 437 U. S., at 193; *Hecht Co.* v. *Bowles*, 321 U. S., at 329.

These commonplace considerations applicable to cases in which injunctions are sought in the federal courts reflect a "practice with a background of several hundred years of history," *Hecht Co.* v. *Bowles*, *supra*, at 329, a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles. *Hecht Co.* v. *Bowles*, *supra*, at 329. As the Court said in *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946):

> "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann*, 10 Pet. 497, 503 . . . ."

In *TVA* v. *Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity. There, we thought that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" than that before us. 437 U. S., at 173. The statute involved, the Endangered Species Act, 87 Stat. 884, 16 U. S. C. § 1531 *et seq.*, required the District Court to enjoin completion of the Tellico Dam in order to preserve the snail

darter, a species of perch. The purpose and language of the statute under consideration in *Hill*, not the bare fact of a statutory violation, compelled that conclusion. Section 7 of the Act, 16 U. S. C. § 1536, requires federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [any] endangered species . . . or result in the destruction or modification of habitat of such species which is determined . . . to be critical." The statute thus contains a flat ban on the destruction of critical habitats.

It was conceded in *Hill* that completion of the dam would eliminate an endangered species by destroying its critical habitat. Refusal to enjoin the action would have ignored the "explicit provisions of the Endangered Species Act." 437 U. S., at 173. Congress, it appeared to us, had chosen the snail darter over the dam. The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.

That is not the case here. An injunction is not the only means of ensuring compliance. The FWPCA itself, for example, provides for fines and criminal penalties. 33 U. S. C. §§ 1319(c) and (d). Respondents suggest that failure to enjoin the Navy will undermine the integrity of the permit process by allowing the statutory violation to continue. The integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA.[7] As Congress explained, the objective of the FWPCA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a).

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[7] The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies. *E. g., Spur Industries, Inc.* v. *Del E. Webb Development Co.*, 108 Ariz. 178, 494 P. 2d 700 (1972); *Boomer* v. *Atlantic Cement Co.*, 26 N. Y. 2d 219, 257 N. E. 2d 870 (1970).

This purpose is to be achieved by compliance with the Act, including compliance with the permit requirements.[8] Here, however, the discharge of ordnance had not polluted the waters, and, although the District Court declined to enjoin the discharges, it neither ignored the statutory violation nor undercut the purpose and function of the permit system. The court ordered the Navy to apply for a permit.[9] It temporarily, not permanently, allowed the Navy to continue its activities without a permit.

In *Hill*, we also noted that none of the limited "hardship exemptions" of the Endangered Species Act would "even remotely apply to the Tellico Project." 437 U. S., at 188. The prohibition of the FWPCA against discharge of pollutants, in contrast, can be overcome by the very permit the Navy was ordered to seek.[10] The Senate Report to the 1972

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[8] Federal agencies must comply with the water pollution abatement requirements "in the same manner, and to the same extent as any nongovernmental entity . . . ." 33 U. S. C. § 1323(a) (1976 ed., Supp. IV). S. Rep. No. 92–414, p. 80 (1971), pointed to "[f]ederal agencies such as the Department of Defense" for failing to abate pollution.

[9] The Navy applied for an NPDES permit in December 1979. In May 1981, the EPA issued a draft NPDES permit and a notice of intent to issue that permit. The FWPCA requires a certification of compliance with state water quality standards before the EPA may issue an NPDES permit. 33 U. S. C. § 1341(a). The Environmental Quality Board of the Commonwealth of Puerto Rico denied the Navy a water quality certificate in connection with this application for an NPDES in June 1981. In February 1982, the Environmental Quality Board denied the Navy's reconsideration request and announced it was adhering to its original ruling. In a letter dated April 9, 1982, the Solicitor General informed the Clerk of the Court that the Navy has filed an action challenging the denial of the water quality certificate. *United States* v. *Commonwealth of Puerto Rico*, Civ. Action No. 82–0726 (Dist. Ct. PR).

[10] As we have explained, the 1972 Amendments to the FWPCA established the NPDES as

"a means of achieving and enforcing the effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves

Amendments explains that the permit program would be enacted because "the Committee recognizes the impracticality of any effort to halt all pollution immediately." S. Rep. No. 92–414, p. 43 (1971). That the scheme as a whole contemplates the exercise of discretion and balancing of equities militates against the conclusion that Congress intended to deny courts their traditional equitable discretion in enforcing the statute.

Other aspects of the statutory scheme also suggest that Congress did not intend to deny courts the discretion to rely on remedies other than an immediate prohibitory injunction. Although the ultimate objective of the FWPCA is to eliminate all discharges of pollutants into the navigable waters by 1985, the statute sets forth a scheme of phased compliance. As enacted, it called for the achievement of the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. 33 U. S. C. § 1311(b). This scheme of phased compliance further suggests that this is a statute in which Congress envisioned, rather than curtailed, the exercise of discretion.[11]

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to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. . . . With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. . . . In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205 (1976) (footnote omitted).

[11] We have, however, held some standards related to phased compliance to be absolute. See *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64 (1980). In *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981), we concluded that the federal common law of nuisance was pre-empted by the FWPCA and other similar

The FWPCA directs the Administrator of the EPA to seek an injunction to restrain immediately discharges of pollutants he finds to be presenting "an imminent and substantial endangerment to the health of persons or to the welfare of persons." 33 U. S. C. § 1364(a) (1976 ed., Supp. IV). This rule of immediate cessation, however, is limited to the indicated class of violations. For other kinds of violations, the FWPCA authorizes the Administrator of the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order . . . ." 33 U. S. C. § 1319(b).[12] The provision makes clear that Congress did not

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Acts: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.*, at 15; see *Milwaukee* v. *Illinois*, 451 U. S. 304 (1981). But, as we have also observed in construing this Act: "The question . . . is not what a court thinks is generally appropriate to the regulatory process, it is what Congress intended . . . ." *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S., at 138. Here we do not read the FWPCA as intending to abolish the courts' equitable discretion in ordering remedies.

[12] The statute at issue in *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944), contained language very similar to that in § 1319(b). It directed the Price Administrator to seek "a permanent or temporary injunction, restraining order, or other order" to halt violations. *Id.*, at 322. The Court determined that such statutory language did not require the court to issue an injunction even when the Administrator had sued for injunctive relief. In *Hecht Co.*, the court's equitable discretion overrode that of the Administrator. If a court can properly refuse an injunction in the circumstances of *Hecht Co.*, the exercise of its discretion seems clearly appropriate in a case such as this, where the EPA Administrator was not a party and had not yet expressed his judgment. The action of the District Court permitted it to obtain the benefit of the EPA's recommendation before deciding to enjoin the discharge.

In *Hecht Co.*, unlike here, the violations had ceased by the time the injunction was sought. The Court, however, explained that "the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction." *Id.*, at 327. Thus, contrary to the dissent's characterization, *post*, at 327–328, the Court did not base its decision on the fact that violations had ceased.

anticipate that all discharges would be immediately enjoined. Consistent with this view, the administrative practice has not been to request immediate cessation orders. "Rather, enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act." Brief for Petitioners 17. See *Milwaukee* v. *Illinois*, 451 U. S. 304, 320–322 (1981). Here, again, the statutory scheme contemplates equitable consideration.

Both the Court of Appeals and respondents attach particular weight to the provision of the FWPCA permitting the President to exempt federal facilities from compliance with the permit requirements. 33 U. S. C. § 1323(a) (1976 ed., Supp. IV).[13] They suggest that this provision indicates congressional intent to limit the court's discretion. According to respondents, the exemption provision evidences Congress' determination that only paramount national interests justify failure to comply and that only the President should make this judgment.

We do not construe the provision so broadly. We read the FWPCA as permitting the exercise of a court's equitable discretion, whether the source of pollution is a private party or a federal agency, to order relief that will achieve *compliance* with the Act. The exemption serves a different and complementary purpose, that of permitting *noncompliance* by federal agencies in extraordinary circumstances. Executive Order No. 12088, 3 CFR 243 (1979), which implements the exemption authority, requires the federal agency requesting such an exemption to certify that it cannot meet the applicable pollution standards. "Exemptions are granted by the President only if the conflict between pollution control standards and crucial federal activities cannot be resolved through the development of a practicable remedial program." Brief for Petitioners 26, n. 30.

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[13] See n. 6, *supra*.

Should the Navy receive a permit here, there would be no need to invoke the machinery of the Presidential exemption. If not, this course remains open. The exemption provision would enable the President, believing paramount national interests so require, to authorize discharges which the District Court has enjoined. Reading the statute to permit the exercise of a court's equitable discretion in no way eliminates the role of the exemption provision in the statutory scheme.

Like the language and structure of the Act, the legislative history does not suggest that Congress intended to deny courts their traditional equitable discretion. Congress passed the 1972 Amendments because it recognized that "the national effort to abate and control water pollution has been inadequate in every vital aspect." S. Rep. No. 92–414, p. 7 (1971). The past failings included enforcement efforts under the Rivers and Harbors Appropriation Act of 1899 (Refuse Act), 33 U. S. C. § 401 *et seq.* The "major purpose" of the 1972 Amendments was "to establish a comprehensive long-range policy for the elimination of water pollution." S. Rep. No. 92–414, *supra,* at 95. The permit system was the key to that policy. "The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *Milwaukee* v. *Illinois, supra,* at 310–311; see generally *EPA* v. *California ex rel. State Water Resources Control Board,* 426 U. S. 200 (1976). Nonetheless, "[i]n writing the enforcement procedures involving the Federal Government the Committee drew extensively . . . upon the existing enforcement provisions of the Refuse Act of 1899." S. Rep. No. 92–414, *supra,* at 63. Violations of the Refuse Act have not automatically led courts to issue injunctions. See *Reserve Mining Co.* v. *EPA,* 514 F. 2d 492, 535–538 (CA8 1975); *United States* v. *Rohm & Haas Co.,* 500 F. 2d 167, 175 (CA5 1974), cert. denied, 420 U. S. 962 (1975); *United States* v. *Kennebec Log Driving Co.,* 491 F. 2d 562, 571 (CA1 1973), on remand, 399 F. Supp. 754, 759–760 (Me. 1975).

III

This Court explained in *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944), that a major departure from the long tradition of equity practice should not be lightly implied. As we did there, we construe the statute at issue "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." *Id.*, at 330. We do not read the FWPCA as foreclosing completely the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.

The exercise of equitable discretion, which must include the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue at this stage in the proceedings. The District Court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. Should it become clear that no permit will be issued and that compliance with the FWPCA will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.

Because Congress, in enacting the FWPCA, has not foreclosed the exercise of equitable discretion, the proper standard for appellate review is whether the District Court abused its discretion in denying an immediate cessation order while the Navy applied for a permit. We reverse and remand to the Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

I join the opinion of the Court. In my view, however, the record clearly establishes that the District Court in this case did not abuse its discretion by refusing to enjoin the immediate cessation of all discharges. Finding that the District Court acted well within the equitable discretion left to it under the Federal Water Pollution Control Act (FWPCA), I would remand the case to the Court of Appeals with instructions that the decision of the District Court should be affirmed.*

The propriety of this disposition is emphasized by the dissenting opinion of JUSTICE STEVENS, *post*, p. 322. I agree with his view that Congress may limit a court's equitable discretion in granting remedies under a particular statute, and that some statutes may constrain discretion more narrowly than others. I stand with the Court, however, in finding no indication that Congress intended to limit the court's equitable discretion under the FWPCA in the manner suggested by JUSTICE STEVENS. As the Court's remand order might be thought to leave open whether the District Court in this case acted within its range of permissible discretion under the

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*The District Court's thorough opinion demonstrates the reasonableness of its decision in light of all pertinent factors, including of course the evident purpose of the statute. The District Court concluded as matters of fact that the Navy's violations have caused no "appreciable harm," *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 706 (PR 1979), and indeed that the Navy's control of the area "probably constitutes a positive factor in its over all ecology," *id.*, at 682. Moreover, the District Court found it "abundantly clear from the evidence in the record . . . that the training that takes place in Vieques is vital to the defense of the interests of the United States." *Id.*, at 707. Balancing the equities as they then stood, the District Court declined to order an *immediate* cessation of all violations but nonetheless issued affirmative orders aimed at securing compliance with the law. See *id.*, at 708. As I read its opinion, the District Court did not foreclose the possibility of ordering further relief that might become appropriate under changed circumstances at a later date.

FWPCA, it would promote both clarity and economy for us to hold now that the District Court did not abuse its discretion and that its decision should be reinstated.

JUSTICE STEVENS, dissenting.

The appropriate remedy for the violation of a federal statute depends primarily on the terms of the statute and the character of the violation. Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion.[1] Because the Federal Water Pollution Control Act does not specifically command the federal courts to issue an injunction every time an unpermitted discharge of a pollutant occurs, the Court today is obviously correct in asserting that such injunctions should not issue "automatically" or "mechanically" in every case. It is nevertheless equally clear that by enacting the 1972 Amendments to the FWPCA Congress channeled the discretion of the federal judiciary much more narrowly than the Court's rather glib opinion suggests. Indeed, although there may well be situations in which the failure to obtain an NPDES permit would not require immediate cessation of all discharges, I am convinced that Congress has circumscribed the district courts' discretion on the question of remedy so narrowly that a general rule of immediate cessation must be applied in all but a narrow category of cases. The Court of Appeals was quite correct in holding that this case does not present the kind of exceptional situation that justifies a departure from the general rule.

The Court's mischaracterization of the Court of Appeals' holding is the premise for its essay on equitable discretion. This essay is analytically flawed because it overlooks the limitations on equitable discretion that apply in cases in which public interests are implicated and the defendant's violation

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[1] Cf. *Steelworkers* v. *United States*, 361 U. S. 39, 54–59 (Frankfurter and Harlan, JJ., concurring).

of the law is ongoing. Of greater importance, the Court's opinion grants an open-ended license to federal judges to carve gaping holes in a reticulated statutory scheme designed by Congress to protect a precious natural resource from the consequences of ad hoc judgments about specific discharges of pollutants.

I

Contrary to the impression created by the Court's opinion, the Court of Appeals did not hold that the District Court was under an absolute duty to require compliance with the FWPCA "under any and all circumstances," *ante*, at 313, or that it was "mechanically obligated to grant an injunction for every violation of law," *ibid.* The only "absolute duty" that the Court of Appeals mentioned was the Navy's duty to obtain a permit before discharging pollutants into the waters off Vieques Island.[2] In light of the Court's opinion the point is worth repeating—the Navy, like anyone else,[3] must obey the law.

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[2] "Whether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the Environmental Protection Agency, upon review of the evidence, has granted a permit." *Romero-Barcelo* v. *Brown*, 643 F. 2d 835, 861 (CA1 1981).

This statement by the Court of Appeals is entirely consistent with the comments in the Senate Report on the legislation that "[e]nforcement of violations . . . should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay," and that "the issue before the courts would be a factual one of whether there had been compliance." S. Rep. No. 92–414, pp. 64, 80 (1971).

[3] The statute expressly subjects federal agencies to all laws "respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U. S. C. § 1323(a) (1976 ed., Supp. IV). Indeed, Congress required federal agencies "to provide national leadership in the control of water pollution," S. Rep. No. 92–414, *supra*, at 67, and to "be a model for the Nation," H. R. Rep. No. 92–911, p. 118 (1972).

The Court of Appeals did not hold that the District Court had no discretion in formulating remedies for statutory violations. It merely "conclude[d] that the district court erred in undertaking a traditional balancing of the parties' competing interests." *Romero-Barcelo* v. *Brown*, 643 F. 2d 835, 861 (CA1 1981). The District Court was not free to disregard the "congressional ordering of priorities" and "the judiciary's 'responsibility to protect the integrity of the . . . process mandated by Congress.'" *Ibid.* (quoting *Jones* v. *Lynn*, 477 F. 2d 885, 892 (CA1 1973)). The Court of Appeals distinguished a statutory violation that could be deemed merely "technical" from the Navy's "[utter disregard of] the statutory mandate." 643 F. 2d, at 861–862. It then pointed out that an order prohibiting any discharge of ordnance into the coastal waters off Vieques until an NPDES permit was obtained would not significantly affect the Navy's training operations because most, if not all, of the Navy's targets were land-based. *Id.*, at 862, n. 55. Finally, it noted that the statute authorized the Navy to obtain an exemption from the President if an injunction would have a significant effect on national security. *Id.*, at 862; see 33 U. S. C. § 1323(a) (1976 ed., Supp. IV).

Under these circumstances—the statutory violation is blatant and not merely technical, and the Navy's predicament was foreseen and accommodated by Congress—the Court of Appeals essentially held that the District Court retained no discretion to deny an injunction. The discretion exercised by the District Court in this case was wholly at odds with the intent of Congress in enacting the FWPCA. In essence, the District Court's remedy was a judicial permit exempting the Navy's operations in Vieques from the statute until such time as it could obtain a permit from the Environmental Protection Agency or a statutory exemption from the President. The two principal bases for the temporary judicial permit were matters that Congress did not commit to judicial discretion. First, the District Court was persuaded that the pollu-

tion was not harming the quality of the coastal waters, see *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 706–707 (PR 1979); and second, the court was concerned that compliance with the Act might adversely affect national security, see *id.*, at 707–708. The Court of Appeals correctly noted that the first consideration is the business of the EPA[4] and the second is the business of the President.[5]

The Court unfairly uses the Court of Appeals' opinion in this case as a springboard for a lecture on the principles of equitable remedies. The Court of Appeals' reasoning was correct in all respects. It recognized that the statute categorically prohibits discharges of pollutants without a permit. Unlike the Court, see *ante*, at 314–315, it recognized that the requested injunction was the only remedy that would bring the Navy into compliance with the statute on Congress' timetable.[6] It then demonstrated that none of the reasons of-

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[4] "Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution control as being 'sporadic' and 'ad hoc,' S. Rep. No. 92–414, p. 95 (1971), 2 Leg. Hist. 1511, apt characterizations of any judicial approach applying federal common law, see *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 319 (1955)." *Milwaukee* v. *Illinois*, 451 U. S. 304, 325.

[5] In my opinion the national security considerations that were persuasive to the District Court are not matters that are suitable for judicial evaluation. Congress has wisely given the President virtually unlimited authority to exempt the military from the statute on national defense grounds. If those grounds justify an exemption in this case, the Navy clearly should have obtained it from its Commander in Chief, not from a judge unlearned in such matters. This Court, however, makes the curious argument that the Presidential exemption was intended to permit *noncompliance* with the statute and therefore merely complements the equitable discretion of a district court also to authorize noncompliance. *Ante*, at 318–319.

[6] The District Court ordered the Navy to file for an NPDES permit "'with all deliberate speed.'" *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646, 708 (PR 1979) (quoting *Brown* v. *Board of Education*, 349 U. S. 294, 301).

fered by the District Court for refusing injunctive relief was consistent with the statute or was compelling under the circumstances. The position of the Court of Appeals in effect was that the federal courts' equitable discretion is constrained by a strong presumption in favor of enforcing the law as Congress has written it. By reversing, the Court casts doubt on the validity of that position. This doubt is especially dangerous in the environmental area, where the temptations to delay compliance are already substantial.[7]

II

Our cases concerning equitable remedies have repeatedly identified two critical distinctions that the Court simply ignores today. The first is the distinction between cases in which only private interests are involved and those in which a requested injunction will implicate a public interest. Second, within the category of public interest cases, those cases in which there is no danger that a past violation of law will recur have always been treated differently from those in which an existing violation is certain to continue.

Yakus v. *United States*, 321 U. S. 414, illustrates the first distinction. The Court there held that Congress constitutionally could preclude a private party from obtaining an injunction against enforcement of federal price control regulations pending an adjudication of their validity. In any balancing process, the Court explained, special deference must be given to the public interest:

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[7] It is ironic that the Court comes to the aid of the Navy even though Congress authorized an executive exemption for federal (particularly military) operations but no analogous exemption for important private activities, and even though Congress intended federal agencies to assume a leadership role in the water pollution control effort. To paraphrase the Senate Report, the Federal Government cannot expect private industry to obey the law by ceasing discharges of pollutants until a permit is obtained if the Federal Government is not willing to obey the same law or at least invoke a statutory exemption. See S. Rep. No. 92–414, p. 67 (1971).

> "Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. . . .
>
> "But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Id.*, at 440 (footnote omitted).

In that case, the public interest, reflected in an Act of Congress, was in opposition to the availability of injunctive relief. The Court stated, however, that the public interest factor would have the same special weight if it favored the granting of an injunction:

> "This is but another application of the principle, declared in *Virginia Ry. Co.* v. *System Federation*, 300 U. S. 515, 552, that 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Id.*, at 441.

Hecht Co. v. *Bowles*, 321 U. S. 321, which the Court repeatedly cites, did involve an attempt to obtain an injunction against future violations of a federal statute. That case fell into the category of cases in which a past violation of law had been found and the question was whether an injunction should issue to prevent future violations. Cf. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633–636; *United States* v. *Oregon Medical Society*, 343 U. S. 326, 332–334. Because the record established that the past violations were inadvert-

ent, that they had been promptly terminated, and that the defendant had taken vigorous and adequate steps to prevent any recurrence, the Court held that the District Court had discretion to deny injunctive relief. But in reaching that conclusion, the Court made it clear that judicial discretion "must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." 321 U. S., at 331. Indeed, the Court emphasized that any exercise of discretion "should reflect an acute awareness of the Congressional admonition" in the statute at issue. *Ibid.*

In contrast to the decision in *Hecht*, today the Court pays mere lipservice to the statutory mandate and attaches no weight to the fact that the Navy's violation of law has not been corrected.[8] The Court cites no precedent for its holding that an ongoing deliberate violation of a federal statute should be treated like any garden-variety private nuisance action in which the chancellor has the widest discretion in fashioning relief.[9]

Our prior cases involving the appropriate remedy for an ongoing violation of federal law establish a much more stringent test than the Court applies today. Thus, in *United States* v. *City and County of San Francisco*, 310 U. S. 16, a case in which the Government claimed that the city's disposition of electric power was prohibited by an Act of Congress, the Court held that "this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued." *Id.*, at 30. "The equitable doctrines relied on do not militate against the capacity of a court of equity as a

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[8] The Navy has been in continuous violation of the statute during the entire decade since its enactment.

[9] Indeed, I am unaware of any case in which the Court has permitted a statutory violation to continue.

proper forum in which to make a declared policy of Congress effective." *Id.*, at 31. An injunction to prohibit continued violation of that policy "is both appropriate and necessary." *Ibid.*[10]

In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, the Court plainly stated that an equitable remedy for the violation of a federal statute was neither automatic on the one hand, nor simply a matter of balancing the equities on the other.[11] *Albemarle* holds that the district court's remedial

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[10] In the steel seizure case, Justice Frankfurter rejected "the Government's argument that overriding public interest prevents the issuance of the injunction despite the illegality of the seizure":

"'Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 609–610 (concurring opinion).

[11] "The petitoners contend that the statutory scheme provides no guidance, beyond indicating that backpay awards are within the District Court's discretion. We disagree. It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power 'in light of the large objectives of the Act,' *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331 (1944). That the court's discretion is equitable in nature, see *Curtis* v. *Loether*, 415 U. S. 189, 197 (1974), hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288, 292 (1960), this Court held, in the face of a silent statute, that

decision must be measured against the purposes that inform the Act of Congress that has been violated. *Id.*, at 417.

III

The Court's discussion of the FWPCA creates the impression that Congress did not intend any significant change in the enforcement provisions of the Rivers and Harbors Appropriation Act of 1899. See *ante*, at 319. The Court goes so far as to suggest that the FWPCA is little more than a codification of the common law of nuisance.[12] The contrast between this casual attitude toward the FWPCA and the Court's writing in *Milwaukee* v. *Illinois*, 451 U. S. 304, is stark. In that case the Court refused to allow federal judges to supplement the statutory enforcement scheme by enjoining a nuisance, whereas in this case the question is whether a federal judge may create a loophole in the scheme by refusing

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district courts enjoyed the 'historic power of equity' to award lost wages to workmen unlawfully discriminated against under § 17 of the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U. S. C. § 217 (1958 ed.). The Court simultaneously noted that 'the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement.' 361 U. S., at 296.

"It is true that '[e]quity eschews mechanical rules . . . [and] depends on flexibility.' *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Moragne* v. *States Marine Lines*, 398 U. S. 375, 405 (1970)." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415–417 (footnotes omitted).

[12] "The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies. *E. g.*, *Spur Industries, Inc.* v. *Del E. Webb Development Co.*, 108 Ariz. 178, 494 P. 2d 700 (1972); *Boomer* v. *Atlantic Cement Co.*, 26 N. Y. 2d 219, 257 N. E. 2d 870 (1970)." *Ante*, at 314, n. 7.

to enjoin a violation. Why a different standard should be used to define the scope of judicial discretion in these two situations is not explained.

In *Milwaukee* v. *Illinois* the Court described the FWPCA in these terms:

> "The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them." *Id.*, at 326.

Ironically, today the Court holds that federal district courts may in effect "write their own ticket" under the guise of federal common law *before* permits have been issued.

The Court distinguishes *TVA* v. *Hill*, 437 U. S. 153, on the ground that the Endangered Species Act contained a "flat ban" on the destruction of critical habitats. *Ante*, at 314. But the statute involved in this case also contains a flat ban against discharges of pollutants into coastal waters without a permit.[13] Surely the congressional directive to protect the

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[13] Indeed, this proposition has been consistently, repeatedly, and unequivocally reaffirmed by this Court:

"The discharge of 'pollutants' into water is unlawful without a permit issued by the Administrator of the EPA or, if a State has developed a program that complies with the FWPCA, by the State." *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 7.

"Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205.

"We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the

Nation's waters from gradual but possibly irreversible contamination is no less clear than the command to protect the snail darter.[14] To assume that Congress has placed a greater value on the protection of vanishing forms of animal life than on the protection of our water resources is to ignore the text, the legislative history,[15] and the previously consistent interpretation of this statute.[16]

It is true that in *TVA* v. *Hill* there was no room for compromise between the federal project and the statutory objective to preserve an endangered species; either the snail

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field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee* v. *Illinois*, 451 U. S., at 317.

In *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64, the Court read the "plain language of the statute," *id.*, at 73, to require private firms "either to conform to BPT standards or to cease production." *Id.*, at 76.

[14] "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee* v. *Illinois*, *supra*, at 318 (emphasis in original; footnote omitted).

[15] The Senate Report emphasized that "if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct." S. Rep. No. 92-414, p. 65 (1971).

[16] "The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois* v. *Milwaukee*[, 406 U. S. 91,] was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee* v. *Illinois*, *supra*, at 319.

Today's holding that a federal court has inherent power to grant exemptions from the statutory permit requirement presents a dramatic contrast with the holding in *Milwaukee* v. *Illinois:*

"Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." 451 U. S., at 320.

darter or the completion of the Tellico Dam had to be sacrificed. In the FWPCA, the Court tells us, the congressional objective is to protect the integrity of the Nation's waters, not to protect the integrity of the permit process. *Ante*, at 314. Therefore, the Court continues, *ante*, at 315, a federal court may compromise the process chosen by Congress to protect our waters as long as the court is content that the waters are not actually being harmed by the particular discharge of pollutants.

On analysis, however, this reasoning does not distinguish the two cases. Courts are in no better position to decide whether the permit process is necessary to achieve the objectives of the FWPCA than they are to decide whether the destruction of the snail darter is an acceptable cost of completing the Tellico Dam. Congress has made both decisions, and there is nothing in the respective statutes or legislative histories to suggest that Congress invited the federal courts to second-guess the former decision any more than the latter.

A disregard of the respective roles of the three branches of government also tarnishes the Court's other principal argument in favor of expansive equitable discretion in this area.[17] The Court points out that Congress intended to halt water pollution gradually, not immediately, and that "the scheme as a whole contemplates the exercise of discretion and balancing of equities." *Ante*, at 316. In the Court's words, Congress enacted a "scheme of phased compliance." *Ibid.* Equitable discretion in enforcing the statute, the Court states, is therefore consistent with the statutory scheme.

The Court's sophistry is premised on a gross misunderstanding of the statutory scheme. Naturally, in 1972 Congress did not expect dischargers to end pollution immediately.[18] Rather, it entrusted to expert administrative

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[17] See also n. 5, *supra*.

[18] "The Committee believes that the no-discharge declaration in Section 13 of the 1899 Refuse Act is useful as an enforcement tool. Therefore, this

agencies the task of establishing timetables by which dischargers could reach that ultimate goal. These timetables are determined by the agencies and included in the NPDES permits; the conditions in the permits constitute the terms by which compliance with the statute is measured.[19] Quite obviously, then, the requirement that each discharger subject itself to the permit process is crucial to the operation of the "scheme of phased compliance." By requiring each discharger to obtain a permit *before* continuing its discharges of pollutants, Congress demonstrated an intolerance for delay in compliance with the statute. It is also obvious that the "exercise of discretion and balancing of equities" were tasks delegated by Congress to expert agencies, not to federal courts, yet the Court simply ignores the difference.

IV

The decision in *TVA* v. *Hill* did not depend on any peculiar or unique statutory language. Nor did it rest on any special interest in snail darters. The decision reflected a profound

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section [§ 301] declares the discharge of pollutants unlawful. The Committee believes it is important to clarify this point: No one has the right to pollute.

"But the Committee recognizes the impracticality of any effort to halt all pollution immediately. Therefore, this section provides an exception if the discharge meets the requirements of this section, Section 402, and others listed in the bill." S. Rep. No. 92–414, *supra*, at 43.

[19] "An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S., at 205 (citations omitted).

respect for the law and the proper allocation of lawmaking responsibilities in our Government.[20] There we refused to sit as a committee of review. Today the Court authorizes freethinking federal judges to do just that. Instead of requiring adherence to carefully integrated statutory procedures that assign to nonjudicial decisionmakers the responsibilities for evaluating potential harm to our water supply as well as potential harm to our national security, the Court unnecessarily and casually substitutes the chancellor's clumsy foot for the rule of law.

I respectfully dissent.

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[20] "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:

"'The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.' R. Bolt, A Man for All Seasons, Act I, p. 147 (Three Plays, Heinemann ed. 1967).

"We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *TVA* v. *Hill*, 437 U. S. 153, 194–195.

SOUTHERN PACIFIC TRANSPORTATION CO. *v.* COMMERCIAL METALS CO.

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

No. 81-622. Argued March 31, 1982—Decided April 27, 1982

Respondent, as consignor, shipped goods by rail to a third party under uniform straight bills of lading prescribed by the Interstate Commerce Commission (ICC). Each bill provided that the consignor was liable for freight charges unless it signed a statement in the bill that "[t]he carrier shall not make delivery of this shipment without payment of freight and all other lawful charges." Respondent failed to execute this "nonrecourse" clause in the bills of lading. Petitioner, a common carrier by rail, delivered the first shipment to the consignee without collecting the freight charges in advance and without investigating the consignee's credit standing. Petitioner delivered the other shipments only after receiving checks from the consignee, but the checks were dishonored by the consignee's bank for insufficient funds. After unsuccessfully attempting to collect the unpaid freight charges from the consignee, petitioner requested that respondent pay the charges and, when payment was not made, filed suit against respondent in Federal District Court. The court ruled that although petitioner had established a prima facie case for the recovery of the freight charges, respondent had established a valid equitable defense by showing that petitioner had failed to comply with the ICC's credit regulations. These regulations, promulgated pursuant to § 3(2) of the Interstate Commerce Act, did not allow for delivery of freight on credit for more than five days. The Court of Appeals affirmed.

Held: Petitioner's violation of the credit regulations does not bar its collection of lawful freight charges from respondent. Pp. 342-352.

(a) Petitioner established a prima facie case of respondent's liability for the freight charges by proving that respondent failed to sign the nonrecourse clause in the bills of lading. The bill of lading is the basic transportation contract between the shipper-consignor and the carrier, and, unless the bill provides to the contrary, the consignor remains primarily liable for the freight charges. Thus, by failing to execute the nonrecourse provision, respondent continued to be primarily liable. Pp. 342-344.

(b) Petitioner's violation of the credit regulations did not provide respondent with an equitable affirmative defense to petitioner's prima facie

case. Neither § 3(2) of the Act nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge. Nor does either contain any words of affirmative defense to a freight charge action. The history of the regulations further indicates that this silence was not inadvertent—the intent of the rules was to protect carriers, not to penalize them. And public policy concerns disfavor judicial implication of affirmative defenses based on carrier violations of the credit regulations. The ICC has ample authority to police the credit practices of carriers, and thereby to deter improper practices, without the judicially created remedy of forfeiture of freight charges. Pp. 344–352.

641 F. 2d 235, reversed.

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

James H. Pipkin, Jr., argued the cause for petitioner. With him on the briefs were *Charles G. Cole*, *Michael R. Johnson*, and *Harold S. Lentz*.

David M. Sudbury argued the cause for respondent. With him on the brief were *Richard Gary Thomas* and *Robert L. Feldman*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a common carrier's violation of credit regulations issued by the Interstate Commerce Commission (ICC) bars the carrier's collection of a lawful freight charge from a shipper-consignor who, under the terms of the shipment's bill of lading, is primarily liable for the charge.

I

Petitioner Southern Pacific Transportation Company (SP) is a common carrier by rail. Respondent Commercial Metals Company (Metals), a Delaware corporation with principal

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*Briefs of *amici curiae* urging reversal were filed by *Nelson J. Cooney*, *Robert A. Hirsch*, *Alan J. Thiemann*, and *Kenneth E. Siegel* for the American Trucking Associations, Inc.; and by *Patricia A. Smith* for the Association of American Railroads.

Frederic L. Wood filed a brief for the National Industrial Traffic League as *amicus curiae* urging affirmance.

place of business in Dallas, Tex., is in the business of buying and selling steel goods. Petitioner instituted this action against respondent in the United States District Court for the Northern District of Texas to recover freight charges for three cars of steel cobble shipped by rail in 1974 from Detroit, Mich., to Alhambra, Cal.

Each of the three shipments was consigned by Metals to Penn Central Transportation Company, as initial carrier,[1] under the uniform straight bill of lading prescribed by the ICC. Each bill of lading included a "nonrecourse" clause that the consignor might sign. That clause reads: "Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."[2] In each instance, respondent Metals, as consignor, failed to execute this nonrecourse clause. Metals, however, already had received payment for the goods prior to shipment. Tr. of Oral Arg. 5, 6, 24–25; Brief for Respondent 21.

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[1] The shipments moved over the respective lines of the Penn Central, the St. Louis Southwestern Railway Company (an SP subsidiary), and the SP. Pursuant to an interline agreement, SP has paid the other two carriers their proportionate shares of the freight charges earned on the shipments.

[2] Section 7 of the Conditions of the Bill of Lading reads in pertinent part:

"The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. *The consignor shall be liable for the freight and all other lawful charges, except that* if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. . . . The term 'delivering carrier' means the line-haul carrier making ultimate delivery." (Emphasis added.)

The first of the three cars was tendered to Penn Central at Detroit on April 11, 1974, for transportation to Carco Steel Corporation (Carco), as consignee, in Alhambra. SP released the car to Carco on April 25 without collecting the freight charge in advance of delivery. On the same day, however, SP mailed to Carco a bill for $4,634.11, the correct amount of the charge. Carco was not a credit patron of SP and had never applied to SP for credit. SP never before had made a delivery to Carco. Nevertheless, the carrier made no investigation of Carco's credit standing.

The second and third shipments took place on May 2, 1974, when Metals consigned two other cars of cobble to Penn Central for transportation to Carco. SP delivered the cars to Carco on May 16. This time, SP released the cars only after receiving checks from Carco in the respective amounts of $5,761.79 and $2,383.67 for the freight charges. The larger amount was correct, but the smaller check should have been for $3,283.66 and thus was $900 short.[3] On May 20, SP issued freight bills in the correct amounts to Carco. The two checks were dishonored by Carco's bank for insufficient funds.

In August 1974, after efforts to collect the unpaid freight charges from Carco had proved fruitless, SP filed suit against Carco in a California state court. Attempts to serve the summons and complaint were unsuccessful.

On December 17, 1976, more than 30 months after the shipments, SP notified Metals of Carco's failure to pay the freight charges. SP requested that Metals, as the consignor who had failed to execute the nonrecourse provision in the bills of lading, pay the $13,679.56 total charges in satisfaction of its primary liability for the three shipments. This was the first notice to Metals that the freight charges had not been col-

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[3] SP suggests that the $900 difference was occasioned by a transposition of the initial digits. Brief for Petitioner 31, n. 21. No explanation of the one-cent variance is offered.

lected from Carco. When payment was not forthcoming, SP instituted the present action against Metals in federal court.

On this record, stipulated by the parties, the District Court ruled that SP had established a prima facie case for the recovery of the freight charges from Metals. It found the charges correct and in accord with applicable tariffs and that no part of those charges had been paid. App. 22. "Absent a showing of valid and affirmative defenses," then, Metals was liable to the carrier. *Id.*, at 23. The court rejected Metals' claim that the passage of time barred SP's recovery; although Metals lacked notice until December 1976 that the charges for the 1974 shipments had not been paid, the court noted that the applicable period of limitation was three years and that the carrier had been making efforts to locate Carco and to receive payment.

The District Court, however, went on to hold that Metals had established a valid equitable defense to SP's collection of the charges by showing that SP had failed to comply with the ICC's credit regulations promulgated pursuant to § 3(2) of the Interstate Commerce Act, 49 U. S. C. § 3(2).[4] App. 23. See 49 CFR pt. 1320 (1981). The court was not persuaded by SP's suggestion that Metals had failed to avail itself of its contractual opportunity for exoneration afforded by the non-recourse provision in the bills of lading. The court concluded: "The loss sustained by [SP] was due entirely to its own fault and negligence by failing to take the proper credit precautions when it delivered the goods to Carco. . . . I think that it is fundamentally unfair and inequitable for the defendant in this case to pay for the gross negligence of the plaintiff." App. 24. Accordingly, judgment was entered for Metals. *Id.*, at 26.

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[4] In 1978, the Interstate Commerce Act was revised and recodified by Pub. L. 95–473, 92 Stat. 1337, as 49 U. S. C. § 10101 *et seq.* (1976 ed., Supp. III). Because the transactions at issue in this case took place prior to 1978, we refer to the Act in its prior form unless otherwise specified.

The United States Court of Appeals for the Fifth Circuit affirmed that judgment. 641 F. 2d 235 (1981). Like the District Court, the Court of Appeals acknowledged that in the absence of a valid defense, Metals must be held liable to SP for the freight charges. *Id.*, at 236. The court felt, however, that § 3(2) of the Act, the payment-before-delivery provision, provided a barrier to the carrier's collection of the charges from the consignor.[5] The implementing regulation,[6] which modified the statutory mandate by allowing for delivery of freight on credit for up to five days, nevertheless was "quite strict." *Ibid.* Thus, Metals could assert as a defense the carrier's extension of credit to Carco without adequate precautions for a period in excess of that provided by the regulation. The court concluded: "Under these circumstances, we are compelled to hold that the carrier's failure to comply with the applicable ICC regulations is a defense, available to [Metals], in an action by [SP] for unpaid freight charges." *Id.*, at 239.

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[5] Section 3(2) reads:

"No carrier by railroad . . . shall deliver or relinquish possession at destination of any freight . . . shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination . . . ."

[6] The applicable regulation reads in pertinent part:

"The carrier, *upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part*, may relinquish possession of the freight in advance of the payment of the tariff charges thereon *and may extend credit* in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, *for a period of 4 days* (*or 5 days* where retention or possession of freight by the carrier until tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part." 49 CFR § 1320.1 (1981) (emphasis added).

Because of a conflict in the decided cases,[7] we granted certiorari. 454 U. S. 1052 (1981).

II

Since 1919, the ICC has prescribed a uniform bill of lading for use on all interstate domestic shipments of freight by rail. See *In re Bills of Lading*, 52 I. C. C. 671 (1919), modified, 64 I. C. C. 357 (1921), further modified, 66 I. C. C. 63 (1922).[8] The bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers. *Texas & Pacific R. Co.* v. *Leatherwood*, 250 U. S. 478, 481 (1919).

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[7] In agreement with the decision of the Fifth Circuit in the present case is *Brown Transportation Corp.* v. *Atcon, Inc.*, 144 Ga. App. 301, 241 S. E. 2d 15 (1977), cert. denied *sub nom. Brown Transport Corp.* v. *Atcon, Inc.*, 439 U. S. 1014 (1978) (with two Justices dissenting). The contrary result has been reached in other cases. See, *e. g.*, *Consolidated Freightways Corp.* v. *Pacheco Int'l Corp.*, 488 F. Supp. 68 (CD Cal. 1979), and *Pennsylvania R. Co.* v. *Marcelletti*, 256 Mich. 411, 240 N. W. 4 (1932).

There is disagreement, too, as to whether equitable defenses may be asserted in various other situations where regulated carriers seek to recover lawful tariff charges. Compare, *e. g.*, *Aero Mayflower Transit Co.* v. *Hofberger*, 259 Ark. 322, 532 S. W. 2d 759 (1976), and *Westover* v. *United Van Lines, Inc.*, 154 Ga. App. 865, 270 S. E. 2d 74 (1980) (defenses upheld), with *Bartlett-Collins Co.* v. *Surinam Nav. Co.*, 381 F. 2d 546 (CA10 1967); *American Red Ball Transit Co.* v. *McCarthy*, 114 N. H. 514, 323 A. 2d 897 (1974), cert. denied, 420 U. S. 930 (1975); *Western Maryland R. Co.* v. *Cross*, 96 W. Va. 666, 123 S. E. 572 (1924); and *Arizona Feeds* v. *Southern Pacific Transp. Co.*, 21 Ariz. App. 346, 519 P. 2d 199 (1974) (defenses not recognized).

This division prompted one commentator some years ago to refer to the "striking lack of uniformity in decisions concerning the liability of consignors and consignees despite the obvious need for uniformity in interstate commercial transactions." Note, Carriers: Federal Bills of Lading: Liability of Parties to a Prepaid Shipment, 38 Cornell L. Q. 596, 603 (1953).

[8] The form of the bill of lading has been modified several times since 1922, see, *e. g.*, *In re Bills of Lading*, 245 I. C. C. 527 (1941), but only the 1921 and 1922 modifications affected the provisions of the bill of lading relevant to this case.

"Each [term] has in effect the force of a statute, of which all affected must take notice." *Ibid.* Unless the bill provides to the contrary, the consignor remains primarily liable for the freight charges. When the ICC first promulgated the uniform bill of lading, it stated:

> "The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges." *In re Bills of Lading*, 52 I. C. C., at 721.

This rule has not changed over time. Recently, the ICC again observed that the consignor's liability "is governed by the bill of lading contract between the parties and must be decided by interpreting that contract." *C–G–F Grain Co.* v. *Atchison, T. & S. F. R. Co.*, 351 I. C. C. 710, 712 (1976).

Clearly, then, under the contract between Metals as consignor and SP as the carrier, the consignor was primarily liable for the freight charges in question. Just as clearly, however, Metals was in a position to effectuate its release from liability by executing the nonrecourse clause in the bill of lading. Signing that clause would have operated to excuse Metals from liability. By failing to execute the nonrecourse provision, Metals continued to be primarily liable for those charges. *Illinois Steel Co.* v. *Baltimore & O. R. Co.*, 320 U. S. 508, 513 (1944); *New York, N. H. & H. R. Co.* v. *California Fruit Growers Exchange*, 125 Conn. 241, 254–255, 5 A. 2d 353, 359, cert. denied, 308 U. S. 567 (1939). See also *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65–67 (1924).

It is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed. *Id.*, at 65–66, and n. 3. See *Pitts-*

burgh, C., C. & St. L. R. Co. v. *Fink*, 250 U. S. 577, 581–583 (1919). This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act—to achieve uniformity in freight transportation charges, and thereby to eliminate the discrimination and favoritism that had plagued the railroad industry in the late 19th century. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 361 (1943); *New York, N. H. & H. R. Co.* v. *ICC*, 200 U. S. 361, 391 (1906).

Both the District Court and the Court of Appeals correctly found that SP had established a prima facie case of Metals' liability for the freight charges in question by proving that Metals had failed to sign the nonrecourse clause. This much, indeed, is conceded by Metals. Brief for Respondent 11; Tr. of Oral Arg. 31.

III

SP concedes that its failure to collect all freight charges from Carco before releasing the shipments violated the ICC regulation with regard to at least the first of the three shipments. *Id.*, at 4, 17. See 49 CFR § 1320.1 (1981), quoted in n. 6, *supra*. The question, then, is whether the Court of Appeals properly found that SP's violation of the regulation provided Metals with an equitable affirmative defense to SP's prima facie case.[9]

A. The ICC has comprehensively regulated the extension of credit to shippers by rail carriers. See 49 CFR pt. 1320 (1981). Yet neither the statute under which the regulations

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[9] Metals now asserts, as well, that SP's actions violated § 7 of the Conditions of the Bill of Lading, see n. 2, *supra*, and thus constituted a complete abrogation of SP's contractual obligations under the bill of lading. See Brief for Respondent 11. SP answers that this argument was presented to neither the District Court nor the Court of Appeals. See Reply Brief for Petitioner 4. Because the Court of Appeals did not rely on this theory to grant respondent relief, and because we did not grant certiorari to consider this breach-of-contract claim, we decline to address it.

were promulgated, 49 U. S. C. § 3(2), nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge. Nor does either contain any words of affirmative defense to a freight charge action. Indeed, to the extent the ICC has spoken to this question, it has stated: "[A] violation of section 3(2) by [a carrier], in itself, would have had no effect on [a consignor's] responsibility for payment of undercharges." *C–G–F Grain Co.* v. *Atchison, T. & S. F. R. Co.*, 351 I. C. C., at 712. Although § 3(2) "prohibits a rail carrier from delivering freight without collecting all charges thereon[,] . . . it contains no provision shielding a consignor from liability for lawful charges." *Ibid.* Thus, at least in dictum, the ICC has suggested that "[t]he question of [a consignor's] liability [under a bill of lading] does not turn on whether any provision of the act has been violated." *Ibid.*

We view the absence of any provision for an affirmative defense in the ICC's credit regulations as an administrative construction of the statute that aids our determination of congressional intent. "[L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. . . . Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence." *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 565 (1980). We so regard the administrative silence here. When an administrative agency historically has engaged in comprehensive regulation of an industry's credit practices, the agency's silence regarding an affirmative defense based on a violation of those regulations must be deemed significant.

B. The legislative and administrative history of the credit regulations further indicates that this silence was not inadvertent—the intent of the rules was to protect carriers, not to penalize them. Prior to 1918, the Federal Government did not regulate the extension of credit by rail carriers.

Wartime regulation revealed, however, that a general requirement of payment before delivery would protect the working capital of carriers and avoid discrimination among credit recipients. Cf. *Ex parte No. MC-1*, 2 M. C. C. 365, 374 (1937). After the first World War, when Congress returned the railroads to private control, § 405 of the Transportation Act, 1920, 41 Stat. 479, added paragraph (2) to § 3 of the Interstate Commerce Act. See n. 5, *supra*. The regulations adopted by the ICC in 1920 under the statute as so amended permitted railroads to extend limited credit to shippers on a nondiscriminatory basis. The regulations have remained largely unchanged to the present time. Until 1971, no court seriously suggested that a violation of the credit regulations precluded a carrier from collecting a freight charge from the party with primary liability. Instead, a defense of estoppel based on a violation of the credit regulations was held to be inconsistent with the purpose of the regulations themselves. Courts were concerned that a rule permitting selective estoppels would defeat the antidiscriminatory purpose of the Act and would weaken the capital structure of common carriers. See, *e. g.*, *Western Maryland R. Co.* v. *Cross*, 96 W. Va. 666, 673, 123 S. E. 572, 575 (1924); *Chicago Junction R. Co.* v. *Duluth Log Co.*, 161 Minn. 466, 469, 202 N. W. 24, 25 (1925); *East Texas Motor Freight Lines* v. *Franklin County Distilling Co.*, 184 S. W. 2d 505, 507 (Tex. Civ. App. 1944).

Despite the absence of any textual or historical support for an affirmative defense in either the statute or the regulations, the Court of Appeals concluded that Metals could raise SP's failure to comply fully with the regulations as an absolute equitable defense to SP's freight charge action. The Court of Appeals relied primarily on what it regarded as "a closely analogous situation," 641 F. 2d, at 237, presented in *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d 56 (CA7 1971). On examination, however, that Seventh Circuit case plainly is distinguishable from the present one.

The defendant there was a *consignee* to whom goods had been delivered under bills of lading marked "prepaid." Relying upon the carrier's explicit representation of prepayment, the consignee paid the amount of the freight charges to the shipper-consignor. In fact, however, the carrier had extended credit to the consignor and had failed to collect the charges within the period allowed by the regulations. When the consignor went out of business, the carrier turned to the consignee for payment. The Court of Appeals, by a divided vote, held the carrier estopped.

Admiral differs from this case in four crucial respects. First, in *Admiral*, the carrier not only violated ICC credit regulations but also made to the defendant a material misrepresentation regarding prepayment. The carrier here, in contrast, was charged solely with failure to observe the applicable ICC credit regulations. Second, in the Seventh Circuit case, the consignee-defendant had paid full freight charges to the consignor. Had the Seventh Circuit also awarded relief to the carrier, it would have "require[d] an innocent consignee to defray freight charges exactly double the amount contemplated by the applicable tariffs." 442 F. 2d, at 65 (Stevens, J., concurring). Here, the defendant paid no freight charges; thus, an award of relief to the carrier creates no possibility of enforcing a double payment.

Third, in *Admiral*, the grounds for equitable estoppel were created by the consignee's payment of freight charges in detrimental reliance on the carrier's misrepresentation. The carrier's violation of the credit regulations offered only "additional grounds for the intervention of the principles of equity." *Id.*, at 60 (majority opinion). In this case, there is no suggestion that the consignor knew of, or changed its position detrimentally in reliance on, the carrier's credit violation. Fourth, and most significant, the defendant-consignee in the Seventh Circuit case had no means by which to protect itself from freight charge liability. In this case, of course, the defendant-consignor could have protected itself com-

pletely simply by signing the nonrecourse clause in the bills of lading.

C. Finally, public policy concerns disfavor judicial implication of affirmative defenses based on carrier violations of the Commission's credit regulations. We recognize that the regulations are technical. Thousands of railcars are delivered every day by the country's railroads. See Association of American Railroads, Yearbook of Railroad Facts 25 (1981) (approximately 62,000 deliveries per day). Almost inevitably, some cars will be delivered to noncredit patrons, some freight bills will be sent out late, and some accounts will not be collected within the specified time. A 1966 study by the ICC's Bureau of Enforcement found that almost a third of 15,751 bills examined were overdue and that over half of those overdue were delinquent more than 10 days. See *In re Regulations for Payment of Rates and Charges*, 326 I. C. C. 483, 485 (1966).[10] After appraising this data, the ICC agreed that "the evidence establishes many and continued violations of the credit regulations. However, we are unable to conclude on this record that rigid rules . . . would provide a practical or desirable solution. [T]here are many reasons for credit violations which are beyond correction by rules, e. g., where shippers have unexpected peak workloads, where there are controversies over amounts due, where additional information is needed such as weights or evaluations, where standard office procedures are in the process of change, where temporary cash flow problems occur, and where it becomes necessary to check the validity of charges with third persons. Stringent credit rules . . . would destroy the flexibility needed to meet problems of this nature." *Id.*, at 489–490. Indeed, in 1980, the ICC proposed repealing the credit regulations altogether, noting that "apparent, wide-

[10] The methodology of this study was questioned by the railroads. The roads' own figures, however, showed that of 445,984 collectible items accrued during the period of the investigation, more than 10,000 resulted in credit violations. 326 I. C. C., at 486.

spread noncompliance with the regulations indicates that the payment periods and other time limits prescribed are simply not realistic for many of the situations in which they apply." *Ex parte Nos. MC–1, 73, 143, and 170*, 45 Fed. Reg. 31766.

It thus appears that the Court of Appeals in the present case implied an affirmative defense that would penalize railroads for violations of the credit regulations just as the agency responsible for administering those regulations was pronouncing them unrealistic. The prospect raised for the carrier is that it will be barred from recovering lawful freight charges, even from a consignor who fails to execute the nonrecourse clause, for possibly unavoidable violations of the credit rules. "The obvious consequence would be to discourage [carriers] from extending credit where the operation of this rather difficult statute is in doubt." *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 753 (1947). Ironically, those shippers who pay their bills currently in a responsible manner would suffer as a result.

Metals argues that a ruling for SP places SP "in the unrealistic position of being incapable of doing any wrong" and therefore creates "no incentive [for carriers] to improve inefficient and careless credit practices." Brief for Respondent 12. Metals further claims that the loss at issue here would not have occurred if SP only had complied with its obligations under the regulations. *Id.*, at 24. The answer to this is that the ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes the power to issue a cease-and-desist order, see *Shaw Warehouse Co.* v. *Southern R. Co.*, 308 I. C. C. 609, 633–634, 637 (1959), appeal dism'd *sub nom. Southern R. Co.* v. *United States*, 186 F. Supp. 29 (ND Ala. 1960); the power to seek a federal-court injunction requiring a carrier to comply with the regulations, see *ICC* v. *All-American, Inc.*, 505 F. 2d 1360 (CA7 1974); and the power to bring suit for the $5,000 civil forfeiture, provided by 49 U. S. C. § 16(8) and 49 U. S. C. § 11901(a) (1976 ed., Supp.

III), for each knowing violation of an order of the Commission, see, *e. g.*, *United States* v. *Western Pacific R. Co.*, 385 F. 2d 161 (CA10 1967), cert. denied *sub nom. Denver & R. G. W. R. Co.* v. *United States*, 391 U. S. 919 (1968); *United States* v. *Pennsylvania R. Co.*, 308 F. Supp. 293 (ED Pa. 1969).

Thus, the ICC may regulate the credit practices of carriers even without the judicially created remedy of forfeiture of freight charges. Furthermore, a reading of the cited cases reveals that the question whether a credit violation has occurred often will require the ICC or the courts to conduct a factual inquiry as to the carrier's intent to violate the regulations. The "credit violation defense" adopted by the Court of Appeals requires a carrier to forfeit freight charges without regard to the nature of its violation.[11] This inflexible ap-

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[11] The facts of this case illustrate the problems that may arise when a court ventures to create law in this highly technical field. The rulings of the District Court and the Court of Appeals denied SP recovery not only for the first car, which was delivered without any payment upon the freight charge, but also for the two cars for which it did demand payment before delivery and received checks for the charges.

Yet acceptance of a proper check as payment for a freight charge is an acknowledged commercial practice in the railroad industry. See *Fullerton Lumber Co.* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 520, 522 (1931); see also 49 CFR § 1320.13 (1981). It therefore is at least possible that SP's insistence on payment by check before releasing the second and third cars constituted compliance with the regulations, which require only that the railroad take "precautions deemed by it to be sufficient to assure payment of the tariff charges." 49 CFR § 1320.1 (1981). It is true, of course, that the check for one car was understated by $900, but, as has been noted, SP mailed a freight bill for the correct amount to Carco within four days of the delivery. See 49 CFR § 1320.5 (1981) (carrier may extend credit for up to 30 days on balance due in the event of undercharges).

Furthermore, it is by no means clear that SP could safely have deferred delivery of the second and third cars until after Carco had paid the charges on the first car. The carrier's lien for unpaid charges covers only the goods in the immediate shipment. 49 U. S. C. § 105. See *Atlas S.S. Co.* v. *Colombian Land Co.*, 102 F. 358, 361 (CA2 1900). Once Carco offered to pay the charges on the second and third cars, even serious suspicion

proach disenables courts from considering the carrier's intent, the degree of the shipper's fault, the effect of enforcement on the carrier's existing permissible credit practices, and other subjective factors in deciding whether or not to enforce a shipper's primary liability for freight charges.

Metals also advances a number of "double payment" cases in support of its claim for an affirmative defense. See, *e. g.*, *Southern Pacific Transp. Co.* v. *Campbell Soup Co.*, 455 F. 2d 1219 (CA8 1972); *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d 56 (CA7 1971); *Farrell Lines, Inc.* v. *Titan Industrial Corp.*, 306 F. Supp. 1348 (SDNY), aff'd, 419 F. 2d 835 (CA2 1969), cert. denied, 397 U. S. 1042 (1970); *Southern Pacific Co.* v. *Valley Frosted Foods Co.*, 178 Pa. Super. 217, 116 A. 2d 70 (1955). To be sure, these cases speak in equity terms. But none of these cases turned solely on a carrier's violation of credit regulations. Each and all of them involved a carrier's misrepresentation, such as a false assertion of prepayment on the bill of lading, upon which a consignee detrimentally relied only to find itself later sued by the carrier for the same freight charges. We find that these double payment cases constitute their own category and stand against the placement of duplication of liability upon an innocent party. See *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d, at 65 (Stevens, J., concurring).

As we have noted above, no similar double payment liability is in prospect here. Metals, not the carrier, selected the consignee. Furthermore, Metals has been paid for its goods while the carrier has not been paid for its services. The carrier unsuccessfully has pursued its remedies against the consignee before turning to the shipper-consignor for payment. Nor had the statute of limitation run when SP finally sued Metals for payment.

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about Carco's financial health might not have allowed SP to withhold delivery without risking liability to Carco for conversion of its goods. See 49 U. S. C. § 88 (carrier's duty to deliver goods on demand).

We, of course, are in no position to condone slipshod collection practices and a carrier's violation of the governing regulations. But the terms of the bill of lading are specific and clear. Metals' failure to execute the nonrecourse provision in the bill of lading specifically placed upon it primary liability for the freight charges. To permit SP's violation of the credit regulations to be raised as an affirmative defense to its prima facie case would serve to nullify the enforceability of the nonrecourse clause. Nor do we believe that judicial implication of such a defense is necessary to encourage carrier compliance with credit rules. Railroads have real economic incentives to collect their freight charges from consignees insofar as they are able. The remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper.

We therefore hold that the Court of Appeals erred by permitting Metals to assert an affirmative defense against SP based on its violation of the ICC credit regulations. Such "equities" as may exist by virtue of the carrier's delay and its violation of the credit regulations are insufficient in magnitude to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) [will] estop or preclude it from enforcing payment of the full amount by a person liable therefor." *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S., at 65.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* CURRAN ET AL.

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

No. 80–203. Argued November 2, 1981—Decided May 3, 1982*

The Commodity Exchange Act (CEA), which regulates commodity futures trading, was substantially amended by the Commodity Futures Trading Commission Act of 1974. Among other things, the Commodity Futures Exchange Commission was created to assume the regulatory and enforcement powers previously exercised by the Secretary of Agriculture and certain additional powers, and that Commission was authorized to grant reparations to any person complaining of a violation of the CEA or its implementing regulations committed by any futures commission merchant, floor broker, commodity trading adviser, or commodity pool operator. But the 1974 Act, like the original legislation and other amendatory enactments, was silent on the subject of private judicial remedies for persons injured by a violation of the CEA. These cases involve an action by an investor in commodity futures contracts against his futures commission merchant or broker for violation of an antifraud provision of the CEA, and three actions by speculators in futures contracts against the New York Mercantile Exchange and its officials and against futures commission merchants, claiming damages resulting from unlawful price manipulation that allegedly could have been prevented by the Exchange's enforcement of its own rules. In each action, after the respective District Courts had ruled adversely to the plaintiffs, the respective Courts of Appeals held that the plaintiffs had implied rights of action under the CEA.

Held: A private party may maintain an action for damages caused by a violation of the CEA. Pp. 374–395.

(a) Where it is clear that an implied cause of action under the CEA was a part of the "contemporary legal context" in which Congress undertook a comprehensive reexamination and amendment of the CEA in 1974, the fact that the amendments left intact the provisions under which

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*Together with No. 80–757, *New York Mercantile Exchange et al.* v. *Leist et al.;* No. 80–895, *Clayton Brokerage Co. of St. Louis, Inc.* v. *Leist et al.;* and No. 80–936, *Heinold Commodities, Inc., et al.* v. *Leist et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy. Pp. 374–382.

(b) Moreover, a review of the legislative history of the 1974 enactment indicates that preservation of the remedy was indeed what Congress intended. Pp. 382–388.

(c) Purchasers and sellers of futures contracts have standing to assert both types of claims involved here—violation of the statutory prohibition against fraudulent and deceptive conduct and of the provisions designed to prevent price manipulation. The legislative history clearly indicates that Congress intended to protect all futures traders from price manipulation and other fraudulent conduct violative of the statute. Since actions by investors against exchanges were part of the contemporary legal context that Congress intended to preserve, exchanges can be held accountable for breaching their statutory duties to enforce their own rules prohibiting price manipulation. It follows that those persons who are participants in a conspiracy to manipulate the market in violation of those rules are also subject to suit by futures traders who can prove injury from such violations. Pp. 388–395.

622 F. 2d 216 and 638 F. 2d 283, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 395.

Richard P. Saslow argued the cause for petitioner in No. 80–203. With him on the briefs was *Douglas G. Graham*. *William E. Hegarty* argued the cause for petitioners in No. 80–757. With him on the briefs were *Maurice Mound*, *Charles Platto*, *Joseph W. Muccia*, and *Ruth D. MacNaughton*. *Gerard K. Sandweg, Jr.*, argued the cause for petitioners in Nos. 80–895 and 80–936. With him on the briefs for petitioner in No. 80–895 was *W. Stanley Walch*. *Lawrence H. Hunt, Jr.*, *Stuart S. Ball*, *Michael W. Davis*, *Donald G. McCabe*, *Edward J. Boyle*, and *Barbara A. Mentz* filed briefs for petitioners in No. 80–936.

Robert A. Hudson argued the cause and filed a brief for respondents in No. 80–203. *Leonard Toboroff* argued the cause and filed a brief for Leist et al., respondents in Nos.

80–757, 80–895, and 80–936. *Leonard M. Mendelson* filed a brief for National Super Spuds, Inc., et al., respondents in No. 80–936.

Barry Sullivan argued the cause for the Commodity Futures Trading Commission as *amicus curiae* urging affirmance in No. 80–203. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Geller*, *Pat G. Nicolette*, *Gregory C. Glynn*, and *Mark D. Young*.†

JUSTICE STEVENS delivered the opinion of the Court.

The Commodity Exchange Act (CEA), 7 U. S. C. §1 *et seq.* (1976 ed. and Supp. IV),[1] has been aptly characterized

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†Briefs of *amici curiae* urging reversal in Nos. 80–757, 80–895, and 80–936 were filed by *John H. Stassen*, *Terry L. Claassen*, *James L. Fox*, *Maurice Mound*, *James H. O'Hagan*, *Jerrold E. Salzman*, *Edmund R. Schroeder*, *Walter N. Vernon III*, and *Frederick L. White* for the Board of Trade of the City of Chicago et al.; by *Stephen F. Selig* and *Barry J. Mandel* for the Futures Industry Association, Inc.; and by *Russell E. Brooks* and *Richard C. Tufaro* for the New York Stock Exchange, Inc.

Leonard Toboroff filed a brief for Samuel Friedman as *amicus curiae* urging affirmance in No. 80–203.

Solicitor General McCree, *Deputy Solicitor General Geller*, *Barry Sullivan*, *Pat G. Nicolette*, *Gregory C. Glynn*, and *Mark D. Young* filed a brief for the Commodity Futures Trading Commission as *amicus curiae* urging affirmance in Nos. 80–757, 80–895, and 80–936.

Michael A. Doyle filed a brief for Sunnyside Eggs, Inc., et al., as *amici curiae* in Nos. 80–757, 80–895, and 80–936.

[1] The history of the CEA includes six major legislative enactments. The Future Trading Act, 42 Stat. 187 (1921), was declared unconstitutional in *Hill* v. *Wallace*, 259 U. S. 44 (1922), and was superseded by the Grain Futures Act, 42 Stat. 998 (1922). Major amendments to the operative statute followed in the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936), the Act of Feb. 19, 1968, 82 Stat. 26, the Commodity Futures Trading Commission Act of 1974, 88 Stat. 1389, and the Futures Trading Act of 1978, 92 Stat. 865. The 1936 amendments changed the name of the operative statute to the CEA; citations to the Grain Futures Act, the original legislation, accordingly will refer to the CEA and not to the original name of the legislation. Citations to amending legislation will refer to the date of the amendments, in order not to confuse the operative statute and the

as "a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex."[2] The central question presented by these cases is whether a private party may maintain an action for damages caused by a violation of the CEA. The United States Court of Appeals for the Sixth Circuit answered that question affirmatively, holding that an investor may maintain an action against his broker for violation of an antifraud provision of the CEA.[3] The Court of Appeals for the Second Circuit gave the same answer to the question in actions brought by investors claiming damages resulting from unlawful price manipulation that allegedly could have been prevented by the New York Mercantile Exchange's enforcement of its own rules.[4]

We granted certiorari to resolve a conflict between these decisions and a subsequent decision of the Court of Appeals for the Fifth Circuit,[5] and we now affirm. Prefatorily, we describe some aspects of the futures trading business, summarize the statutory scheme, and outline the essential facts of the separate cases.[6]

1936 amendments, both of which are entitled the Commodity Exchange Act. For a discussion of this history of federal regulation, see *infra*, at 360–367.

[2] H. R. Rep. No. 93–975, p. 1 (1974) (hereinafter House Report).

[3] 622 F. 2d 216 (1980). Accord, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F. 2d 129, 133, n. 7 (CA8) (dictum), cert. denied, 444 U. S. 838 (1979); *Hirk* v. *Agri-Research Council, Inc.*, 561 F. 2d 96, 103, n. 8 (CA7 1977). See also *Master Commodities, Inc.* v. *Texas Cattle Management Co.*, 586 F. 2d 1352, 1355 (CA10 1978) (assuming that a private right of action exists).

[4] *Leist* v. *Simplot*, 638 F. 2d 283 (1980).

[5] *Rivers* v. *Rosenthal & Co.*, 634 F. 2d 774 (1980), cert. pending, No. 80–1542.

[6] Our understanding of the futures trading business and of the facts is gleaned primarily from the congressional Reports relating to the 1974 amendments to the CEA, the opinions of the Courts of Appeals, and the pleadings.

I

Prior to the advent of futures trading, agricultural products generally were sold at central markets. When an entire crop was harvested and marketed within a short timespan, dramatic price fluctuations sometimes created severe hardship for farmers or for processors. Some of these risks were alleviated by the adoption of quality standards, improvements in storage and transportation facilities, and the practice of "forward contracting"—the use of executory contracts fixing the terms of sale in advance of the time of delivery.[7]

When buyers and sellers entered into contracts for the future delivery of an agricultural product, they arrived at an agreed price on the basis of their judgment about expected market conditions at the time of delivery. Because the weather and other imponderables affected supply and demand, normally the market price would fluctuate before the contract was performed. A declining market meant that the executory agreement was more valuable to the seller than the commodity covered by the contract; conversely, in a rising market the executory contract had a special value for the buyer, who not only was assured of delivery of the commodity but also could derive a profit from the price increase.

The opportunity to make a profit as a result of fluctuations in the market price of commodities covered by contracts for future delivery motivated speculators to engage in the practice of buying and selling "futures contracts." A speculator who owned no present interest in a commodity but anticipated a price decline might agree to a future sale at the current market price, intending to purchase the commodity at a reduced price on or before the delivery date. A "short" sale of that kind would result in a loss if the price went up instead of down. On the other hand, a price increase would produce a gain for a "long" speculator who had acquired a contract to

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[7] See House Report, at 33–34.

purchase the same commodity with no intent to take delivery but merely for the purpose of reselling the futures contract at an enhanced price.

In the 19th century the practice of trading in futures contracts led to the development of recognized exchanges or boards of trade. At such exchanges standardized agreements covering specific quantities of graded agricultural commodities to be delivered during specified months in the future were bought and sold pursuant to rules developed by the traders themselves. Necessarily the commodities subject to such contracts were fungible. For an active market in the contracts to develop, it also was essential that the contracts themselves be fungible. The exchanges therefore developed standard terms describing the quantity and quality of the commodity, the time and place of delivery, and the method of payment; the only variable was price. The purchase or sale of a futures contract on an exchange is therefore motivated by a single factor—the opportunity to make a profit (or to minimize the risk of loss) from a change in the market price.

The advent of speculation in futures markets produced well-recognized benefits for producers and processors of agricultural commodities. A farmer who takes a "short" position in the futures market is protected against a price decline; a processor who takes a "long" position is protected against a price increase. Such "hedging" is facilitated by the availability of speculators willing to assume the market risk that the hedging farmer or processor wants to avoid. The speculators' participation in the market substantially enlarges the number of potential buyers and sellers of executory contracts and therefore makes it easier for farmers and processors to make firm commitments for future delivery at a fixed price. The liquidity of a futures contract, upon which hedging depends, is directly related to the amount of speculation that takes place.[8]

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[8] See n. 11, *infra*. The ability of producers and processors to hedge against risks of price changes is only one of the advantages of futures trad-

Persons who actually produce or use the commodities that are covered by futures contracts are not the only beneficiaries of futures trading. The speculators, of course, have opportunities to profit from this trading. Moreover, futures trading must be regulated by an organized exchange. In addition to its regulatory responsibilities, the exchange must maintain detailed records and perform a clearing function to discharge the offsetting contracts that the short or long speculators have no desire to perform.[9] The operation of the exchange creates employment opportunities for futures commission merchants, who solicit orders from individual traders, and for floor brokers, who make the actual trades on the floor of the exchange on behalf of futures commission merchants and their customers. The earnings of the persons who operate the futures market—the exchange itself, the clearinghouse, the floor brokers, and the futures commission merchants—are financed by commissions on the purchase and sale of futures contracts made over the exchange.

Thus, in a broad sense, futures trading has a direct financial impact on three classes of persons. Those who actually are interested in selling or buying the commodity are described as "hedgers";[10] their primary financial interest is in the profit to be earned from the production or processing of the commodity. Those who seek financial gain by taking positions in the futures market generally are called "speculators" or "investors"; without their participation, futures markets "simply would not exist."[11] Finally, there are the

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ing. Other advantages are described at some length in the House Report, at 132–134.

[9] The House Report, at 149, states that only about "3% of all futures contracts traded are normally settled by an actual delivery."

[10] Of course, when a hedger takes a long or a short position that is greater than its interest in the commodity itself, it is to that extent no longer a hedger, but a speculator.

[11] "Broadly speaking, futures traders fall into two general classifications, i. e. 'trade' hedging customers, and speculators. All orders which reach

futures commission merchants, the floor brokers, and the persons who manage the market; they also are essential participants, and they have an interest in maximizing the activity on the exchange. The petitioners in these cases are members of this third class whereas their adversaries, the respondents, are speculators or investors.

II

Because Congress has recognized the potential hazards as well as the benefits of futures trading, it has authorized the regulation of commodity futures exchanges for over 60 years. In 1921 it enacted the Future Trading Act, 42 Stat. 187, which imposed a prohibitive tax on grain[12] futures transactions that were not consummated on an exchange designated

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the trading floor originate with one or the other group of traders. The 'trade' customer is the hedger who seeks, at low cost, to protect himself or his company against possible loss due to adverse price fluctuations in the market place. Speculators, on the other hand, embrace all representatives of the general public, including some institutions, plus floor scalpers and position traders, who seek financial gain by taking positions in volatile markets. The principal role of the speculator in the markets is to take the risks that the hedger is unwilling to accept. The opportunity for profit makes the speculator willing to take those risks. The activity of speculators is essential to the operation of a futures market in that the composite bids and offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match." *Id.*, at 138.

[12] Grain was defined to include "wheat, corn, oats, barley, rye, flax, and sorghum." § 2(a) of the CEA, 42 Stat. 998, codified as amended, 7 U. S. C. § 2 (1976 ed., Supp. IV).

as a "contract market" by the Secretary of Agriculture.[13] The 1921 statute was held unconstitutional as an improper exercise of the taxing power in *Hill* v. *Wallace*, 259 U. S. 44 (1922), but its regulatory provisions were promptly re-enacted in the Grain Futures Act, 42 Stat. 998, and upheld under the commerce power in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (1923).[14] Under the original legislation, the principal function of the Secretary was to require the governors of a privately organized exchange to supervise the operation of the market. Two of the conditions for designation were that the governing board of the contract market prevent its members from disseminating misleading market information[15] and prevent the "manipulation of prices or the cornering of any grain by the dealers or operators upon such board."[16] The requirement that designated contract mar-

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[13] "It was an effort by Congress, through taxing at a prohibitive rate sales of grain for future delivery, to regulate such sales on boards of trade by exempting them from the tax if they would comply with the congressional regulations." *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 31 (1923).

[14] "The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held . . . prevented our sustaining the Future Trading Act. [T]he act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce." *Id.*, at 32.

Congress replaced the prohibitive tax on futures trading not conducted on a designated contract market with a direct prohibition of such trading. See § 4 of the CEA, 42 Stat. 999–1000, codified as amended, 7 U. S. C. § 6.

[15] § 5(c) of the CEA, 42 Stat. 1000, codified as amended, 7 U. S. C. § 7(c).

[16] § 5(d) of the CEA, 42 Stat. 1000. Section 5(d), codified as amended, 7 U. S. C. § 7(d), requires as a condition of designation that the governing board of the board of trade "provid[e] for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board."

The Secretary of Agriculture also was authorized to proceed directly against a violator of these and other provisions of the CEA by suspending a

kets police themselves and the prohibitions against disseminating misleading information and manipulating prices have been part of our law ever since.

In 1936 Congress changed the name of the statute to the Commodity Exchange Act, enlarged its coverage to include other agricultural commodities,[17] and added detailed provisions regulating trading in futures contracts. Commodity Exchange Act, ch. 545, 49 Stat. 1491. Among the significant new provisions was § 4b, prohibiting any member of a contract market from defrauding any person in connection with the making of a futures contract,[18] and § 4a, authorizing a

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violator's trading privileges. § 6(b) of the CEA, 42 Stat. 1002, codified as amended, 7 U. S. C. § 9. Moreover, misdemeanor penalties were authorized for violations of certain provisions of the CEA. § 9 of the CEA, 42 Stat. 1003, codified as amended, 7 U. S. C. § 13 (1976 ed., Supp. IV). The penalties subsequently have been increased. Today, § 9(b) of the CEA, 7 U. S. C. § 13(b) (1976 ed., Supp. IV), provides in pertinent part:

"It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity . . . . Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution."

[17] The 1936 amendments extended coverage to cotton, rice, butter, eggs, and Irish potatoes. § 3(a) of the 1936 amendments, 49 Stat. 1491 (amending § 2(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 2 (1976 ed., Supp. IV)).

[18] § 5 of the 1936 amendments, 49 Stat. 1493 (adding § 4b of the CEA). Section 4b, codified as amended, 7 U. S. C. § 6b, provides in pertinent part:

"It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made,

commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General to fix limits on the amount of permissible speculative trading in a futures contract.[19] The legislation also required registration of futures commission merchants and floor brokers.[20]

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on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

"(A) to cheat or defraud or attempt to cheat or defraud such other person;

"(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

"(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

"(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person."

[19] § 5 of the 1936 amendments, 49 Stat. 1492 (adding § 4a of the CEA). Section 4a, codified as amended, 7 U. S. C. § 6a, provides in pertinent part:

"(1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall, from time to time, after due notice and opportunity for hearing, by order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the commission finds are necessary to diminish, eliminate, or prevent such burden."

[20] § 5 of the 1936 amendments, 49 Stat. 1494–1495 (adding §§ 4d(1) and 4e of the CEA, codified as amended, 7 U. S. C. §§ 6d(1) and 6e (1976 ed. and

In 1968 the CEA again was amended to enlarge its coverage[21] and to give the Secretary additional enforcement authority. Act of Feb. 19, 1968, 82 Stat. 26. The Secretary was authorized to disapprove exchange rules that were inconsistent with the statute,[22] and the contract markets were required to enforce their rules;[23] the Secretary was authorized to suspend a contract market[24] or to issue a cease-and-desist order[25] upon a showing that the contract market's rules were not being enforced. In addition, the criminal sanctions for price manipulation were increased significantly,[26] and any

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Supp. IV)). The 1936 amendments also authorized the commission to order an exchange to cease and desist from violating the CEA or any rules promulgated thereunder in lieu of revoking its designation as a contract market. § 9 of the 1936 amendments, 49 Stat. 1500 (adding § 6b of the CEA, codified as amended, 7 U. S. C. § 13a (1976 ed., Supp. IV)).

[21] Livestock and livestock products were included in the definition of commodity. § 1(a) of the 1968 amendments, 82 Stat. 26 (amending § 2(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 2 (1976 ed., Supp. IV)).

[22] § 23 of the 1968 amendments, 82 Stat. 33 (adding § 8a(7) of the CEA, codified as amended, 7 U. S. C. § 12a(7)).

[23] § 12(c) of the 1968 amendments, 82 Stat. 29 (adding §§ 5a(8), (9) of the CEA, codified as amended, 7 U. S. C. §§ 7a(8), (9)). Today, § 5a(8) of the CEA, 7 U. S. C. § 7a(8), requires each contract market to

"[e]nforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or by any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission."

[24] § 15 of the 1968 amendments, 82 Stat. 30 (amending § 6(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 8(a) (1976 ed., Supp. IV)).

[25] § 18 of the 1968 amendments, 82 Stat. 31–32 (amending § 6b of the CEA, codified as subsequently amended, 7 U. S. C. § 13a (1976 ed., Supp. IV)).

[26] § 25 of the 1968 amendments, 82 Stat. 33–34 (amending § 9 of the CEA, codified as subsequently amended, 7 U. S. C. § 13 (1976 ed., Supp. IV)).

person engaged in price manipulation was subjected to the Secretary's authority to issue cease-and-desist orders for violations of the CEA and implementing regulations.[27]

In 1974, after extensive hearings and deliberation, Congress enacted the Commodity Futures Trading Commission Act of 1974. 88 Stat. 1389. Like the 1936 and the 1968 legislation, the 1974 enactment was an amendment to the existing statute[28] that broadened its coverage[29] and increased the penalties for violation of its provisions.[30] The Commission was authorized to seek injunctive relief,[31] to alter or supplement a contract market's rules,[32] and to direct a contract market to take whatever action deemed necessary by the Commission in an emergency.[33] The 1974 legislation retained the basic statutory prohibitions against fraudulent practices and price manipulation,[34] as well as the authority to prescribe

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[27] § 17 of the 1968 amendments, 82 Stat. 31 (adding § 6(c) of the CEA, codified as amended, 7 U. S. C. § 13b).

[28] Title I, 88 Stat. 1389, Title II, 88 Stat. 1395, and Title IV, 88 Stat. 1412, each amended separate sections of the CEA; Title III, 88 Stat. 1406, added an entirely new section authorizing the creation of national futures associations.

[29] Section 201(b) of the 1974 amendments, 88 Stat. 1395 (amending § 2(a) of the CEA, codified as subsequently amended, 7 U. S. C. § 2 (1976 ed., Supp. IV)), extended the coverage of the statute to "all . . . goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."

[30] § 212 of the 1974 amendments, 88 Stat. 1403–1404 (amending §§ 6, 6b, 6(c), and 9 of the CEA, codified as subsequently amended, 7 U. S. C. §§ 9, 13, 13a, 13b (1976 ed. and Supp. IV)).

[31] § 211 of the 1974 amendments, 88 Stat. 1402 (adding § 6c of the CEA, 7 U. S. C. § 13a–1).

[32] § 213 of the 1974 amendments, 88 Stat. 1404 (replacing § 8a(7) of the CEA, 7 U. S. C. § 12a(7)).

[33] § 215 of the 1974 amendments, 88 Stat. 1404–1405 (adding § 8(9) of the CEA, 7 U. S. C. § 12a(9)).

[34] Congress extended the registration requirement and the corresponding antifraud and criminal penalty provisions to commodity trading advisers and commodity pool operators. §§ 205 and 409 of the 1974 amend-

trading limits. The 1974 amendments, however, did make substantial changes in the statutory scheme; Congress authorized a newly created Commodities Futures Trading Commission to assume the powers previously exercised by the Secretary of Agriculture, as well as certain additional powers. The enactment also added two new remedial provisions for the protection of individual traders. The newly enacted § 5a(11) required every contract market to provide an arbitration procedure for the settlement of traders' claims of no more than $15,000.[35] And the newly enacted § 14 authorized the Commission to grant reparations to any person complaining of any violation of the CEA, or its implementing regulations, committed by any futures commission merchant or any associate thereof, floor broker, commodity trading adviser, or commodity pool operator.[36] This section authorized the Commission to investigate complaints and, "if in its opinion the facts warrant such action," to afford a hearing before an administrative law judge. Reparations orders entered by the Commission are subject to judicial review.

The latest amendments to the CEA, the Futures Trading Act of 1978, 92 Stat. 865, again increased the penalties for violations of the statute.[37] The enactment also authorized the States to bring *parens patriae* actions, seeking injunctive or

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ments, 88 Stat. 1398–1400, 1414 (adding §§ 4n, 4*o*, and amending § 9(c) of the CEA, codified as subsequently amended, 7 U. S. C. §§ 6n, 6*o*, 13 (1976 ed. and Supp. IV)).

[35] § 209 of the 1974 amendments, 88 Stat. 1401 (adding § 5a(11) of the CEA, codified as subsequently amended, 7 U. S. C. § 7a(11) (1976 ed., Supp. IV)).

[36] § 106 of the 1974 amendments, 88 Stat. 1393–1395 (adding § 14 of the CEA, codified as subsequently amended, 7 U. S. C. § 18 (1976 ed. and Supp. IV)).

[37] § 19 of the 1978 amendments, 92 Stat. 875 (amending § 9 of the CEA, 7 U. S. C. § 13 (1976 ed., Supp. IV)).

monetary relief for certain violations of the CEA, implementing regulations, or Commission orders.[38]

Like the previous enactments, as well as the 1978 amendments, the Commodity Futures Trading Commission Act of 1974 is silent on the subject of private judicial remedies for persons injured by a violation of the CEA.

III

In the four cases before us, the allegations in the complaints filed by respondents are assumed to be true. The first involves a complaint by customers against their broker. The other three arise out of a malfunction of the contract market for futures contracts covering the delivery of Maine potatoes in May 1976, "'when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country.'"[39]

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[38] "Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, or floor broker) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this Act, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate." § 15 of the 1978 amendments, 92 Stat. 872 (adding § 6d(1) of the CEA, 7 U. S. C. § 13a–2(1) (1976 ed., Supp. IV)).

[39] 638 F. 2d, at 285 (quoting *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1256, 1258 (SDNY 1979)). "The default was virtually unprecedented and, in the words of CFTC officials and members of the industry, shocked the commodity markets and the participants more than any other single event in recent years." H. R. Rep. No. 95–1181, p. 99 (1978).

No. 80–203

Respondents in No. 80–203 were customers of petitioner, a futures commission merchant registered with the Commission. In 1973, they authorized petitioner to trade in commodity futures on their behalf and deposited $100,000 with petitioner to finance such trading. The trading initially was profitable, but substantial losses subsequently were suffered and the account ultimately was closed.

In 1976, the respondents commenced this action in the United States District Court for the Eastern District of Michigan. They alleged that petitioner had mismanaged the account, had made material misrepresentations in connection with the opening and the management of the account, had made a large number of trades for the sole purpose of generating commissions, and had refused to follow their instructions. Respondents claimed that petitioner had violated the CEA, the federal securities laws, and state statutory and common law.

The District Court dismissed the claims under the federal securities laws and stayed other proceedings pending arbitration. App. to Pet. for Cert. in No. 80–203, pp. A–39 to A–49. On appeal, a divided panel of the Court of Appeals for the Sixth Circuit affirmed the dismissal of the federal securities laws claims,[40] but held that the contractual provision requiring respondents to submit the dispute to arbitration was unenforceable.[41] Judge Engel, writing for the majority, then *sua sponte* noticed and decided the question whether re-

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[40] 622 F. 2d, at 221–224. The court held that a discretionary commodity account was not a security subject to the federal securities laws, relying primarily on *Milnarik* v. *M–S Commodities, Inc.*, 457 F. 2d 274 (CA7), cert. denied, 409 U. S. 887 (1972).

[41] The Court of Appeals also decided that the plaintiffs need not invoke the jurisdiction of the Commission prior to maintaining their CEA action. 622 F. 2d, at 235–236. Petitioner does not challenge that decision.

spondents could maintain a private damages action under the CEA:[42]

> "Although the CEA does not expressly provide for a private right of action to recover damages, an implied right of action was generally thought to exist prior to the 1974 amendment of the Act. Consistent with this view, no issue concerning the continuing validity of the implied right of action was raised in the court below, nor in this appeal. Nevertheless, to provide direction to the district court upon remand and to avoid further delay in this already protracted litigation, we review this issue and specifically agree that an implied private right of action survived the 1974 amendments to the Act." 622 F. 2d 216, 230 (1980) (footnotes omitted).

Judge Phillips dissented from this conclusion. *Id.*, at 237. We granted certiorari limited to this question: "Does the Commodity Exchange Act create an implied private right of action for fraud in favor of a customer against his broker?" 451 U. S. 906 (1981).

Nos. 80–757, 80–895, and 80–936

One of the futures contracts traded on the New York Mercantile Exchange provided for the delivery of a railroad car lot of 50,000 pounds of Maine potatoes at a designated place on the Bangor and Aroostook Railroad during the period between May 7, 1976, and May 25, 1976. Trading in this contract commenced early in 1975 and terminated on May 7, 1976. On two occasions during this trading period the Department of Agriculture issued reports containing estimates that total potato stocks, and particularly Maine potato stocks, were substantially down from the previous year. This in-

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[42] Although the complaint alleged a violation of § 6 of the CEA, the parties agree that the section under which recovery is sought is § 4b, 7 U. S. C. § 6b (quoted in n. 18, *supra*).

formation had the understandable consequences of inducing investors to purchase May Maine potato futures contracts (on the expectation that they would profit from a shortage of potatoes in May) and farmers to demand a higher price for their potatoes on the cash market.[43]

To counteract the anticipated price increases, a group of entrepreneurs described in the complaints as the "short sellers" formed a conspiracy to depress the price of the May Maine potato futures contract. The principal participants in this "short conspiracy" were large processors of potatoes who then were negotiating with a large potato growers association on the cash market. The conspirators agreed to accumulate an abnormally large short position in the May contract, to make no offsetting purchases of long contracts at a price in excess of a fixed maximum, and to default, if necessary, on their short commitments. They also agreed to flood the Maine cash markets with unsold potatoes. This multifaceted strategy was designed to give the growers association the impression that the supply of Maine potatoes would be plentiful. On the final trading day the short sellers had accumulated a net short position of almost 1,900 contracts, notwithstanding a Commission regulation[44] limiting their lawful net position to 150 contracts. They did, in fact, default.

The trading limit also was violated by a separate group described as the "long conspirators." Aware of the short conspiracy, they determined that they not only could counteract its effects but also could enhance the price the short conspirators would have to pay to liquidate their short positions by accumulating an abnormally large long position—at the close of trading they controlled 911 long contracts—and by creat-

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[43] As a result of the first report issued in August 1975, "the price of the Contract rose from $9.75 per cwt ($.0975 per pound) to a record price of $19.15 per cwt ($.1915 per pound) by October 3, 1975." Complaint, App. in Nos. 80–757, 80–895, 80–936, p. 48.

[44] See 17 CFR § 150.10(a)(1)(iii) (1981).

ing an artificial shortage of railroad cars during the contract delivery period. Because the long conspirators were successful in tying up railroad cars, they prevented the owners of warehoused potatoes from making deliveries to persons desiring to perform short contracts.[45]

Respondents are speculators who invested long in Maine futures contracts.[46] Allegedly, if there had been no price manipulation, they would have earned a significant profit by reason of the price increase that free market forces would have produced.

Petitioners in No. 80–757 are the New York Mercantile Exchange and its officials. Respondents' complaints alleged that the Exchange knew, or should have known, of both the short and the long conspiracies but failed to perform its statutory duties to report these violations to the Commission and to prevent manipulation of the contract market. The Exchange allegedly had the authority under its rules to declare an emergency, to require the shorts and the longs to participate in an orderly liquidation, and to authorize truck deliveries and other measures that would have prevented or mitigated the consequences of the massive defaults.

Petitioners in No. 80–895 and No. 80–936 are the firms of futures commission merchants that the short conspirators used to accumulate their net short position. The complaint alleged that petitioners knowingly participated in the conspiracy to accumulate the net short position, and in doing so violated position and trading limits imposed by the Commission and Exchange rules requiring liquidation of contracts

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[45] "Because the long conspirators had successfully tied up all the freight cars of the Bangor & Aroostook, Incomco was unable to deliver its warehoused potatoes to persons seeking delivery to fulfill short contracts. As the warm weather set in, the 1,500,000 pounds of potatoes became rotten, and Incomco's total investment was lost." 638 F. 2d, at 291.

[46] One respondent, Incomco, had taken delivery on March 1976 Maine potato futures contracts and planned to sell these potatoes to short traders in the May contract.

that obviously could not be performed.[47] Moreover, the complaint alleged that petitioners violated their statutory duty to report violations of the CEA to the Commission.

In late 1976, three separate actions were filed in the United States District Court for the Southern District of New York.[48] After extensive discovery, the District Court ruled on various motions, all of which challenged the plaintiffs' right to recover damages under the CEA.[49] The District Court considered it beyond question that the plaintiffs were within the class for whose special benefit the statute had been enacted,[50] but it concluded that Congress did not in-

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[47] Exchange Rule 44.02, governing the final day of trading, provides in part:

"(a) On the final day of trading in the delivery month, it shall be the responsibility of each clearinghouse member who is not in a position to fulfill his contractual obligation on any maturing contract by prescribed notice and tender, to have a liquidating order entered on the Exchange floor not later than five minutes before the time established as the official close for such delivery month. All such orders shall be market orders to be executed prior to the expiration of trading."

[48] The Commission had previously commenced its own investigation, which led to administrative proceedings against various parties involved in the default on the May Maine potatoes futures contract. See Brief for Petitioners in No. 80–936, p. 3. Substantial penalties were imposed. See 638 F. 2d, at 330, n. 3 (Mansfield, J., dissenting).

[49] Although the complaints are not so specific, apparently respondents sought to recover damages from all defendants under §§ 4b and 9(b) of the CEA, 7 U. S. C. §§ 6b and 13(b) (1976 ed. and Supp. IV), from the conspirator traders and their brokers under § 4a, 7 U. S. C. § 6a, and from the exchange under §§ 5(d) and 5a(8), 7 U. S. C. §§ 7(d) and 7a(8). Sections 5(d), 9(b), 4b, 4a, and 5a(8) are quoted in nn. 16, 18, 19, and 23, *supra*.

[50] "There can be no question that plaintiffs, investors in the commodities market and a dealer in potatoes, are within the class 'for whose especial benefit the statute was enacted.' As Senator Dole stated, the primary purposes of the 1974 amendments to the Act were '[to protect] against manipulation of markets and to protect any individual who desires to participate in futures market trading.' Additionally, the Act itself states that price manipulation and unreasonable fluctuations in price 'are detrimental

tend a private right of action to exist under the CEA. The court granted summary judgment on all claims seeking recovery under that statute. *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1257, 1259–1263 (1979).

A divided panel of the Court of Appeals for the Second Circuit reversed. The majority opinion, written by Judge Friendly, adopted essentially the same reasoning as the Sixth Circuit majority in No. 80–203, but placed greater emphasis on "the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and [its] desire to preserve them," *Leist* v. *Simplot*, 638 F. 2d 283, 307 (1980), and on the similarity between the implied private remedies under the CEA and the remedies implied under other federal statutes, particularly those regulating trading in securities, *id.*, at 296–299. Judge Mansfield, in dissent, reasoned that the pre–1974 cases recognizing a private right of action under the CEA were incorrectly decided and that a fair application of the criteria identified in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975),[51] required rejection of plaintiffs' damages claims. 638 F. 2d, at 323.

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to . . . persons handling commodit[ies].'" 470 F. Supp., at 1259–1260 (footnotes omitted).

[51] "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g.*, *Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be

We granted certiorari. 450 U. S. 910 (1981). For the purpose of considering the question whether respondents may assert an implied cause of action for damages, it is assumed that each of the petitioners has violated the statute and thereby caused respondents' alleged injuries.

IV

> "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation." *Cannon* v. *University of Chicago*, 441 U. S. 677, 717 (1979).

Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change. When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33 (1916).[52] Under this approach, federal courts,

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inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment)."

[52] In that case the Court stated:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default

following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.[53]

Because the *Rigsby* approach prevailed throughout most of our history,[54] there is no merit to the argument advanced by

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is implied, according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (*Per* Holt, C. J., *Anon.*, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium.* See 3 Black. Com. 51, 123; *Couch* v. *Steel*, 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125." 241 U. S., at 39–40.

[53] T. Cooley, Law of Torts 790 (2d ed. 1888) described the common-law remedy for breach of a statutory duty in this way:

"[W]hen the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none."

A few years earlier an opinion by Judge Cooley was quoted with approval by this Court in support of its holding that a railroad's breach of a statutory duty to fence its right-of-way gave an injured party an implied damages remedy. See *Hayes* v. *Michigan Central R. Co.*, 111 U. S. 228, 240 (1884).

[54] See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) ("'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded'") (quoting 3 W. Blackstone, Commentaries *23); *Kendall* v. *United States*, 12 Pet. 524, 624 (1838) ("It cannot be denied but that congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"); *Pollard* v. *Bailey*, 20 Wall. 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common-law action"); *Hayes* v. *Michigan Central R. Co.*, *supra*, at 240 ("[E]ach person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery"); *De Lima* v. *Bidwell*, 182 U. S. 1, 176–177 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy").

petitioners that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine. As Justice Frankfurter explained:

> "Courts . . . are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations. *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515; *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has 'left the matter at large for judicial determination,' our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 351. If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized. *Texas & Pac. R. Co.* v. *Rigsby*, 241 U. S. 33; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; cf. *De Lima* v. *Bidwell*, 182 U. S. 1." *Montana-Dakota Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, 261–262 (1951) (dissenting opinion).

During the years prior to 1975, the Court occasionally refused to recognize an implied remedy, either because the statute in question was a general regulatory prohibition enacted for the benefit of the public at large, or because there was evidence that Congress intended an express remedy to provide the exclusive method of enforcement.[55] While the

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[55] See, *e. g.*, *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464 (1959); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453 (1974).

Rigsby approach prevailed, however, congressional silence or ambiguity was an insufficient reason for the denial of a remedy for a member of the class a statute was enacted to protect.[56]

In 1975 the Court unanimously decided to modify its approach to the question whether a federal statute includes a private right of action.[57] In *Cort* v. *Ash*, 422 U. S. 66 (1975), the Court confronted a claim that a private litigant could recover damages for violation of a criminal statute that had never before been thought to include a private remedy. In rejecting that claim the Court outlined criteria that primarily focused on the intent of Congress in enacting the statute under review.[58] The increased complexity of federal legislation[59] and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required. Our cases subsequent to *Cort* v. *Ash* have plainly stated that our focus must be on "the intent of Congress." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981).[60] "The

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[56] See, *e. g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191 (1967); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6 (1971).

[57] See *California* v. *Sierra Club*, 451 U. S. 287, 292–293 (1981).

[58] See n. 51, *supra*.

[59] Statistics compiled in J. Bibby, T. Mann, & N. Ornstein, Vital Statistics on Congress, 1980, p. 91 (1980), indicate that, compared to 30 years ago, Congress today passes fewer, but much longer, public bills.

[60] "There is no allegation that the antitrust laws expressly establish a right of action for contribution. Nothing in these statutes refers to contribution, and if such a right exists it must be by implication. Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress. *E. g.*, *California* v. *Sierra Club*, [451 U. S.] 287; *Universities Research Assn.* v. *Coutu*, 450 U. S. 754 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979); *Touche Ross & Co.*

key to the inquiry is the intent of the Legislature." *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981). The key to these cases is our understanding of the intent of Congress in 1974 when it comprehensively reexamined and strengthened the federal regulation of futures trading.

V

In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping.[61] When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question

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v. *Redington*, 442 U. S. 560 (1979). Congressional intent may be discerned by looking to the legislative history and other factors: *e. g.*, the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief. See *California* v. *Sierra Club*, *supra; Cort* v. *Ash*, 422 U. S. 66 (1975)."

[61] "The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that that conclusion was entirely reasonable. Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover federal employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U. S. 820, 828 (1976) (footnote omitted).

is whether Congress intended to preserve the pre-existing remedy.

In *Cannon* v. *University of Chicago*, we observed that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." 441 U. S., at 696–697. In considering whether Title IX of the Education Amendments of 1972 included an implied private cause of action for damages, we assumed that the legislators were familiar with the judicial decisions construing comparable language in Title VI of the Civil Rights Act of 1964 as implicitly authorizing a judicial remedy, notwithstanding the fact that the statute expressly included a quite different remedy. We held that even under the "strict approach" dictated by *Cort* v. *Ash*, "our evaluation of congressional action in 1972 must take into account its contemporary legal context." 441 U. S., at 698–699. See *California* v. *Sierra Club*, 451 U. S. 287, 296, n. 7 (1981).

Prior to the comprehensive amendments to the CEA enacted in 1974, the federal courts routinely and consistently had recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA or rules and regulations promulgated pursuant to the statute.[62] The routine recognition of a private remedy under the CEA prior to our decision in *Cort* v. *Ash* was comparable to the routine acceptance of an analogous remedy under the Securities Exchange Act of 1934.[63] The Court described that remedy in *Blue Chip*

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[62] There is no dispute concerning the state of the law in 1974, even by those who have argued that a private cause of action under the CEA did not survive the 1974 amendments. See, *e. g.*, *Rivers* v. *Rosenthal & Co.*, 634 F. 2d, at 779; Davis, The Commodity Exchange Act: Statutory Silence is Not Authorization for Judicial Legislation of an Implied Private Right of Action, 46 Mo. L. Rev. 316, 321 (1981).

[63] The recognition of a private cause of action under the CEA was also fully consistent with the implication doctrine followed by this Court prior to *Cort* v. *Ash*. See *supra*, at 374–377.

Stamps v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975) (footnote omitted):

> "Despite the contrast between the provisions of Rule 10b–5 and the numerous carefully drawn express civil remedies provided in the Acts of both 1933 and 1934, it was held in 1946 by the United States District Court for the Eastern District of Pennsylvania that there was an implied private right of action under the Rule. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512. This Court had no occasion to deal with the subject until 25 years later, and at that time we confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 150–154 (1972). Such a conclusion was, of course, entirely consistent with the Court's recognition in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964), that private enforcement of Commission rules may '[provide] a necessary supplement to Commission action.'"

Although the consensus of opinion concerning the existence of a private cause of action under the CEA was neither as old nor as overwhelming as the consensus concerning Rule 10b–5, it was equally uniform and well understood. This Court, as did other federal courts and federal practitioners, simply assumed that the remedy was available. The point is well illustrated by this Court's opinion in *Chicago Mercantile Exchange* v. *Deaktor*, 414 U. S. 113 (1973), which disposed of two separate actions in which private litigants alleged that an exchange had violated § 9(b) of the CEA by engaging in price manipulation and § 5a by failing both to enforce its own rules and to prevent market manipulation.[64] The Court held that

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[64] "In one, the *Phillips* suit, it was alleged that the Exchange had forced sales of futures contracts in March 1970 fresh eggs at artificially depressed

the judicial proceedings should not go forward without first making an effort to invoke the jurisdiction of the Commodity Exchange Commission, but it did not question the availability of a private remedy under the CEA.[65]

In view of the absence of any dispute about the proposition prior to the decision of *Cort* v. *Ash* in 1975, it is abundantly clear that an implied cause of action under the CEA was a part of the "contemporary legal context" in which Congress legislated in 1974. Cf. *Cannon* v. *University of Chicago*, 441 U. S., at 698–699. In that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that

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market prices and had thereby monopolized and restrained commerce in violation of §§ 1 and 2 of the Sherman Act, and had violated § 9(b) of the Commodity Exchange Act (CEA) by manipulating prices of a commodity for future delivery on a contract market. The Exchange was also accused of violating § 5a of the CEA for failure to enforce one of its own rules. In the second suit, the *Deaktor* case, the Exchange was charged with violating the CEA and its own rules as a designated contract market because it had failed to exercise due care to halt the manipulative conduct of certain of its members who allegedly had cornered the July 1970 market in frozen pork bellies futures contracts." 414 U. S., at 113–114 (statutory citations omitted).

[65] The Court of Appeals had expressly confirmed the availability of a private remedy, see *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d 529, 534 (CA7 1973), but the exchange did not question that ruling before this Court. Rather, the exchange's complaint concerned the Court of Appeals' refusal to invoke the doctrine of primary jurisdiction:

"The Chicago Mercantile Exchange has thus been put in an intolerable position. It must diligently seek to prevent, deter, and punish violations of its rules; but enforcement of its rules now exposes it to unrestricted attacks in federal courts by disgruntled traders. This situation will disrupt, if not immobilize, the self-regulatory machinery established by the Commodity Exchange Act. The doctrine of primary jurisdiction expressed in *Ricci* was designed to alleviate this dilemma." Pet. for Cert. in *Chicago Mercantile Exchange* v. *Deaktor*, O. T. 1973, No. 73–241, pp. 11–12.

Congress affirmatively intended to preserve that remedy.[66] A review of the legislative history of the statute persuasively indicates that preservation of the remedy was indeed what Congress actually intended.

VI

Congress was, of course, familiar not only with the implied private remedy but also with the long history of federal regulation of commodity futures trading.[67] From the enactment of the original federal legislation, Congress primarily has relied upon the exchanges to regulate the contract markets. The 1922 legislation required for designation as a contract market that an exchange "provide for" the making and filing of reports and records, the prevention of dissemination of false or misleading reports, the prevention of price manipulation and market cornering, and the enforcement of Commission orders.[68] To fulfill these conditions, the exchanges promulgated rules and regulations, but they did not always enforce them. In 1968, Congress attempted to correct this flaw in the self-regulation concept by enacting § 5a(8), 7 U. S. C. § 7a(8), which requires the exchanges to enforce their own rules.[69]

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[66] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414, n. 8 (1975); *NLRB* v. *Gullett Gin Co.*, 340 U. S. 361, 366 (1951); *National Lead Co.* v. *United States*, 252 U. S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978).

[67] See generally *supra*, at 360–367.

[68] See 7 U. S. C. § 7.

[69] See S. Rep. No. 947, 90th Cong., 2d Sess., 2–3 (1968).

The enactment of § 5a(8), coupled with the recognition by the federal courts of an implied private remedy for violations of the CEA, gave rise to a new problem. As representatives of the exchanges complained during the hearings preceding the 1974 amendments,[70] the exchanges were being sued for not enforcing their rules. The complaint was taken seriously because it implicated the self-regulation premise of the CEA:

> "In the few years [§ 5a(8)] has been in the present Commodity Exchange Act, there is growing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." House Report, at 46 (emphasis in original).[71]

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[70] See, *e. g.*, Hearings on H. R. 11955 before the House Committee on Agriculture, 93d Cong., 2d Sess., 62 (1974); Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes before the House Committee on Agriculture, 93d Cong., 1st Sess., 121 (1973).

[71] In introducing the House bill, Representative Poage, the Chairman of the House Agriculture Committee, explained this development at some length. See 119 Cong. Rec. 41333 (1973). Representative Thone, a member of that Committee, later reiterated the problem. See 120 Cong. Rec. 10748 (1974) ("Some observers believe that the provision of the 1968 amendments requiring exchanges to enforce their own rules, thereby implicitly giving private parties the right to sue for nonenforcement, has had a perverse effect. To avoid risk of litigation, exchange authorities have been encouraged to reduce rather than strengthen rules designed to insure fair trading").

Congress could have removed this impediment to exchange rulemaking by eliminating the implied private remedy,[72] but it did not follow that course. Rather, it solved the problem by authorizing the new Commodity Futures Trading Commission to supplement exchange rules.[73] Congress thereby corrected the legal mechanism of self-regulation while preserving a significant incentive for the exchanges to obey the law. Only this course was consistent with the expressed purpose of the 1974 legislation, which was to "amend the Commodity Exchange Act to *strengthen* the regulation of futures trading."[74]

Congress in 1974 created new procedures through which traders might seek relief for violations of the CEA, but the legislative evidence indicates that these informal procedures were intended to supplement rather than supplant the implied judicial remedy. These procedures do not substitute for the private remedy either as a means of compensating injured traders or as a means of enforcing compliance with the statute. The reparations procedure established by § 14 is not available against the exchanges,[75] yet we may infer from the above analysis that Congress viewed private litigation against exchanges as a valuable component of the self-regula-

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[72] Indeed, Congress was urged to grant the exchanges immunity from private causes of action. See Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes, *supra*, at 121. The president of one exchange even proposed the addition of specific language to the statute that would have granted such immunity. See Hearings on H. R. 11955, *supra*, at 123; Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., 317 (1974).

[73] See § 8a(7) of the CEA, 7 U. S. C. § 12a(7).

[74] 88 Stat. 1389 (emphasis added).

[75] The reparations procedure is available against only futures commission merchants and their associates, floor brokers, commodity trading advisers, and commodity pool operators. In addition to exchanges, this list excludes traders who violate the CEA.

tion concept. Nor is that procedure suited for the adjudication of all other claims. The Commission may, but need not, investigate a complaint, and may, but need not, serve the respondent with the complaint. If the Commission permits the complaint to issue, it need not provide an administrative hearing if the claim does not exceed $5,000. The arbitration procedure mandated by § 5a(11) is even narrower in scope. Only members and employees of the contract market are subject to the procedure, and the use of the procedure by a trader is voluntary and is limited to claims of less than $15,000. There are other indications in the legislative history that the two sections were not intended to be exclusive of the implied judicial remedy. It was assumed by hearings witnesses that the informal procedures were supplementary.[76] Indeed, it was urged that complainants be put to the choice between informal and judicial actions.[77] A representative of one exchange urged Congress to place a dollar limit on claims arbitrable under § 5a(11) because there was an "economic impediment to Court litigation" only with small claims,[78] and such a limit was enacted. Chairman Poage described the newly enacted informal procedures as "new customer protection features,"[79] and Senator Talmadge, the Chairman of the Senate Committee on Agriculture and Forestry, stated that the reparations procedure was "not in-

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[76] See, *e. g.*, Hearings on H. R. 11955, *supra*, at 249 ("We point out that section 209 of the bill . . . requires contract markets to establish arbitration procedures for the settlement of customers' claims and grievances against members and employees of a contract market. In addition to these arbitration procedures, complainants of course have access to the courts. If the Commission is also given jurisdiction to pass upon civil disputes, there would then be a third forum for the same issues").

[77] See *id.*, at 321.

[78] See Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113, *supra*, at 415.

[79] 120 Cong. Rec. 10737 (1974).

tended to interfere with the courts in any way," although he hoped that the burden on the courts would be "somewhat lighten[ed]" by the availability of the informal actions.[80]

The late addition of a saving clause in § 2(a)(1) provides direct evidence of legislative intent to preserve the implied private remedy federal courts had recognized under the CEA. Along with an increase in powers, the Commission was given exclusive jurisdiction over commodity futures trading. The purpose of the exclusive-jurisdiction provision in the bill passed by the House[81] was to separate the functions of the Commission from those of the Securities and Exchange Commission and other regulatory agencies.[82] But the provision raised concerns that the jurisdiction of state and federal courts might be affected. Referring to the treble damages action provided in another bill that he and Senator McGovern had introduced, Senator Clark pointed out: "[T]he House bill not only does not authorize them, but section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate."[83] It was. The Senate added a saving clause to the exclusive-jurisdiction provision, providing that "[n]othing in this section shall

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[80] *Id.*, at 30459.

[81] The provision in the bill passed by the House provided as follows: "*Provided*, that the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery . . . : *And provided further*, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities [and] Exchange Commission or other regulatory authorities under the laws of the United States . . . ." H. R. 13113, 93d Cong., 2d Sess., § 201 (1974).

[82] See House Report, at 3.

[83] Hearings on S. 2485, S. 2578, S. 2837, and H. R. 13113, *supra*, at 205. For other expressions of concern, see *id.*, at 259–260 (Chairman Rodino of the House Committee on the Judiciary); *id.*, at 664 (Chairman Talmadge).

supersede or limit the jurisdiction conferred on courts of the United States or any State."[84] The Conference accepted the Senate amendment.[85]

The inference that Congress intended to preserve the pre-existing remedy is compelling. As the Solicitor General argues on behalf of the Commission as *amicus curiae*, the private cause of action enhances the enforcement mechanism fostered by Congress over the course of 60 years. In an enactment purporting to strengthen the regulation of commodity futures trading, Congress evidenced an affirmative intent to preserve this enforcement tool.[86] It removed an impediment to exchange rulemaking caused in part by the implied private remedy not by disapproving that remedy but rather by giving the Commission the extraordinary power to supplement exchange rules. And when several Members of Congress expressed a concern that the exclusive-jurisdiction provision, which was intended only to consolidate federal regulation of commodity futures trading in the Commission, might be construed to affect the implied cause of action as well as other court actions, Congress acted swiftly to dispel any such notion. Congress could have made its intent clearer only by expressly providing for a private cause of action in the statute. In the legal context in which Congress acted, this was unnecessary.

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[84] See 7 U. S. C. § 2.

[85] Chairmen Talmadge and Poage reported that "the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC." 120 Cong. Rec. 34737, 34997 (1974).

[86] In his opinion for the Second Circuit panel majority, Judge Friendly extensively analyzed the evidence of legislative intent with respect to the pre-existing private remedy. See 638 F. 2d, at 307–321. We need not restate that analysis in the same detail.

In view of our construction of the intent of the Legislature there is no need for us to "trudge through all four of the factors when the dispositive question of legislative intent has been resolved." See *California* v. *Sierra Club*, 451 U. S., at 302 (REHNQUIST, J., concurring in judgment). We hold that the private cause of action under the CEA that was previously available to investors survived the 1974 amendments.

VII

In addition to their principal argument that no private remedy is available under the CEA, petitioners also contend that respondents, as speculators, may not maintain such an action and that, in any event, they may not sue an exchange or futures commission merchants for their alleged complicity in the price manipulation effected by a group of short traders. To evaluate these contentions, we must assume the best possible case for the speculator in terms of proof of the statutory violations, the causal connection between the violations and the injury, and the amount of damages. It is argued that no matter how deliberate the defendants' conduct, no matter how flagrant the statutory violation, and no matter how direct and harmful its impact on the plaintiffs, the federal remedy that is available to some private parties does not encompass these actions.

The cause of action asserted in No. 80–203 is a claim that respondents' broker violated the prohibitions against fraudulent and deceptive conduct in § 4b. In the other three cases the respondents allege violations of several other sections of the CEA that are designed to prevent price manipulation.[87]

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[87] Section 4a instructs the Commission to fix trading and position limits to curb excessive speculation. 7 U. S. C. § 6a. Section 5(d) requires as a condition for designation as a contract market that an exchange prevent price manipulation by dealers, 7 U. S.C § 7(d), and § 5a(8) imposes a duty upon contract markets to enforce their rules, 7 U. S. C. § 7a(8). Section 9(b) fixes criminal penalties for price manipulation and other violations of the CEA. 7 U. S. C. § 13(b) (1976 ed., Supp. IV).

We are satisfied that purchasers and sellers of futures contracts have standing to assert both types of claims.

The characterization of persons who invest in futures contracts as "speculators" does not exclude them from the class of persons protected by the CEA. The statutory scheme could not effectively protect the producers and processors who engage in hedging transactions without also protecting the other participants in the market whose transactions over exchanges necessarily must conform to the same trading rules. This is evident from the text of the statute. The antifraud provision, § 4b, 7 U. S. C. § 6b, by its terms makes it unlawful for any person to deceive or defraud any other person in connection with any futures contract. This statutory language does not limit its protection to hedging transactions; rather, its protection encompasses every contract that "is or may be used for (a) hedging . . . or (b) determining the price basis of any transaction . . . in such commodity." See n. 18, *supra*. Since the limiting language defines the character of the contracts that are covered, and since futures contracts traded over a regulated exchange are fungible, it is manifest that all such contracts may be used for hedging or price basing, even if the parties to a particular futures trade may both be speculators. In other words, all purchasers or sellers of futures contracts—whether they be pure speculators or hedgers—necessarily are protected by § 4b.[88]

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[88] The language of § 4b is similar to that of § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and this Court has recognized an implied cause of action under the Securities and Exchange Commission's Rule 10b–5 on behalf of all securities traders. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S., at 13, n. 9; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975). We recognized in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), that the implication of a cause of action under Rule 10b–5 could be "explained historically"; "the Court explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of a Rule 10b–5 cause of action." *Id.*, at 692, n. 13. In terms of the number of years and the number of decisions in which an implied cause of action was recognized, the CEA action does not compare favorably with the Rule

The legislative history quite clearly indicates that Congress intended to protect all futures traders from price manipulation and other fraudulent conduct violative of the statute. It is assumed, of course, that federal regulation of futures trading benefits the entire economy; a sound futures market tends to reduce retail prices of the underlying commodities. The immediate beneficiaries of a healthy futures market are the producers and processors of commodities who can minimize the risk of loss from volatile price changes on the cash market by hedging on the futures market.[89] As the House Report on the 1974 amendments explained at length,[90] their ability to engage in hedging depends on the availability of investors willing to assume or to share the hedger's risk in the hope of making a profit. The statutory proscriptions against price manipulation and other fraudulent practices were intended to ensure that hedgers would sell or purchase the underlying commodities at a fair price and that legitimate investors would view the assumption of the hedger's risk as a fair investment opportunity. Although the speculator has never been the favorite of Congress, Congress recognized his crucial role in an effective and orderly futures market and intended him to be protected by the statute as much as the hedger. Judge Friendly's discussion of the legislative history, see 638 F. 2d, at 304–307, amply supports his observation that "[i]t is almost self-evident that legislation regulating future trading was for the 'especial benefit' of futures traders," *id.*, at 306–307.

Although § 4b compels our holding that an investor defrauded by his broker may maintain a private cause of action

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10b–5 action. On the other hand, Congress comprehensively reexamined the CEA in 1974 and did not amend the sections under which the cause of action had been implied; no comparable legislative approval or acquiescence exists for the Rule 10b–5 remedy.

[89] See, *e. g.*, § 3 of the CEA, 42 Stat. 999, codified as amended, 7 U. S. C. § 5.

[90] See, *e. g.*, n. 11, *supra*.

for fraud, petitioners in the three manipulation cases correctly point out that the other sections of the CEA that they are accused of violating are framed in general terms and do not purport to confer special rights on any identifiable class of persons. Under *Cort* v. *Ash*, the statutory language would be insufficient to imply a private cause of action under these sections.[91] But we are not faced with the *Cort* v. *Ash* inquiry.[92] We have held that Congress intended to preserve the pre-existing remedy; to determine whether the pre-existing remedy encompasses respondents' actions, we must turn once again to the law as it existed in 1974.

Although the first case in which a federal court held that a futures trader could maintain a private action was a fraud claim based on § 4b,[93] subsequent decisions drew no distinction between an action against a broker and an action against

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[91] "The Court consistently has found that Congress intended to create a cause of action 'where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case.' *Cannon* v. *University of Chicago*, 441 U. S. 677, 690, n. 13 (1979). Conversely, it has noted that there 'would be far less reason to infer a private remedy in favor of individual persons' where Congress, rather than drafting the legislation 'with an unmistakable focus on the benefited class,' instead has framed the statute simply as a general prohibition or a command to a federal agency. *Id.*, at 690–692." *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 771–772 (1981).

[92] "The statutes originally enacted in 1933 and 1934 have been amended so often with full congressional awareness of the judicial interpretation of Rule 10b–5 as implicitly creating a private remedy that we must now assume that Congress intended to create rights for the specific beneficiaries of the legislation as well as duties to be policed by the SEC. This case therefore does not present the same kind of issue discussed in *Cort* v. *Ash*, 422 U. S. 66 [1975], namely, *whether* the statute created an implied private remedy. Rather, the question presented here is *who* may invoke that remedy." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 55, n. 4 (1977) (STEVENS, J., dissenting) (emphasis in original).

[93] The seminal decision was *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (ND Ill. 1967), in which the implication of a private remedy on behalf of

an exchange.[94] When Congress acted in 1974, courts were recognizing causes of action on behalf of investors against exchanges. The *Deaktor* case, which came before this Court, is an example.[95] Moreover, these actions against exchanges

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commodity futures traders against their broker was based on Restatement of Torts § 286 (1938).

"Violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect. Restatement, Torts, Section 286. Violation of the standard of conduct set out in Section 6b of the Commodity Exchange Act is a tort for which plaintiffs, as members of the class Congress sought to protect from the type of harm they allege here, have a federal civil remedy even in the absence of specific mention of a civil remedy in the Commodity Exchange Act. The Restatement rationale was the basis for the presently well accepted rule that a civil remedy cognizable in the federal courts will be implied for a defrauded investor under Section 78j of the Securities Act of 1934 and Securities and Exchange Commission regulation 10b–5 thereunder. Kardon v. National Gypsum Co., D. C., 69 F. Supp. 512 (1946)." 265 F. Supp., at 447.

[94] *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d, at 534; *Booth* v. *Peavey Co. Commodity Services*, 430 F. 2d 132, 133 (CA8 1970); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1083–1092 (SDNY 1974), aff'd, 550 F. 2d 762 (CA2), cert. denied *sub nom. Miller* v. *New York Produce Exchange*, 434 U. S. 823 (1977); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61, 65–66 (MD Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (ND Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 766 (SDNY 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338, 1342–1343 (ED La. 1972); *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375, 1383–1384 (SDNY 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 437 (ND Cal. 1968), modified, 430 F. 2d 1202 (CA9 1970).

[95] The facts alleged in the *Deaktor* case are quite similar to those alleged in the Second Circuit case:

"Darryl B. Deaktor, plaintiff in Nos. 71–1890 and 71–1893, brought a class action against the Chicago Mercantile Exchange and various members of the Exchange alleging that the defendant members manipulated

were well recognized. During the hearings on the 1974 amendments to the CEA, a complaint voiced by representatives of the exchanges was that the exchanges were being sued for not enforcing their rules. Congress responded to the complaint by authorizing the Commission to supplement exchange rules because, we have inferred,[96] Congress wished to preserve the private cause of action as a tool for enforcement of the self-regulation concept of the CEA.

To the extent that the *Cort* v. *Ash* inquiry[97] is relevant to the question now before us—whether respondents' claims can be pursued under the implied cause of action that Congress preserved—it is noteworthy that the third and fourth factors of that inquiry support an affirmative answer. As the Solicitor General has argued on behalf of the Commodities Futures Trading Commission, it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy."[98] Moreover, there is no basis for believing that state law will afford an adequate remedy against an exchange. On the contrary, throughout the long history of federal regulation of futures trading it has been federal law that has imposed a stringent duty upon exchanges to police the trading activities in the markets that they are authorized by statute to regu-

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and cornered the July, 1970 frozen pork bellies futures contracts market, forcing up the price of those contracts and injuring traders, such as the plaintiff, who sold short and had not liquidated their positions prior to the defendants' manipulation and thus were required to cover their positions by the purchase of contracts at inflated prices. This conduct was alleged to be in violation of 7 U. S. C. § 1 *et seq.* of the Commodity Exchange Act. The Exchange was sued on the ground of failing to exercise reasonable care in compliance with 7 U. S. C. § 7a(8), and thus failing to be aware of and to promptly halt the unlawful activities of the defendants." 479 F. 2d, at 530. See also *Seligson* v. *New York Produce Exchange*, *supra*, at 1083–1092.

[96] See *supra*, at 382–384.

[97] See n. 51, *supra*.

[98] *Cort* v. *Ash*, 422 U. S., at 78.

late.[99] Since the amendments to the original legislation regulating futures trading consistently have strengthened that regulatory scheme, the elimination of a significant enforcement tool would clash with this legislative pattern. We therefore may not simply assume that Congress silently withdrew the pre-existing private remedy against exchanges.[100]

Having concluded that exchanges can be held accountable for breaching their statutory duties to enforce their own rules prohibiting price manipulation, it necessarily follows that those persons who are participants in a conspiracy to manipulate the market in violation of those rules are also subject to suit by futures traders who can prove injury from these violations.[101] As we said regarding the analogous Rule 10b–5, "privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S., at 745. Because there is no indication of legislative intent that privity should be an element of the implied remedy under the CEA,[102] we are not prepared to fashion such a limitation. As has been the case with the Rule 10b–5

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[99] That duty has been the centerpiece of federal regulation in this area since 1921. See *supra*, at 361–362, 382–384.

[100] "It is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." 638 F. 2d, at 313.

[101] Indeed, in the *Deaktor* case, members of the exchange alleged to have manipulated the futures contract price and cornered the market were sued by short traders. See n. 95, *supra*.

[102] Notably, the reparations provision enacted in 1974, 7 U. S. C. § 18, includes no express limitation on the types of aggrieved persons that can seek reparations from persons registered under certain provisions of the statute. Section 18(a) provides that "[a]ny person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j or 6m of this title may, at any time within two years after the cause of action accrues," file a complaint with the Commission.

action,[103] unless and until Congress acts, the federal courts must fill in the interstices of the implied cause of action under the CEA. The elements of liability, of causation, and of damages are likely to raise difficult issues of law and proof in litigation arising from the massive price manipulation that is alleged to have occurred in the May 1976 futures contract in Maine potatoes. We express no opinion about any such question. We hold only that a cause of action exists on behalf of respondents against petitioners.

The judgments of the Courts of Appeals are affirmed.

It is so ordered.

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

The Court today holds that Congress intended the federal courts to recognize implied causes of action under five separate provisions of the Commodity Exchange Act (CEA), 7 U. S. C. § 1 *et seq.* (1976 ed. and Supp IV). The decision rests on two theories. First, the Court relies on fewer than a dozen cases in which the lower federal courts *erroneously* upheld private rights of action in the years prior to the 1974 amendments to the CEA. Reasoning that these mistaken decisions constituted "the law" in 1974, the Court holds that Congress must be assumed to have endorsed this path of error when it *failed to amend* certain sections of the CEA in that year. This theory is incompatible with our constitutional separation of powers, and in my view it is without support in logic or in law. Additionally—whether alternatively or cumulatively is unclear—the Court finds that Congress in 1974 "affirmatively" manifested its intent to "preserve" pri-

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[103] See, *e. g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972).

vate rights of action by adopting particular amendments to the CEA. This finding is reached without even token deference to established tests for discerning congressional intent.

I

In determining whether an "implied" cause of action exists under a federal statute, "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U. S. 11, 15–16 (1979). See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981) *(Sea Clammers)*.[1] In these cases private rights of action are asserted under five separate provisions of the CEA—two of them passed initially in 1922, two in 1936, and one adopted for the first time in 1968.[2] The Court does

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[1] As the Court correctly observes, *ante*, at 377, reliance on congressional intent as dispositive of implication questions was at least implicit in the four-pronged inquiry mandated by *Cort* v. *Ash*, 422 U. S. 66 (1975). The *Cort* test explicitly called for inquiries into whether plaintiffs were seen by Congress as especial beneficiaries of a statutory scheme, whether an implied cause of action would be consistent with legislative purpose, and whether the asserted cause of action traditionally was relegated to state law. See *id.*, at 78. But these factors all are important primarily as indices of congressional intent. As we recently explained in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981), "Congressional intent may be discerned by looking to . . . , *e. g.*, the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief."

[2] The five sections are § 4a, 7 U. S. C. § 6a; § 4b, 7 U. S. C. § 6b; § 5a(8), 7 U. S. C. § 7a(8); § 5(d), 7 U. S. C. § 7(d); and § 9(b), 7 U. S. C. § 13(b). Though subsequently amended, §§ 5(d) and 9(b) were both adopted as part of the Grain Futures Act of 1922. See 42 Stat. 1000, 1003. Section 5(d) authorizes the Commodity Futures Trading Commission (CFTC) to designate as a "contract market" (and thus permit trading upon) a commodities exchange only when the exchange's governing board "provides for the prevention of manipulation of prices and the cornering of any commodity

not argue that Congress in 1922, in 1936, or in 1968, intended to authorize private suits for damages in the federal courts. In 1936—the year in which the CEA was adopted as the successor statute to the Grain Futures Act[3]—Congress did not even provide for federal-court jurisdiction to enforce the CEA.[4] And the Court adduces no evidence that congressional views had changed by 1968.

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by the dealers or operators" upon the exchange. Its terms suggest no intent to confer a right of action on any class of aggrieved persons.

Section 9(b)—as are §§ 4a and 4b—is a criminal provision. It establishes that "[i]t shall be a felony" for "any person" to manipulate commodity prices, to corner commodities, to deliver false crop or market information, or to omit or misstate facts to the CFTC. Before today the Court had established that private rights of action generally would not be inferred from criminal prohibitions. See *California* v. *Sierra Club*, 451 U. S. 287, 294 (1981); *Cannon* v. *University of Chicago*, 441 U. S. 677, 690–693, n. 13 (1979).

Sections 4a and 4b were adopted as part of the Commodity Exchange Act of 1936. See 49 Stat. 1492, 1493. Section 4a provides that it is illegal for any person to buy, sell, or hold positions in excess of limitations established by the CFTC. Section 4b declares it unlawful for designated persons who make commodity futures contracts for other persons to cheat, defraud, deceive, or make false statements to such other persons. Sections 4a and 4b are similar to § 206 of the Investment Advisers Act of 1940. See 15 U. S. C. § 80b–6. We have held explicitly that the language of § 206 does not create an implied damages action. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U. S. 11, 16, n. 6, 24 (1979).

Section 5a(8), 7 U. S. C. § 7a(8), is traceable to the 1968 amendments. It directs that each "contract market" shall enforce its own approved rules relating to contract and trading requirements. Section 5a(8) resembles the language of 15 U. S. C. § 78q(a) (1970 ed.), that we found to create no implied private damages action under the Securities Exchange Act of 1934. *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 562, n. 2, 579 (1979).

[3] The structural history of the CEA and its antecedents is ably summarized by the Court and requires no further recounting here. See *ante*, at 360–367.

[4] Congress had included jurisdictional provisions under several securities laws preceding enactment of the 1936 amendments to the CEA, thus evidencing that it knew quite well how to authorize private suits for civil damages when it wished to do so. *TAMA*, *supra*, at 20–21.

If the Court focused its implication inquiry on the intent of the several Congresses that enacted the statutory provisions involved in these cases, it thus is indisputable that the plaintiffs would have no claim. "The dispositive question" in implication cases is whether Congress intended to create the right to sue for damages in federal court. "Having answered that question in the negative, our inquiry [would be] at an end." *TAMA*, *supra*, at 24. See *Sea Clammers*, *supra*, at 13.

The Court today asserts its fidelity to these principles but shrinks from their application. It does so in the first instance by invoking a novel legal theory—one that relies on congressional inaction and on erroneous decisions by the lower federal courts. In 1967 a Federal District Court in the Northern District of Illinois upheld the existence of a private right of action under one section of the CEA. *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (1967). Relying on state common-law principles set forth in § 286 of the Restatement of Torts (1938), *Goodman* ruled that the "complete absence of provision for private civil actions in the Commodity Exchange Act," 265 F. Supp., at 447, was not decisive:

> "'Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. *On the contrary, they are implied unless the legislation evidences a contrary intention.* Brown v. Bullock, D.C., 194 F. Supp. 207, 224, aff'd on other grounds, 2 Cir., 294 F. 2d 415; cited in Wheeldin v. Wheeler, 373 U. S. 647 at 661, 662 . . . (Brennan, J., dissenting).'
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> "There is no indication in the Commodity Exchange Act that Congress intended *not* to allow private persons injured by violations access to the federal courts." *Ibid.* (emphasis added).

The Court does not dispute that the *Goodman* court erred. The *Goodman* court placed primary emphasis on inquiring

whether Congress had created a regulatory system for the *benefit* of the plaintiffs' class. As the court's citation of the Restatement of Torts made apparent, this inquiry has been thought appropriate for common-law courts of general jurisdiction. But our cases establish that it is *not* appropriate for federal courts possessed only of limited jurisdiction. On the contrary, we have established that an "argument in favor of implication of a private right of action based on tort principles . . . is entirely misplaced." *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). "The dispositive question [is] whether *Congress* intended to create any such [private damages] remedy." *TAMA*, 444 U. S., at 24 (emphasis added). The *Goodman* court did not even ask this question.[5]

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[5] The Court correctly observes that the effect of *Cort* v. *Ash* was to "*modify* [this Court's] approach to the question whether a federal statute includes a private right of action." *Ante*, at 377 (emphasis added). As exemplifying a previous approach the Court quotes *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916): "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ." The Court does not appear to argue, however, that *Rigsby* mandated the *Goodman* decision. Nor does *Rigsby* somehow validate *Goodman* as a correct statement of the law as it was in 1967. As is clear from a reading of the opinion, *Rigsby* stated not so much a rule of substantive law as a maxim of statutory construction. *Rigsby* did not question that the *creation* of rights of action was a congressional function. On the contrary, in *Rigsby* the Court devoted most of its opinion, not to the question whether a remedy could be "implied" under the statute, but to the question whether it was within the constitutional power of Congress to impose tort liability of the kind asserted. See 241 U. S., at 40–43 (asserting that plaintiff will be entitled to recover "unless it be beyond the power of *Congress* under the commerce clause of the Constitution *to create* such a liability") (emphasis added).

Moreover, although the *Rigsby* approach made the denial of a damages action "the exception rather than the rule," *ante*, at 375, the Court even during the *Rigsby* period refused to recognize implied remedies where the evidence—even with the aid of the maxim—failed to indicate that Congress had intended to create them. See, *e. g.*, *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464, 474 (1959) ("The question is, of course, one of statutory in-

About 10 cases—none decided by this Court[6]—followed *Goodman*'s mistake. Seven of these found *Goodman* dispositive without further comment.[7] Three remaining cases[8] added to *Goodman*'s analysis only by quoting differing por-

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tent"); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 457–458 (1974) *(Amtrak)* ("It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent . . .").

[6] One of these cases, *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d 529, 534 (CA7), rev'd on other grounds *sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U. S. 113 (1973), did come before this Court. But the petition for certiorari included no "implication" question, and our *per curiam* opinion decided the case on primary jurisdiction grounds. Reversing the decision of the Court of Appeals, which had upheld the jurisdiction of the District Court to entertain a private suit for damages under the CEA, we held that "the *Deaktor* plaintiffs, who . . . alleged violations of the CEA and the rules of the [Chicago Mercantile] Exchange, should be routed in the first instance to the [Commodity Exchange Commission] whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case." *Id.*, at 115.

The Court today notes that *Deaktor* "did not question the availability of a private remedy under the CEA." *Ante*, at 381. But neither does *Deaktor* exert any precedential force on an issue that the parties did not present and the Court did not decide. In any event, our disposition of the *Deaktor* case—referring the matters complained of to the Commodity Exchange Commission—at least is consistent with a view that plaintiffs enjoy no private rights of action in the courts, but that they are entitled to seek administrative relief through the procedures made available under the CEA.

[7] See *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 437 (ND Cal. 1968), modified on other grounds, 430 F. 2d 1202 (CA9 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (Minn. 1968); *Booth* v. *Peavey Co. Commodity Services*, 430 F. 2d 132, 133 (CA8 1970) (alternative holding); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338, 1343 (ED La. 1972); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 766 (SDNY 1972); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (ND Tex. 1972) (by implication); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61, 65–66 (MD Pa. 1973).

[8] See *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375, 1384 (SDNY 1970); *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084 (SDNY 1974), aff'd, 550 F. 2d 762 (CA2) (no explicit discussion of propriety of implying cause of action under the CEA), cert.

tions of one sentence discussing the CEA's purpose.[9] This single sentence "leaves no doubt that Congress intended to [benefit the named classes of persons by enacting the CEA] . . . . But whether Congress intended additionally that [the CEA] provisions would be enforced through private litigation is a different question." *TAMA*, *supra*, at 17–18. Because these cases ignore this "different question," they fail to rectify *Goodman*'s fundamental legal error—that of basing a finding of an implied cause of action under a federal statute on common-law principles. "There is, of course, 'no federal general common law.'" *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981), quoting *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938).

To the Court, however, this all is irrelevant. The *Goodman* line may have been wrong. The decisions all may have been rendered by lower federal courts. *Goodman* nevertheless was "the law" in 1974. Moreover, the Court reasons, Congress must be presumed to have known of *Goodman* and its progeny, see *ante*, at 378–382; and it could have changed the law if it did not like it, see *ante*, at 381–382. Yet Congress, the Court continues, "left intact the statutory provisions under which the federal courts had implied a cause of action." *Ante*, at 381. This legislative *inaction*, the Court concludes, signals a conscious intent to "preserve" the right of action that *Goodman* mistakenly had created. *Ante*, at 382. And this unexpressed "affirmative intent" of Congress now is binding on this Court, as well as all other federal courts.[10]

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denied *sub nom. Miller* v. *New York Produce Exchange*, 434 U. S. 823 (1977); *Deaktor* v. *L. D. Schreiber & Co.*, *supra*, at 534.

[9] "The fundamental purpose of the Commodity Exchange Act 'is to ensure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves.'" Campbell, Trading in Futures under the Commodity Exchange Act, 26 Geo. Wash. L. Rev. 215, 223 (1958), quoting H. R. Rep. No. 421, 74th Cong., 1st Sess., 1 (1935).

[10] If Congress must be presumed to have known of the lower court deci-

This line of reasoning is inconsistent with fundamental premises of our structure of government. Fewer than a dozen District Courts wrongly create a remedy in damages under the CEA; Congress fails to correct the error; and congressional silence binds this Court to follow the erroneous decisions of the District Courts and Courts of Appeals. The Court today does not say that *Goodman* was correctly decided. Congress itself surely would reject emphatically the *Goodman* view that federal courts are free to hold, as a general rule of statutory interpretation, that private rights of action are to be implied unless Congress "evidences a contrary intention." Yet today's decision is predicated in major part on this view.

It is not surprising that the Court—having propounded this novel theory that congressional intent can be inferred from its silence, and that legislative inaction should achieve the force of law—would wish to advance an additional basis for its decision.

II

In 1974 Congress rewrote much of the CEA. It did not, however, re-enact or even amend most of the provisions under which the Court today finds implied rights of action. But the Court does not pause over the question how Con-

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sions in the *Goodman* line, it would seem Congress also should be presumed to have known of this Court's 1974 decision in *Amtrak*, *supra*. *Amtrak* properly directed that the implication of rights of action must adhere to congressional intent. See 414 U. S., at 457–458. More importantly, *Amtrak* also would have alerted Congress that its provision of a comprehensive scheme of administrative remedies—and the 1974 amendments to the CEA admittedly provided such a scheme, see *ante*, at 384–385—would give rise to an inference of intent to preclude alternative modes of relief. See 414 U. S., at 458 ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies"). The Court does not explain the relationship of *Amtrak* to Congress' presumptive knowledge of "the 'contemporary legal context' in which [it] legislated in 1974." *Ante*, at 381.

gress might legislate a right of action merely by remaining silent after the lower federal courts have misstated the law.[11] Instead it argues that at least some of the 1974 amendments evidenced an affirmative congressional intent to "preserve" implied rights of action under the CEA. *Ante*, at 381–382. Fairly read, the evidence fails to sustain this argument.

A

In support of its argument the Court advances no evidence of the kinds generally recognized as most probative of congressional intent. It cites no statutory language stating an intent to preserve judicially created rights. It offers no legislative materials citing *Goodman* or any of its progeny in approving tones. In the hundreds of pages of Committee hearings and Reports that preceded the 1974 amendments, the Court is unable to discover even a single clear remark to the effect that the 1974 amendments would create or preserve private rights of action.

The Court relies instead on three unrelated additions to the CEA that were adopted by Congress in 1974. First, the Court places weight on the enactment of § 8a(7), 7 U. S. C. § 12a(7), which authorizes the Commodity Futures Trading Commission to supplement the trading regulations established by individual commodity exchanges. *Ante*, at 384. The accompanying House Report, H. R. Rep. No. 93–975,

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[11] The Court opinion, see *ante*, at 381–382, and n. 66, cites cases in which we previously have held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). Here, however, Congress did *not* reenact the provisions in issue in 1974; the relevant 1974 amendments altered existing language, but without actively readopting the terms that were left unchanged. It also is significant that the statute involved in *Lorillard* expressly authorized private civil actions. *Id.*, at 579, n. 6. The Court cites no case in which a presumption of congressional awareness was based on erroneous lower court decisions.

p. 46 (1974), explained that the CFTC needed this power to ensure that the local exchanges would establish adequate safeguards. According to the Report, "attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations . . . , since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants." From this observation the Court purports to infer that Congress must have approved of the *Goodman* line of cases.

This single quotation, however, is entirely neutral as to approval or disapproval. Moreover, there is persuasive evidence on the face of the statute that Congress did not contemplate a judicial remedy for damages against the exchanges. The 1974 amendments explicitly subjected the exchanges to fines and other sanctions for nonenforcement of their own rules. See § 6b, 7 U. S. C. § 13a. But the statute specifies that fines may not exceed $100,000 per violation, *ibid.*, and that the Commission must determine whether the amount of any fine will impair an exchange's ability to perform its functions. A private damages action would not be so limited and therefore would expose the exchanges to greater liability than Congress evidently intended.

The second statutory change cited by the Court actually undercuts rather than supports its case. The Court notes that the 1974 Congress enacted two sections creating procedures for reimbursing victims of CEA violations.[12] *Ante*, at

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[12] The added reimbursement procedures are of two types. First, the 1974 Congress added § 5a(11) to the Act. See 88 Stat. 1401. This provision requires commodity exchanges to "provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' *claims and grievances against any member or employee* [of the exchange]"(emphasis added). The procedure applies only to claims involving less than $15,000. This process evidently is designed to encourage the

384–385. In its view these sections evidence a further intent to enhance the availability of relief in damages. Yet the Court suggests no reason why the 1974 Congress would have enacted these duplicative channels for damages recovery if it intended at the same time to approve the implied private damages actions permitted by *Goodman*.[13] Rather, the Court flatly contravenes settled rules for the identification of congressional intent. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *TAMA*, 444 U. S., at 19.[14] "In the absence

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speedy and voluntary resolution of smaller customer disputes at the exchange level.

Second, the 1974 amendments included a new § 14 that expressly authorized damages actions. See 88 Stat. 1393–1394. This adjudicatory procedure apparently is designed to resolve larger disputes or smaller § 5a(11) disputes that are not settled. The actions are brought before the Commission rather than before an exchange. There is no limit on the amount of damages that may be awarded. The Commission's judgments are enforceable by actions in federal district court. 7 U. S. C. § 18.

[13] Instead of attempting to explain this overlap between the express and the implied CEA remedies, the Court points to the limitations Congress placed on its express remedies as compared to an implied *Goodman* action. See *ante*, at 384–385, and n. 75. The Court suggests that Congress' scheme is wanting as a tool for compensation and deterrence. The opposite inference would be more reasonable. One normally would assume that Congress took care to prescribe precisely those remedies compatible with its view of the costs and benefits of different modes of regulation. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289 (1929). See *Sea Clammers*, 453 U. S. 1, 14–15 (1981).

[14] "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Northwest Airlines, Inc.* v. *Transport Workers*, 451

of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Sea Clammers*, 453 U. S., at 15.

The Court finally relies upon congressional enactment of a so-called jurisdictional saving clause as part of the 1974 amendments:

> "Nothing in this section shall supersede or limit the *jurisdiction* conferred on courts of the United States or any State." § 201 (amending § 2 of the Act), 88 Stat. 1395, codified at 7 U. S. C. § 2 (emphasis added).

Ante, at 386–387.

By its terms the saving clause simply is irrelevant to the issue at hand: whether a cause of action should be implied under particular provisions of the CEA. Where judicially cognizable claims do exist, the saving clause makes clear that federal courts retain their jurisdiction. But it neither creates nor preserves any *substantive* right to sue for damages. And it is settled by our cases that "[t]he source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provision." *Touche Ross & Co.* v. *Redington*, 442 U. S., at 577. Cf. *Sea Clammers*, *supra*, at 15–17 (refusing to imply right of action even from a *substantive* "saving clause").[15]

U. S. 77, 97 (1981). See also *Sea Clammers*, *supra*, at 13–15; *Touche Ross & Co.* v. *Redington*, 442 U. S., at 574; *Amtrak*, 414 U. S., at 458.

In an effort to show that these reparation procedures were designed to *supplement* implied rights of action, the Court reviews comments made by hearing witnesses that allude to the existence of "court" actions. *Ante*, at 385–386, and nn. 76–80. These references, however, fairly must be characterized as ambiguous.

[15] In attaching substantive significance to the jurisdictional saving provision, the Court relies heavily on an isolated remark by Senator Clark. See *ante*, at 386. Senator Clark is not identified as a legislative draftsman,

B

Despite its imaginative use of other sources, the Court neglects the only unambiguous evidence of Congress' intent respecting private actions for civil damages under the CEA. That evidence is a chart that appears in the record of Senate Committee hearings.[16] This chart compares features of four proposed bills with the "Present Commodities Exchange Act." It evidently was prepared by the expert Committee staff advising the legislators who considered the 1974 amendments.

The chart is detailed. It occupies five pages of the hearing record. Comparing the feature of "civil money penalties" between the different proposed bills, however, the chart does not list "implied damages actions" under the existing Act. Rather, it says there are "none." Neither does the chart make any reference to implied private damages actions under any of the four proposed amending bills.

Under these circumstances, the most that the Court fairly can claim to have shown is that the 1974 Congress did not dis-

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floor manager, or committee chairman. Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 204, n. 24 (1976) ("Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight"). Moreover, the Court advances no evidence that even Senator Clark was thinking of *Goodman* actions when he expressed his concern to preserve existing state and federal jurisdiction. It is equally plausible that he was thinking primarily of federal antitrust jurisdiction and state-court jurisdiction over contract claims. These were, in fact, precisely the grounds on which three other witnesses, appearing before the same Senate Committee as Senator Clark, criticized the language of an earlier draft of the saving clause. See Hearings on S. 2485, S. 2578, S. 2837 and H. R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., 259–260 (1974) (Chairman Rodino of the House Committee on the Judiciary); *id.*, at 663–664 (Deputy Assistant Attorney General Clearwaters); *id.*, at 667–668 (Director Halverson of the Bureau of Competition, Federal Trade Commission).

[16] The relevant portion of this chart is attached as an Appendix to this opinion.

approve *Goodman* and its progeny. There simply is no persuasive evidence of affirmative congressional intent to recognize rights through the enactment of statutory law, even under the Court's unprecedented theory of congressional ratification by silence of judicial error.

III

The Court's holding today may reflect its view of desirable policy. If so, this view is doubly mistaken.

First, modern federal regulatory statutes tend to be exceedingly complex. Especially in this context, courts should recognize that intricate policy calculations are necessary to decide when new enforcement measures are desirable additions to a particular regulatory structure. Judicial creation of private rights of action is as likely to disrupt as to assist the functioning of the regulatory schemes developed by Congress. See, *e. g.*, *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 782–784 (1981).

Today's decision also is disquieting because of its implicit view of the judicial role in the creation of federal law. The Court propounds a test that taxes the legislative branch with a duty to respond to opinions of the lower federal courts. The penalty for silence is the risk of having those erroneous judicial opinions imputed to Congress itself—on the basis of its presumptive knowledge of the "contemporary legal context." *Ante*, at 379. Despite the Court's allusion to the lawmaking powers of courts at common law, see *ante*, at 374–377, this view is inconsistent with the theory and structure of our constitutional government.

For reasons that I have expressed before, I remain convinced that "we should not condone the implication of any private right of action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist." *Cannon* v. *University of Chicago*, 441 U. S. 677, 749 (1979) (POWELL, J., dissenting).[17] Here the

[17] There can be little doubt that failure to adhere to this standard will encourage the discovery of private causes of action of which Congress never

evidence falls far short of this constitutionally appropriate standard.

Accordingly, I respectfully dissent.

APPENDIX TO OPINION OF POWELL, J., DISSENTING

		HUMPHREY	McGOVERN	HART	Page 5
FEATURES	H. R. 13113	S. 2485	S. 2578	S. 2837, AS AMENDED	PRESENT COMMODITY EXCHANGE ACT
Civil money penalties.	Permits civil money penalties up to $100,000. (Sec. 212)	Permits money penalties of $1,000 to $100,000 but only for failure to comply with a Commission order to cease and desist from violating the Act. (Sec. 7)	Permits money penalties up $100,000 and provides criteria for assessment. Civil actions may be brought by individuals for treble damages. (Sec. 16)	Civil actions may be brought by individuals for treble damages. (Sec. 505) Provides for civil money penalties for violation of a final order. (Sec. 504) Provides Commission with authority to directly impose a fine of up to $100,000, issue a cease and desist order, require restitution, suspend registration, and grant other relief that a court of equity would have the right to grant. (Sec. 406)	None.

Commodity Futures Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H. R. 13113 before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess., 194 (1974).

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dreamed. The escalating recourse to damages suits has placed a severe and growing burden on the lower federal courts. My research—accomplished mostly through a computer search of cases in the federal reporters—indicates that in the past decade there have been at least 243 reported Court of Appeals opinions and 515 District Court opinions dealing with the existence of implied causes of action under various federal statutes. It is time federal courts discontinued the speculative creation of damages liability where the legislative branch has chosen to remain silent.

ZANT, WARDEN *v.* STEPHENS

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

No. 81–89. Argued February 24, 1982—Decided May 3, 1982

After respondent was convicted of murder in a Georgia trial court, his sentencing jury found the existence of three aggravating circumstances specified in the Georgia death penalty statute and imposed the death penalty. Although the Georgia Supreme Court set aside one of the aggravating circumstances found by the jury, it upheld the death sentence, concluding that the evidence supported the jury's findings of the other aggravating circumstances and that therefore the sentence was not impaired. After exhausting state postconviction remedies, respondent filed for a writ of habeas corpus in Federal District Court, which denied relief. The Court of Appeals reversed and remanded insofar as the District Court had left standing respondent's death sentence. This Court granted the petition for certiorari to consider the question whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence. The Georgia Supreme Court consistently has asserted that authority, but there is considerable uncertainty about the state-law premises of Georgia's rule.

Held: Such state-law premises are relevant to the constitutional issue at hand. Thus, pursuant to a Georgia statute providing that under certain circumstances the Georgia Supreme Court will decide questions of state law upon certification from this Court, the following question is certified: What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?

631 F. 2d 397 and 648 F. 2d 446, question certified.

Daryl A. Robinson, Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the brief were *Michael J. Bowers*, Attorney General, *Robert S. Stubbs* II, Executive Assistant Attorney General, and *Marion O. Gordon* and *John C. Walden*, Senior Assistant Attorneys General.

John Charles Boger argued the cause for respondent. With him on the brief were *James C. Bonner, Jr.*, *Jack Greenberg*, *James M. Nabrit III*, *Joel Berger*, *Deborah Fins*, and *Anthony G. Amsterdam*.*

PER CURIAM.

The respondent was convicted of murder in a Georgia Superior Court. His sentencing jury found the following statutory aggravating circumstances:[1]

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*A brief for the State of Alabama et al. as *amici curiae* urging reversal was filed by *Charles A. Graddick*, Attorney General of Alabama, *George Deukmejian*, Attorney General of California, *Jim Smith*, Attorney General of Florida, *William J. Guste, Jr.*, Attorney General of Louisiana, *William A. Allain*, Attorney General of Mississippi, *John D. Ashcroft*, Attorney General of Missouri, and *John M. Morris III*, Assistant Attorney General, *Michael T. Greely*, Attorney General of Montana, *Paul L. Douglas*, Attorney General of Nebraska, *Richard H. Bryan*, Attorney General of Nevada, *Jeff Bingaman*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, *Daniel R. McLeod*, Attorney General of South Carolina, and *David L. Wilkinson*, Attorney General of Utah.

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

[1] The trial judge instructed the sentencing jury as follows:

"Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. You are further authorized to consider all facts and circumstances presented in extinuation *[sic]*, mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a

"(1) that the offense of murder was committed by a person with a prior record of conviction of a capital felony, Code Ann. § 27–2534.1(b)(1); (2) that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Code Ann. § 27–2534.1(b)(1), supra; and, (3) that the offense of murder was committed by a person who had escaped from the lawful custody of a peace officer or a place of lawful

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Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case." App. 18–19.

> confinement, Code Ann. § 27–2534.1(b)(9)." *Stephens* v. *Hopper*, 241 Ga. 596, 597–598, 247 S. E. 2d 92, 94, cert. denied, 439 U. S. 991 (1978).

The jury imposed the death penalty. On direct appeal, the Georgia Supreme Court affirmed. *Stephens* v. *State*, 237 Ga. 259, 227 S. E. 2d 261, cert. denied, 429 U. S. 986 (1976). On the authority of *Arnold* v. *State*, 236 Ga. 534, 224 S. E. 2d 386 (1976), it set aside the second statutory aggravating circumstance found by the jury. It upheld the death sentence, however, on the ground that in *Arnold* "that was the sole aggravating circumstance found by the jury," whereas in the case under review "the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired." 237 Ga., at 261–262, 227 S. E. 2d, at 263.

After exhausting his state postconviction remedies, *Stephens* v. *Hopper*, *supra*, the respondent applied for a writ of habeas corpus in Federal District Court. Relief was denied by that court, but the United States Court of Appeals for the Fifth Circuit "reverse[d] the district court's denial of habeas corpus relief insofar as it le[ft] standing the [respondent's] death sentence, and . . . remanded for further proceedings." 631 F. 2d 397, 407 (1980), modified, 648 F. 2d 446 (1981). We granted the petition for certiorari. 454 U. S. 814.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of *Furman* v. *Georgia*, 408 U. S. 238 (1972), that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court's construing the statute and reviewing capital sentences consistently with this concern. See 428 U. S., at 198, 201–206 (opinion of Stewart, POWELL,

and STEVENS, JJ.); *id.*, at 211–212, 222–224 (WHITE, J., concurring in judgment). Our review of the statute did not lead us to examine all of its nuances. It was only after the state law relating to capital sentencing was clarified in concrete cases that we confronted and addressed more specific constitutional challenges in *Coker* v. *Georgia*, 433 U. S. 584 (1977), *Presnell* v. *Georgia*, 439 U. S. 14 (1978), *Green* v. *Georgia*, 442 U. S. 95 (1979), and *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

Today, we are asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence. The Georgia Supreme Court consistently has asserted that authority.[2] Its construction of state law is clear: "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." *Gates* v. *State*, 244 Ga. 587, 599, 261 S. E. 2d 349, 358 (1979), cert. denied, 445 U. S. 938 (1980).

Despite the clarity of the state rule we are asked to review, there is considerable uncertainty about the state-law prem-

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[2] See *Stevens* v. *State*, 247 Ga. 698, 709, 278 S. E. 2d 398, 407 (1981); *Green* v. *State*, 246 Ga. 598, 606, 272 S. E. 2d 475, 485 (1980), cert. denied, 450 U. S. 936 (1981); *Hamilton* v. *State*, 246 Ga. 264, n. 1, 271 S. E. 2d 173, 174, n. 1 (1980), cert. denied, 449 U. S. 1103 (1981); *Brooks* v. *State*, 246 Ga. 262, 263, 271 S. E. 2d 172 (1980), cert. denied, 451 U. S. 921 (1981); *Collins* v. *State*, 246 Ga. 261, 262, 271 S. E. 2d 352, 354 (1980), cert. denied, 449 U. S. 1103 (1981); *Dampier* v. *State*, 245 Ga. 882, 883, n. 1, 268 S. E. 2d 349, 350, n. 1, cert. denied, 449 U. S. 938 (1980); *Burger* v. *State*, 245 Ga. 458, 461–462, 265 S. E. 2d 796, 799–800, cert. denied, 446 U. S. 988 (1980); *Gates* v. *State*, 244 Ga. 587, 599, 261 S. E. 2d 349, 358 (1979), cert. denied, 445 U. S. 938 (1980); *Stephens* v. *State*, 237 Ga. 259, 261–262, 227 S. E. 2d 261, 263, cert. denied, 429 U. S. 986 (1976).

ises of that rule.[3] The Georgia Supreme Court has never explained the rationale for its position. It may be that implicit in the rule is a determination that multiple findings of statutory aggravating circumstances are superfluous, or a determination that the reviewing court may assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions. In this Court, the Georgia Attorney General offered as his understanding the following construction of state law: The jury must first find whether one or more statutory aggravating circum-

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[3] Last Term, Members of this Court expressed different assumptions about the meaning—and the constitutionality—of the Georgia Supreme Court's position. In *Drake* v. *Zant*, 449 U. S. 999 (1980), the Court declined to grant certiorari and vacate the judgments in two Georgia cases in which the death sentences—premised in part on the (b)(7) aggravating circumstance—were imposed prior to our decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). JUSTICE STEVENS, concurring in the disposition, expressed the opinion that the Georgia Supreme Court's position was so clear that there was no need to remand the cases for reconsideration in light of *Godfrey*. 449 U. S., at 1000. Dissenting from the denial of certiorari, Justice Stewart stated that if one aggravating circumstance found by the jury "could not constitutionally justify the death sentence, Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance." *Id.*, at 1001. He believed that the Georgia Supreme Court's position on the issue was inconsistent with the Georgia capital punishment scheme because "only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death." *Ibid.* JUSTICE WHITE, also dissenting, would have remanded for reconsideration in light of *Godfrey*, a disposition that "would allow the Georgia Supreme Court in the first instance to determine whether the death penalty should be sustained without regard to the validity of the *Godfrey* circumstance." 449 U. S., at 1002. He did "not understand the Georgia cases . . . to hold either that the Georgia Supreme Court is without power to set aside a death penalty if it sustains only one of the aggravating circumstances found by the jury or that, although the court has that power, it invariably will not disturb the death penalty in such situations." *Ibid.*

stances have been established beyond a reasonable doubt. The existence of one or more aggravating circumstances is a threshold finding that authorizes the jury to consider imposing the death penalty; it serves as a bridge that takes the jury from the general class of all murders to the narrower class of offenses the state legislature has determined warrant the death penalty. After making the finding that the death penalty is a possible punishment, the jury then makes a separate finding whether the death penalty should be imposed. It bases this finding "not upon the statutory aggravating circumstances but upon all the evidence before the jury in aggravation and mitigation of punishment which ha[s] been introduced at both phases of the trial." Brief for Petitioner 13.

In view of the foregoing uncertainty, it would be premature to decide whether such determinations, or any of the others we might conceive as a basis for the Georgia Supreme Court's position, might undermine the confidence we expressed in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Georgia capital-sentencing system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster. Suffice it to say that the state-law premises of the Georgia Supreme Court's conclusion of state law are relevant to the constitutional issue at hand.

The Georgia Supreme Court under certain circumstances will decide questions of state law upon certification from this Court. See Ga. Code § 24–4536 (Supp. 1980).[4] We invoke that statute to certify the following question: What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of

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[4] "When it shall appear to the Supreme Court of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such Federal appellate court may certify such questions or propositions of the laws of Georgia to this court for instructions concerning such questions or propositions."

one of the statutory aggravating circumstances found by the jury?

The Clerk of this Court is directed to transmit this certificate, signed by THE CHIEF JUSTICE and under the official seal of the Court, as well as the briefs and record filed with the Court, to the Supreme Court of Georgia, and simultaneously to transmit copies of the certificate to the attorneys for the respective parties.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Six years ago in *Gregg* v. *Georgia*, 428 U. S. 153, 193 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.), this Court declared:

> "Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (Footnote omitted.)

In today's decision, a majority of this Court intimates that a *post hoc* construction of a death penalty statute by the State's highest court may remedy the fact that a jury was improperly instructed with respect to the very factors that save the Georgia statute from unconstitutionality. See *Gregg* v. *Georgia*, *supra*. Because I cannot see how the Georgia Supreme Court's response to this Court's certification could constitutionally justify the imposition of the death penalty in this case, I must dissent.

I

I adhere 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*, *supra*, at 231. Even if I believed that the death penalty could constitutionally be imposed under certain circumstances, however, I believe that respondent Stephens' sentence must be vacated and his case remanded to the Georgia state courts for resentencing.

II

In my opinion, remanding this case for resentencing is compelled by this Court's decisions upholding the constitutionality of the Georgia death penalty statute, and by well-recognized principles of appellate review. Therefore, whether or not the Georgia Supreme Court's construction of the statute in response to this Court's certification might avoid the constitutional infirmity inherent in respondent's sentence in some future case, it can do nothing to alter the fact that respondent's death sentence may have been based in part on consideration of an unconstitutional aggravating circumstance.

Under Georgia law, certification is appropriate "[w]hen it shall appear to the Supreme Court of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State *which are determinative of said cause* and there are no clear controlling precedents in the appellate court decisions of this State." Ga. Code § 24-4536(a) (Supp. 1980) (emphasis added). The majority attempts to bring this case within the ambit of this certification procedure by indicating that "[i]t may be that . . . multiple findings of statutory aggravating circumstances are superfluous, or . . . the reviewing court may assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions." *Ante*, at 415. The majority then requests the Georgia Supreme Court to clarify "the premises of state law that support the conclusion that the death sentence in this case is not impaired

by the invalidity of one of the statutory aggravating circumstances found by the jury." *Ante*, at 416–417.

I wholeheartedly agree that we do not know the answers to these questions. The majority recognizes that we do not possess this information because "[t]he Georgia Supreme Court has never explained the rationale for its position" that a death sentence may be reaffirmed when one of the aggravating circumstances relied on by the jury is declared invalid. *Ante*, at 415. I submit, however, that we are not alone in our ignorance. There is absolutely no indication that the jury sentencing respondent to death or the judge who instructed that jury was any more aware of the answers to these questions than we are today. Indeed, by certifying these questions to the Georgia Supreme Court, the majority concedes that it was impossible for *anyone* to know the answers to these questions at the time respondent was sentenced to death, because "there are no controlling precedents" in Georgia on these issues. Given this Court's prior treatment of cases in which a defendant received a sentence, particularly a death sentence, on the basis of erroneous jury instructions, I do not understand how the Georgia Supreme Court's answer to the certified question could possibly be "determinative" of this case.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court struck down death penalties imposed pursuant to a Georgia statute. Shortly thereafter, the Georgia Legislature enacted the current death penalty statute. This statute provides for a separate sentencing proceeding after the defendant has been found guilty of a capital offense. During the sentencing phase, the trial judge shall instruct the jury[1] to consider "any of the [10] statutory aggravating circumstances which may be supported by the evidence." Ga. Code § 27–2534.1(b) (1978). The aggravating circumstances found

[1] In bench trials, the judge must consider these factors.

by the judge to be warranted by the evidence are submitted to the jury in writing to be used during its deliberations. § 27–2534.1(c). If the jury recommends a death sentence, it "shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt." *Ibid.* Even if it finds that one or more aggravating circumstances has been established beyond a reasonable doubt, the jury is not required to impose the death penalty. See *Bowen* v. *State*, 241 Ga. 492, 246 S. E. 2d 322 (1978). The jury's verdict to impose the death penalty must be unanimous. *Miller* v. *State*, 237 Ga. 557, 229 S. E. 2d 376 (1976). The trial judge is bound by the jury's recommendation of sentence, whether that recommendation be life or death. Ga. Code §§ 26–3102, 27–2514 (1978).

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), this Court held that this statutory scheme satisfied the constitutional guarantee against cruel and unusual punishment. In reaching this conclusion, the two principal opinions relied heavily on the fact that the aggravating circumstances served to guide the jury's discretion. The joint opinion announcing the judgment of the Court emphasized that because "the members of a jury will have had little, if any, previous experience in sentencing," *id.*, at 192 (opinion of Stewart, POWELL, and STEVENS, JJ.), they should be given specific standards to guide their sentencing deliberations, such as those provided in the Model Penal Code, which catalogs "'the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other*'" by the jury. *Id.*, at 193 (quoting ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (emphasis in original). That opinion found that the new Georgia statute satisfied this requirement because, through the statutory aggravating circumstances, "[t]he new Georgia sentencing procedures . . . *focus the jury's attention* on the particularized nature of the crime and the particularized characteristics of the individual defendant." 428 U. S., at 206 (emphasis added). JUSTICE WHITE,

joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, concurring in the judgment, placed an even stronger emphasis on the role of the statutory aggravating circumstances:

> "The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute . . . . As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate *as they are in Georgia by reason of the aggravating-circumstance requirement*, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined." *Id.*, at 222 (first emphasis added).

In *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion of Stewart, J., joined by BLACKMUN, POWELL, and STEVENS, JJ.), this Court reaffirmed the role of aggravating circumstances in protecting against the arbitrary imposition of the death penalty. The *Godfrey* Court addressed the constitutionality of a death sentence imposed in reliance on aggravating circumstance § (b)(7), which allows a jury to impose the death sentence if it finds that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27–2534.1(b)(7) (1978).

The plurality opinion found: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U. S., at 428–429. Section (b)(7), if construed broadly enough to encompass every murder, would

be unconstitutional because it provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 433. The plurality found it significant that this interpretation of § (b)(7) "may . . . have been one to which the members of the jury in this case subscribed," and that, if the jury did hold this view "their preconceptions were not dispelled by the trial judge's sentencing instructions." *Id.*, at 429. Therefore, the jury was not given appropriate guidance, and the death sentence could not constitutionally be imposed.

In my view, this reasoning requires that respondent's death sentence be vacated and that this case be remanded so he can be resentenced by a properly instructed jury. It is conceded that the jury in this case was instructed on an aggravating circumstance that the Georgia Supreme Court has since declared unconstitutional. If this were the only aggravating circumstance found by the jury, it is also undisputed that the State would be unable to impose the death sentence, see *Arnold* v. *State*, 236 Ga. 534, 224 S. E. 2d 386 (1976), even if the Georgia Supreme Court determined that the evidence supported a finding of other statutory aggravating circumstances. Cf. *Presnell* v. *Georgia*, 439 U. S. 14, 16 (1978). Petitioner argues, however, because the jury found two other statutory aggravating circumstances that the Georgia Supreme Court found to be supported by the evidence, that court could reaffirm the death sentence. This argument flies in the face of the reasoning of the *Godfrey* plurality which found it crucial that the *jury's* decision to impose the death sentence be guided by clear and appropriate instructions.

Moreover, this argument is patently contrary to the settled principle that "if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside." 631 F. 2d 397, 406 (CA5 1980) (case below); see *Stromberg* v.

California, 283 U. S. 359 (1931). Since 1931, this Court has consistently declined to speculate about whether a particular jury would have reached the same conclusion in the absence of an unconstitutional instruction. See, *e. g.*, *id.*, at 367–368. Accord, *Bachellar* v. *Maryland*, 397 U. S. 564, 570–571 (1970); *Street* v. *New York*, 394 U. S. 576, 585–588 (1969); *Yates* v. *United States*, 354 U. S. 298, 311–312 (1957). In light of this Court's consistent recognition that "the penalty of death is qualitatively different from a sentence of imprisonment," *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1980) (opinion of Stewart, POWELL, and STEVENS, JJ.); see, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 117–118 (1982) (O'CONNOR, J., concurring), there is certainly no reason to engage in such speculation here. Yet, the jury is not *required* to recommend death even if it finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Therefore, to adopt the bald pronouncement that "[w]here two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death thereon," *Gates* v. *State*, 244 Ga. 587, 599, 261 S. E. 2d 349, 358 (1979), we would have to speculate that the jury's decision to impose the death penalty was not influenced by the presence of the unconstitutional aggravating circumstance.[2]

Recognizing that settled law normally requires that sentences arguably imposed on the basis of unconstitutional instructions cannot stand, petitioner and several States in an

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[2] To date, the majority of state courts that have confronted this issue have declined to speculate whether the jury would still have returned a death sentence in the absence of the subsequently invalidated aggravating circumstance. See, *e. g.*, *Williams* v. *State*, 274 Ark. 9, 11–13, 621 S. W. 2d 686, 687–688 (1981); *State* v. *Irwin*, 304 N. C. 93, 106–108, 282 S. E. 2d 439, 448–449 (1981); *State* v. *Moore*, 614 S. W. 2d 348, 351–352 (Tenn. 1981); *Hopkinson* v. *State*, 632 P. 2d 79, 171–172 (Wyo. 1981). See also *Cook* v. *State*, 369 So. 2d 1251, 1255–1257 (Ala. App. 1979).

amicus curiae brief[3] attempt to distinguish the *Stromberg* line of cases by arguing that, as a matter of statutory construction, a jury's finding that 1 of the 10 aggravating circumstances has been established beyond a reasonable doubt is irrelevant to its ultimate conclusion that the death penalty should be imposed. Specifically, petitioner argues that the term "aggravating circumstance" actually has *two* entirely different meanings, with each meaning representing a separate task that a capital sentencing jury must perform. First, the jury must determine whether any of the 10 statutory "aggravating circumstances" has been established beyond a reasonable doubt. This, petitioner argues, is a threshold determination that only allows the jury to *consider* the death penalty, but has no impact on whether that penalty should be imposed. After reaching this threshold determination, the jury may consider any "evidence in aggravation" or mitigation in reaching its conclusion as to whether the dealth penalty *should* be imposed. According to petitioner, the jury performs this second task free of any influence from the very "legislative guidelines" that, by "focus[ing] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant," prevent the death penalty from being wantonly and freakishly imposed. *Gregg* v. *Georgia*, 428 U. S., at 206–207 (joint opinion of Stewart, POWELL, and STEVENS, JJ.).

Putting to one side both the plausibility and the constitutionality of petitioner's construction of the Georgia death penalty statute,[4] it is patently obvious that this *ex post facto* at-

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[3] The States of Alabama, California, Florida, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, South Carolina, and Utah submitted an *amicus* brief on behalf of petitioner. It is interesting to note that the appellate courts of Alabama and North Carolina have already implicitly rejected the construction now urged by these States as *amici*. See n. 2, *supra*.

[4] In my view, if the Georgia Supreme Court adopted this interpretation of the death penalty statute, it would raise serious questions as to the constitutionality of this statute under *Gregg*.

tempt to avoid the clear mandate of *Stromberg* cannot possibly remedy the constitutional infirmity of respondent's sentence. This conclusion is compelled by this Court's decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). In *Sandstrom*, a defendant was convicted of "deliberate homicide," which, under Montana law, required the State to prove that he "purposefully or knowingly" caused the death of the victim. *Id.*, at 512. At the close of all the evidence, the judge instructed the jury that "'[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.'" *Id.*, at 513. The defendant objected to this instruction on the ground that it unconstitutionally shifted the burden of proof on the issue of intent. On direct appeal, the Montana Supreme Court conceded that shifting the burden of proof in a criminal case was unconstitutional. It nevertheless upheld the challenged instruction on the ground that under its interpretation, the instruction only shifted the burden of production rather than the burden of persuasion. *Id.*, at 513–514. In the proceedings before this Court, the State argued that the Montana Supreme Court's interpretation of the effect of the presumption was conclusive on this Court. *Id.*, at 516.

This Court unanimously[5] rejected the State's attempt to avoid the constitutional issue by the use of a *post hoc* narrowing construction by the State's highest court. While acknowledging that "[t]he Supreme Court of Montana is . . . the final authority on the legal weight to be given a presumption under Montana law, . . . *it is not the final authority on the interpretation which a jury could have given the [challenged] instruction.*" *Id.*, at 516–517 (emphasis added). Instead, this Court defined the relevant question as whether "a reasonable juror could well have been misled by the instruction." *Id.*, at 517. Even assuming the constitutionality of the Montana Supreme Court's interpretation of the pre-

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[5] JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE, filed a separate opinion concurring in both the judgment and the opinion of the Court.

sumption, an interpretation that this Court conceded might have been in the minds of "some jurors," the fact that "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that *Sandstrom's jurors* actually did proceed upon one or the other of these latter interpretations." *Id.*, at 519 (emphasis added). "Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption . . . or a conclusive presumption," *id.*, at 524, this Court held the instruction unconstitutional and remanded the case to the state courts for proceedings not inconsistent with the opinion.[6]

In my view, the case presently before the Court presents even a stronger case for rejecting the relevance of an *ex post facto* saving construction. By certifying this question to the Georgia Supreme Court, the majority concedes that this construction has never been explicitly adopted by the Georgia courts. It must also be acknowledged that petitioner's interpretation of the jury's role under the Georgia law is not the only, or even the most plausible, construction of the death penalty statute. A "reasonable juror" could fairly conclude

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[6] The *Sandstrom* Court also rejected the State's argument that the jury need not have relied on the challenged instruction in finding Sandstrom guilty of intentional murder. The State reasoned that because the tainted instruction could arguably be viewed as only relating to the defendant's "purpose," the jury might have convicted Sandstrom solely on the ground that he "knowingly" caused the death of the victim. Because the statute only requires that the crime be committed "purposefully *or* knowingly," the State argued that there was an alternative basis on which the conviction could be sustained. 442 U. S., at 525. Relying on *Stromberg* v. *California*, 283 U. S. 359 (1931), this Court refused to engage in such speculation, since "even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do." 442 U. S., at 526 (emphasis in original). There is similarly no way to tell whether respondent's jury adopted the Georgia Supreme Court's yet undisclosed interpretation of the Georgia death penalty statute.

that he or she was required to place special emphasis on the existence of statutory aggravating circumstances, and weigh them against each other and against any mitigating circumstances, when deciding whether or not to impose the death penalty. Cf. *Godfrey* v. *Georgia*, 446 U. S., at 428–429. Certainly several Members of this Court have operated under this assumption. See *Gregg* v. *Georgia*, 428 U. S., at 197–198, 221–222; *Godfrey* v. *Georgia*, *supra*, at 436–437 (MARSHALL, J., concurring in judgment); *Drake* v. *Zant*, 449 U. S. 999, 1001 (1980) (Stewart, J., dissenting from denial of certiorari).

If respondent's jury subscribed to this interpretation of their role, "their preconceptions were not dispelled by the trial judge's sentencing instructions." *Godfrey*, *supra*, at 429. Indeed, everything about the judge's charge highlighted the importance of the aggravating circumstances. Not only were the circumstances submitted to the jury in writing, but also the jury was in turn required to write down each and every aggravating circumstance that it found to be established beyond a reasonable doubt. See Ga. Code § 27–2534.1(c) (1978) discussed *supra*, at 420. The jury instructions provide absolutely no indication that, after carefully considering each of the statutory aggravating circumstances submitted by the trial judge, the jury should, or even could, discard this list of officially sanctioned grounds for imposing the death penalty in deciding whether to actually sentence respondent to death.

Absent even a shred of evidence that respondent's trial judge and jury were cognizant of petitioner's asserted construction of the Georgia death penalty statute, a construction never acknowledged by any Georgia appellate court, we can only speculate whether "the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." 631 F. 2d, at 406. It is precisely to guard against such speculation that this Court has uniformly re-

fused to uphold a conviction or sentence that might have been based even in part on an unconstitutional ground.[7] See *supra*, at 423. Furthermore, in *Gregg* v. *Georgia*, *supra*, at 189, this Court made clear that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." See also *Furman* v. *Georgia*, 408 U. S. 238 (1972). Because nothing the Supreme Court of Georgia can say in response to this Court's certification will assure us that *respondent's jury* was "suitably directed,"[8] I must dissent.

JUSTICE POWELL, dissenting.

I am in essential agreement with the views expressed by JUSTICE MARSHALL in Part II of his dissenting opinion, and

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[7] It is irrelevant whether the jury's determination was only partially based on the presence of the unconstitutional aggravating circumstance. As this Court held in *Street* v. *New York*, 394 U. S. 576 (1969), "even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on [an unconstitutional ground], we are still bound to reverse if the conviction could have been based upon *both*" an unconstitutional and a constitutional ground. *Id.*, at 587 (emphasis in original).

[8] The majority's implication that certifying this case will give the Georgia Supreme Court an opportunity to clarify whether it has the power to "assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions," *ante*, at 415, does not alter my conclusion. In affirming respondent's death sentence, the Georgia Supreme Court did not purport to exercise such authority. Nor did the State argue that such action by the Georgia Supreme Court was permissible in the proceedings before this Court. Indeed, prior to this Court's action today, it has always been assumed that "only the trier of fact may impose a death sentence." *Willis* v. *Balkcom*, 451 U. S. 926, 928 (1981) (MARSHALL, J., joined by BRENNAN and Stewart, JJ., dissenting from denial of certiorari). In any event, a "reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law." *Godfrey* v. *Georgia*, 446 U. S. 420, 437 (1980) (MARSHALL, J., concurring in judgment).

with his conclusion that the death sentence was imposed under instructions that could have misled the jury. I would not hold, however, that the case must be remanded for resentencing *by a jury*.

The Court of Appeals for the Fifth Circuit simply reversed and remanded, thus leaving it to the Georgia Supreme Court to determine whether resentencing by a jury is required in this case. It may be that under Georgia law the State Supreme Court lacks authority to resentence. If that should be the case, I would leave open—also for the Supreme Court of Georgia to decide—whether it has authority to find that the instruction was harmless error beyond a reasonable doubt.

O'DELL ET AL. *v.* ESPINOZA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ESPINOZA AND AS GUARDIAN, ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 81-534. Argued April 26, 1982—Decided May 3, 1982

Certiorari dismissed for want of jurisdiction. Reported below: 633 P. 2d 455.

Theodore S. Halaby argued the cause for petitioners. With him on the briefs were *Louis B. Bruno* and *David Neil.*

Scott H. Robinson argued the cause and filed a brief for respondents.*

PER CURIAM.

Under 28 U. S. C. § 1257, this Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Because the Colorado Supreme Court remanded this case for trial, its decision is not final "as an effective determination of the litigation." *Market Street R. Co.* v. *Railroad Comm'n of Cal.*, 324 U. S. 548, 551 (1945). Although there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, see *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), this case does not fit into any of those categories. We therefore dismiss for want of jurisdiction.

It is so ordered.

**Charles S. Sims, Leon Friedman, Christopher A. Hansen,* and *Anthony F. Renzo* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

FINNEGAN ET AL. v. LEU ET AL.

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

No. 80-2150. Argued February 24, 1982—Decided May 17, 1982

Sections 101(a)(1) and (2) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (Act) guarantee equal voting rights and rights of free speech and assembly to "[e]very member of a labor organization," and § 609 of Title VI makes it unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled" under the Act. Section 102 provides that any person whose rights under Title I have been infringed by any violation thereof may bring an action in federal district court for appropriate relief. Petitioners were discharged from their appointed positions as business agents for respondent local union by respondent union president following his election over a candidate supported by petitioners. Petitioners were also members of the union, and their discharges did not render them ineligible to continue union membership. Petitioners filed suit against respondents in Federal District Court alleging that their discharges violated §§ 101(a)(1) and (2). The District Court granted summary judgment for respondents, holding that the Act does not protect a union employee from discharge by the union president if the employee's rights as a union member are not affected. The Court of Appeals affirmed.

Held: Petitioners have failed to establish a violation of the Act. Pp. 435–442.

(a) It is apparent both from the language of §§ 101(a)(1), (2), and 609, and from Title I's legislative history, that Congress sought to protect rank-and-file union members, not the job security or tenure of union officers or employees as such. Pp. 435–437.

(b) The term "discipline," as used in § 609, refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union. The disciplinary sanctions of fine, suspension, and expulsion enumerated in § 609 are all punitive actions taken against union members as members. In contrast, discharge from union employment does not impinge upon the incidents of union membership, and affects union members only to the extent that they also happen to be union employees. Moreover, Congress used essentially the same language elsewhere in the Act with the specific intent not to protect a member's status as a union employee or officer. Accordingly, removal from appointive union em-

ployment is not within the scope of the union sanctions explicitly prohibited by § 609. Pp. 437–439.

(c) Petitioners were not prevented from exercising their rights under §§ 101(a)(1) and (2) as union members to campaign for respondent union president's opponent and to vote in the union election, and they allege only an *indirect* interference with those rights. Whatever limits Title I places on a union's authority to utilize dismissal from union office as part of an attempt to suppress dissent within the union, it does not restrict the freedom of an elected union leader to choose staff members whose views are compatible with his own. Neither the language nor legislative history of the Act suggests that it was intended to address the issue of union patronage, its overriding objective being rather to ensure that unions would be democratically governed and responsive to the union membership's will as expressed in open elections. Pp. 439–442.

652 F. 2d 58, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 442.

Samuel G. Bolotin argued the cause and filed a brief for petitioners.

Ted Iorio argued the cause for respondents. With him on the brief was *Jack Gallon* and *Jeffrey Julius*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the discharge of a union's appointed business agents by the union president, following his election over the candidate supported by the business agents, violated the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C.

**Alan Hyde* and *Paul Alan Levy* filed a brief for the Association for Union Democracy et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll*, *Marsha Berzon*, and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Amy Gladstein* and *James Reif* for the National Labor Law Center of the National Lawyers Guild.

§ 401 *et seq.* The Court of Appeals held that the Act did not protect the business agents from discharge. We granted certiorari to resolve Circuit conflicts,[1] 454 U. S. 813 (1981), and we affirm.

I

In December 1977, respondent Harold Leu defeated Omar Brown in an election for the presidency of Local 20 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization representing workers in a 14-county area of northwestern Ohio.[2] During the vigorously contested campaign, petitioners, then business agents of Local 20, openly supported the incumbent president, Brown. Upon assuming office in January 1978, Leu discharged petitioners and the Local's other business agents, all of whom had been appointed by Brown

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[1] See, *e. g.*, *Lamb* v. *Miller*, 212 U. S. App. D. C. 393, 660 F. 2d 792 (1981); *Maceira* v. *Pagan*, 649 F. 2d 8 (CA1 1981); *Newman* v. *Local 1101, Communications Workers*, 570 F. 2d 439 (CA2 1978); *Bradford* v. *Textile Workers Local 1093*, 563 F. 2d 1138 (CA4 1977); *Gabauer* v. *Woodcock*, 520 F. 2d 1084 (CA8 1975), cert. denied, 423 U. S. 1061 (1976); *Wambles* v. *International Brotherhood of Teamsters*, 488 F. 2d 888 (CA5 1974); *Wood* v. *Dennis*, 489 F. 2d 849 (CA7 1973) (en banc), cert. denied, 415 U. S. 960 (1974); *Grand Lodge of International Assn. of Machinists* v. *King*, 335 F. 2d 340 (CA9), cert. denied, 379 U. S. 920 (1964); *Sheridan* v. *Carpenters Local No. 626*, 306 F. 2d 152 (CA3 1962).

[2] Brown challenged the election results and, following an investigation, the Secretary of Labor determined that unlawful employer contributions had affected the outcome of the election. The Secretary filed suit in the United States District Court for the Northern District of Ohio, and that court ordered a rerun election under the Secretary's supervision; the Court of Appeals for the Sixth Circuit affirmed. *Marshall* v. *Local 20, Teamsters*, 611 F. 2d 645 (1979). In the second election, Leu again defeated Brown.

Brown and Leu had previously opposed each other in the 1974 election for the presidency. Although Leu defeated Brown by a slight margin, the election was set aside by the International Union because of irregularities at the polling places. Brown won the second election, which was held in 1975 under the supervision of a panel from the International Union.

following his election in 1975.[3] Leu explained that he felt the agents were loyal to Brown, not to him, and therefore would be unable to follow and implement his policies and programs.

Local 20's bylaws—which were adopted by, and may be amended by, a vote of the union membership—provide that the president shall have authority to appoint, direct, and discharge the Union's business agents. Bylaws of Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20, Art. IX, § 3 D, Joint Exhibit 1, p. 15 (1975). The duties of the business agents include participation in the negotiating of collective-bargaining agreements, organizing of union members, and processing of grievances. In addition, the business agents, along with the president, other elected officers, and shop stewards, sit as members of the Stewards Council, the legislative assembly of the Union. Petitioners had come up through the union ranks, and as business agents they were also members of Local 20. Discharge from their positions as business agents did not render petitioners ineligible to continue their union membership.

Petitioners filed suit in the United States District Court, alleging that they had been terminated from their appointed positions in violation of the Labor-Management Reporting and Disclosure Act, 29 U. S. C. §§ 411(a)(1), 411(a)(2), 412, and 529. The District Court granted summary judgment for respondents Leu and Local 20, holding that the Act does not protect a union employee from discharge by the president of the union if the employee's rights as a union member are not affected. *Navarro* v. *Leu*, 469 F. Supp. 832 (1979). The United States Court of Appeals for the Sixth Circuit affirmed, concluding "that a union president should be able to work with those who will cooperate with his program and carry out his directives, and that these business agents, who

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[3] When Brown was elected president in 1975, see n. 2, *supra*, the incumbent business agents resigned.

served at the pleasure of the union president, and actively supported the president's opponent could be removed from their employment as union business agents." App. to Pet. for Cert. A3.

II

The Labor-Management Reporting and Disclosure Act of 1959 was the product of congressional concern with widespread abuses of power by union leadership. The relevant provisions of the Act had a history tracing back more than two decades in the evolution of the statutes relating to labor unions. Tensions between union leaders and the rank-and-file members and allegations of union wrongdoing led to extended congressional inquiry. As originally introduced, the legislation focused on disclosure requirements and the regulation of union trusteeships and elections. However, various amendments were adopted, all aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution; not surprisingly, these amendments—ultimately enacted as Title I of the Act, 29 U. S. C. §§ 411–415—were introduced under the title of "Bill of Rights of Members of Labor Organizations."[4] The amendments placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in

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[4] The original "Bill of Rights" amendment was introduced on the floor of the Senate by Senator McClellan and adopted by a vote of 47–46. 105 Cong. Rec. 6469–6493 (1959), 2 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 1096–1119 (1959) (hereafter Leg. Hist.). However, a compromise version of the amendment introduced by Senator Kuchel was substituted shortly thereafter, 105 Cong. Rec. 6716–6727 (1959), 2 Leg. Hist. 1229–1239, and later approved by the House of Representatives as part of the Landrum-Griffin bill, H. R. 8400, 86th Cong., 1st Sess. (1959), 1 Leg. Hist. 628–633. See 105 Cong. Rec. 15711, 15859–15860, 1692–1702 (1959), 2 Leg. Hist. 1645, 1691–1692, 1693–1702.

turn loss of livelihood. Such protection was necessary to further the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of their memberships. See 105 Cong. Rec. 6471–6472, 6476, 15530 (1959), 2 Leg. Hist. 1098–1099, 1103, 1566.

Sections 101(a)(1) and (2) of the Act, 29 U. S. C. §§ 411(a)(1) and (2), on which petitioners rely, guarantee equal voting rights, and rights of speech and assembly, to "[e]very *member* of a labor organization" (emphasis added).[5] In addition, § 609 of the Act, 29 U. S. C. § 529, renders it unlawful for a union or its representatives "to fine, suspend, expel, or otherwise discipline any of its *members* for exercising any right to which he is entitled under the provisions of this Act." (Emphasis added.)[6] It is readily apparent, both from the

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[5] Section 101(a)(1) provides:

"Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

Section 101(a)(2) provides:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

[6] Section 609 provides:

"It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its

language of these provisions and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect.[7]

Petitioners held a dual status as both employees and members of the Union. As *members* of Local 20, petitioners undoubtedly had a protected right to campaign for Brown and support his candidacy. At issue here is whether they were thereby immunized from discharge at the pleasure of the president from their positions as appointed union *employees*.

III

Petitioners contend that discharge from a position as a union employee constitutes "discipline" within the meaning of § 609; and that termination of union employment is therefore unlawful when predicated upon an employee's exercise of rights guaranteed to members under the Act. However, we conclude that the term "discipline," as used in § 609, refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union. Section 609 speaks in terms of disciplining "members"; and the three disciplinary sanctions specifically enumerated—fine, suspension, and expulsion—are all punitive actions taken against union mem-

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members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section."

[7] The provisions of Title I consistently refer to the rights of union "members." As originally passed by the Senate, § 101(a)(4)—which in its present form protects the right of "any member" to institute legal proceedings against the union, 29 U. S. C. § 411(a)(4)—applied to "any member *or officer*" of a labor organization (emphasis added). S. 1555, 86th Cong., 1st Sess., § 101(a)(4) (1959), 1 Leg. Hist. 520. However, the words "or officer" were deleted from the Landrum-Griffin bill, H. R. 8400, 86th Cong., 1st Sess., § 101(a)(4) (1959), 1 Leg. Hist. 630–631, and the House version was retained in Conference, see H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 31 (1959), 1 Leg. Hist. 935. See also *Sheridan* v. *Carpenters Local No. 626*, 306 F. 2d, at 156–157.

bers as members.[8] In contrast, discharge from union employment does not impinge upon the incidents of union membership, and affects union members only to the extent that they happen also to be union employees. See *Sheridan* v. *Carpenters Local No. 626*, 306 F. 2d 152, 156 (CA3 1962). We discern nothing in § 609, or its legislative history, to support petitioners' claim that Congress intended to establish a system of job security or tenure for appointed union employees.

Congress used essentially the same language elsewhere in the Act with the specific intent not to protect a member's status as a union employee or officer. Section 101(a)(5), 29 U. S. C. § 411(a)(5), states that "[n]o member of any labor organization may be fined, suspended, expelled, or otherwise disciplined" without enumerated procedural protections. The Conference Report accompanying S. 1555 as finally enacted, H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 31 (1959), 1 Leg. Hist. 935, explains that this "prohibition on suspension without observing certain safeguards applies only to suspension of membership in the union; *it does not refer to suspension of a member's status as an officer of the union*" (emphasis added). This too is a persuasive indication that the virtually identical language in § 609 was likewise meant to refer only to punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee.[9]

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[8] Compare § 201(a)(5)(H) of the Act, 29 U. S. C. § 431(a)(5)(H), which requires reporting on the procedures for "discipline *or removal* of *officers or agents* for breaches of their trust" (emphasis added).

[9] In *Grand Lodge of International Assn. of Machinists* v. *King*, 335 F. 2d, at 344, the court held that Congress had used the "identical words . . . with quite different meanings" in the two sections. The court found that the "legislative gloss" on the words "otherwise disciplined" in § 101(a)(5) stemmed primarily from congressional concern that "wrongdoing union officials"—and particularly those guilty of misappropriating union funds—might be permitted "to remain in control while the time-consuming 'due process' requirements of the section were met." *Id.*, at 341–342. See 105

We hold, therefore, that removal from appointive union employment is not within the scope of those union sanctions explicitly prohibited by § 609.

IV

Our analysis is complicated, however, by the fact that § 102, 29 U. S. C. § 412, provides independent authority for a suit against a union based on an alleged violation of Title I of the Act. Section 102 states that

> "[a]ny person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

Although the intended relationship between §§ 102 and 609 is not entirely clear, it seems evident that a litigant may maintain an action under § 102—to redress an "infringement" of "rights secured" under Title I—without necessarily stating a violation of § 609.[10]

Cong. Rec. 17899 (1959) (remarks of Sen. Kennedy). However, viewing this concern as inapplicable with regard to § 609, the court concluded that "although Congress did not intend the words 'otherwise discipline' to include removal from union office in section 101(a)(5), it did intend the words to include such action in section 609." 335 F. 2d, at 345. See also *Maceira* v. *Pagan*, 649 F. 2d, at 14; *Wood* v. *Dennis*, 489 F. 2d, at 853–854.

We agree that the purposes of the two sections are different, and that the distinction drawn in *King* is one Congress plausibly could have chosen to make. However, we are hard pressed to discern any such distinction from either the language or legislative history of the Act. Certainly one would expect that if Congress had intended identical language to have substantially different meanings in different sections of the same enactment it would have manifested its intention in some concrete fashion. See *Wood* v. *Dennis*, *supra*, at 858 (Stevens, J., concurring in result).

[10] Section 609, of course, applies to disciplinary action taken in retaliation for the exercise of *any* right secured under the Act, whereas § 102 protects only rights secured by Title I. Although the two sections may be somewhat duplicative as regards union discipline imposed in retaliation for the exercise of Title I rights, this seems due in large part to the fact that the

The question still remains, however, whether petitioners' "rights secured" under Title I were "infringed" by the termination of their union employment. Petitioners, as union members, had a right under §§ 101(a)(1) and (2) to campaign for Brown and to vote in the union election, but they were not prevented from exercising those rights. Rather, petitioners allege only an *indirect* interference with their membership rights, maintaining that they were forced to "choos[e] between their rights of free expression . . . and their jobs." See *Retail Clerks Union Local 648* v. *Retail Clerks International Assn.*, 299 F. Supp. 1012, 1021 (DC 1969).

We need not decide whether the retaliatory discharge of a union member from union office—even though not "discipline" prohibited under § 609—might ever give rise to a cause

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provisions derived from different sources and were originally intended to serve quite different purposes. Section 102 was first included as part of the so-called Kuchel Amendment, see n. 4, *supra*, and was designed to enforce the provisions of Title I by creating an individual right of action for union members. 105 Cong. Rec. 6719 (1959), 2 Leg. Hist. 1232. In contrast, the precursor of § 609 created *criminal* penalties for retaliatory discipline, and was included in the Senate bill prior to the addition of the bill of rights, see S. 1555, 86th Cong., 1st Sess., § 506 (1959) (as reported), 2 Leg. Hist. 390; it apparently was thought to be primarily applicable to violations of the election provisions. See 105 Cong. Rec. 6534 (1959), 2 Leg. Hist. 1140; Rothman, Legislative History of the "Bill of Rights" for Union Members, 45 Minn. L. Rev. 199, 218 (1960). The Landrum-Griffin bill retained this provision, but "temper[ed] the remedy," 105 Cong. Rec. 15531 (1959), 2 Leg. Hist. 1567 (remarks of Rep. Griffin), providing for civil enforcement by the Secretary of Labor instead of criminal sanctions. H. R. 8400, 86th Cong., 1st Sess., § 609 (1959), 1 Leg. Hist. 676. Finally, one day before passage of the Landrum-Griffin bill, § 609 was amended to authorize private suits by making "[t]he provisions of section 102 . . . applicable in the enforcement of this section." The amendment was promoted by Congressmen who thought that enforcement by the Secretary would lead to "unnecessary injection of the executive branch on the Federal level into law enforcement matters," 105 Cong. Rec. 15830 (1959), 2 Leg. Hist. 1662 (remarks of Rep. Cramer). See Rothman, *supra*, at 219.

of action under § 102. For whatever limits Title I places on a union's authority to utilize dismissal from union office as "part of a purposeful and deliberate attempt . . . to suppress dissent within the union," cf. *Schonfeld* v. *Penza*, 477 F. 2d 899, 904 (CA2 1973), it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own.[11] Indeed, neither the language nor the legislative history of the Act suggests that it was intended even to address the issue of union patronage.[12] To the contrary, the Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. See *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 497 (1968). Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election.

Here, the presidential election was a vigorous exercise of the democratic processes Congress sought to protect. Petitioners—appointed by the defeated candidate—campaigned openly against respondent Leu, who was elected by a substantial margin. The Union's bylaws, adopted, and subject to amendment, by a vote of the union membership, grant the president plenary authority to appoint, suspend, discharge, and direct the Union's business agents, who have sig-

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[11] We leave open the question whether a different result might obtain in a case involving nonpolicymaking and nonconfidential employees.

[12] We think it virtually inconceivable that Congress would have prohibited the longstanding practice of union patronage without any discussion in the legislative history of the Act. See *Wood* v. *Dennis*, 489 F. 2d, at 858 (Stevens, J., concurring in result). Had such a result been contemplated, it undoubtedly would have encountered substantial resistance. Moreover, Congress likely would have made some express accommodation to the needs of union employers to appoint and remove policymaking officials. See *ibid.*

nificant responsibility for the day-to-day conduct of union affairs. Nothing in the Act evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies.

No doubt this poses a dilemma for some union employees; if they refuse to campaign for the incumbent they risk his displeasure, and by supporting him risk the displeasure of his successor. However, in enacting Title I of the Act, Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy, and protecting the rights of union *members* from arbitrary action by the union or its officers.

We therefore conclude that petitioners have failed to establish a violation of the Act. Accordingly, the decision of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

I am not prepared to hold that a newly elected president of a local union may discipline, without violating the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. § 401 *et seq.*, and as a matter of retaliation, *all* union member-employees who opposed his candidacy. As the Court notes, a union member possesses, under the Act, rights to freedom of expression and of speech and assembly, *ante*, at 436–437, and a right to support the candidate of his choice.

I must assume that what the Court holds today is that the newly elected president may discharge the union's appointed business agents and other appointed union member-employees who will be instrumental in evolving the president's ad-

ministrative policies. See *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Branti* v. *Finkel*, 445 U. S. 507 (1980). Indeed, the Court uses the terms "staff," *ante*, at 441, and "his own administrators," *ibid.* In addition, this particular union's bylaws expressly give the president plenary authority over the business agents. With that much, I have no difficulty.

On the understanding, but only on the understanding, that the Court by its opinion is not reaching out further to decide the same issue with respect to nonpolicymaking employees, that is, rank-and-file member-employees (a matter which, for me, presents another case for another day), I join the Court's opinion.

GREENE ET AL. *v.* LINDSEY ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81–341. Argued February 23, 1982—Decided May 17, 1982

A Kentucky statute permits service of process in forcible entry or detainer actions to be made by posting a summons "in a conspicuous place on the premises," if the defendant or a member of the defendant's family over 16 years of age cannot be found on the premises. Service of process under this statute was made on appellee tenants in a public housing project by posting a summons on the door of each of their apartments. Appellees claim that they never saw the summonses and did not know of the eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them and their opportunity for appeal had lapsed. They then filed a class action in Federal District Court against appellant public officials, seeking declaratory and injunctive relief under 42 U. S. C. § 1983 and alleging that the notice procedures employed violated the Due Process Clause of the Fourteenth Amendment. The District Court granted summary judgment for appellants, holding that such notice procedures did not deny due process. The Court of Appeals reversed.

Held: In failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State deprived them of property without due process of law required by the Fourteenth Amendment. Pp. 449–456.

(a) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314. Pp. 449–450.

(b) In light of the fact that appellees were deprived of a significant interest in property and, indeed, of the right to continued residence in their homes, it does not suffice to recite that because the action was *in rem*, it was only necessary to serve notice "upon the thing itself." The sufficiency of the notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. Pp. 450–451.

(c) Notices posted on the doors of tenants' apartments were "not infrequently" removed before they could be seen by the tenants. What-

ever the efficacy of posting notice on a door of a person's home in many cases, it is clear that, in the circumstances of this case, merely posting notice on the apartment door did not satisfy minimum standards of due process. Pp. 453–454.

(d) Neither the statute nor the practice of process servers provides for even a second attempt at personal service. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be constitutionally adequate. P. 454.

(e) Notice by mail in the circumstances of this case would go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense. Pp. 455–456.

649 F. 2d 425, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 456.

William L. Hoge III argued the cause and filed a brief for appellants.

Robert Frederick Smith argued the cause for appellees. With him on the brief was *Barry L. Master*.*

JUSTICE BRENNAN delivered the opinion of the Court.

A Kentucky statute provides that in forcible entry or detainer actions, service of process may be made under certain circumstances by posting a summons on the door of a tenant's apartment. The question presented is whether this statute, as applied to tenants in a public housing project, fails to afford those tenants the notice of proceedings initiated against them required by the Due Process Clause of the Fourteenth Amendment.

**Lynn E. Cunningham* filed a brief for the Antioch School of Law et al. as *amici curiae* urging affirmance.

David M. Madway filed a brief for the National Housing Law Project as *amicus curiae*.

I

Appellees Linnie Lindsey, Barbara Hodgens, and Pamela Ray are tenants in a Louisville, Ky., housing project. Appellants are the Sheriff of Jefferson County, Ky., and certain unnamed Deputy Sheriffs charged with responsibility for serving process in forcible entry and detainer actions. In 1975, the Housing Authority of Louisville initiated detainer actions against each of appellees, seeking repossession of their apartments. Service of process was made pursuant to Ky. Rev. Stat. § 454.030 (1975), which states:

> "If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen (16) years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court."

In each instance, notice took the form of posting a copy of the writ of forcible entry and detainer on the door of the tenant's apartment.[1] Appellees claim never to have seen these posted summonses; they state that they did not learn of the

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[1] "Posting" refers to the practice of placing the writ on the property by use of a thumbtack, adhesive tape, or other means. App. 74, 77 (deposition of process servers). Appellants describe the usual method of effecting service pursuant to § 454.030 in the following terms:

"The officer of the court who is charged with serving notice in a forcible entry and detainer action, usually a Jefferson County Deputy Sheriff, takes the following steps in notifying a tenant. First, the officer goes to the apartment in an effort to effectuate personal in-hand service. Second, if the named tenant is absent or will not appear at the door, personal in-hand service is made on any member of the tenant's family over sixteen years of age. Finally, if no one answers the door, a copy of the notice is posted on the premises, usually the door." Brief for Appellants 3.

eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them, and after their opportunity for appeal had lapsed.

Thus without recourse in the state courts, appellees filed this suit as a class action in the United States District Court for the Western District of Kentucky, seeking declaratory and injunctive relief under 42 U. S. C. § 1983. They claimed that the notice procedure employed as a predicate to these eviction proceedings did not satisfy the minimum standards of constitutionally adequate notice described in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and that the Commonwealth of Kentucky had thus failed to afford them the due process of law guaranteed by the Fourteenth Amendment. Named as defendants were the Housing Authority of Louisville, several public officials charged with responsibility over particular Louisville public housing projects, Joseph Greene, the Jefferson County Sheriff, and certain known and unknown Deputy Sheriffs.

On cross-motions for summary judgment, the District Court granted judgment for appellants. In an unreported opinion, the court noted that some 70 years earlier, in *Weber* v. *Grand Lodge of Kentucky, F. & A. M.*, 169 F. 522 (1909), the Court of Appeals for the Sixth Circuit had held that constructive notice by posting on the door of a building, pursuant to the predecessor statute to § 454.030, provided an adequate constitutional basis upon which to commence an eviction action, on the ground that it was reasonable for the State to presume that a notice posted on the door of the building in dispute would give the tenant actual notice in time to contest the action. Although the District Court recognized that "conditions have changed since the decision in *Weber* . . . and . . . that there is undisputed testimony in this case that notices posted on the apartment doors of tenants are often removed by other tenants," App. 41–42, the court nevertheless concluded that the procedures employed did not deny due

process in light of the fact "that posting only comes into play after the officer directed to serve notice cannot find the defendant on the premises," *id.*, at 42.

The Court of Appeals for the Sixth Circuit reversed the grant of summary judgment in favor of appellants and remanded the case for further proceedings. 649 F. 2d 425 (1981). Acknowledging that its decision in *Weber* directed a contrary result, the Court of Appeals examined the doctrinal basis of that decision, and concluded that it rested in part on distinctions between actions *in rem* and actions *in personam* that had been drawn in cases such as *Pennoyer* v. *Neff*, 95 U. S. 714 (1878); *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559 (1889); *Arndt* v. *Griggs*, 134 U. S. 316 (1890); *Ballard* v. *Hunter*, 204 U. S. 241 (1907); and *Longyear* v. *Toolan*, 209 U. S. 414 (1908), and that had been substantially undercut by intervening decisions of this Court. In overruling *Weber*, the Court of Appeals cited *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), *Mullane*, *supra*, and *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), as cases calling for a more realistic appraisal of the adequacy of process provided by the State. Turning to the circumstances of this case and the procedures contemplated by § 454.030, the Court of Appeals noted that while there may have been "a time when posting provided a surer means of giving notice than did mailing, [t]hat time has passed. The uncontradicted testimony by process servers themselves that posted summonses are not infrequently removed by persons other than those served constitutes effective confirmation of the conclusion that notice by posting 'is not reasonably calculated to reach those who could easily be informed by other means at hand,' " 649 F. 2d, at 428, quoting *Mullane*, *supra*, at 319.[2] The court held, therefore, that the notice provided

[2] The Court of Appeals concluded that "[r]equiring Kentucky to provide notice by mail when personal service proves infeasible will not be overly burdensome. The cost will be minimal, and the state's conceded interest

pursuant to § 454.030 was constitutionally deficient. We noted probable jurisdiction, 454 U. S. 938 (1981), and now affirm.

II

A

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). And the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," *Mullane*, *supra*, at 314. Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled *in personam*. *McDonald* v. *Mabee*, 243 U. S. 90, 92 (1917). Nevertheless, certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance, we have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service. But we have also clearly recognized that the Due Process Clause does prescribe a constitutional minimum: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the*

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in providing a summary procedure for settlement of landlord-tenant disputes will not be seriously circumscribed." 649 F. 2d, at 428. The court then noted with approval the provisions of the New York counterpart of § 454.030, which provides that when notice is served by posting, a copy of the petition must be sent by registered or certified mail within a day of the posting. *Ibid.*, citing *Velazquez* v. *Thompson*, 451 F. 2d 202, 205 (CA2 1971).

pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U. S., at 314 (emphasis added). It is against this standard that we evaluate the procedures employed in this case.

B

Appellants argue that because a forcible entry and detainer action is an action *in rem*, notice by posting is *ipso facto* constitutionally adequate. Appellees concede that posting has traditionally been deemed appropriate for *in rem* proceedings, but argue that detainer actions can now encompass more than the simple issue of the tenant's continued right to possession, and that they therefore require the more exacting forms of notice customarily provided for proceedings *in personam*. Appellants counter by conceding that if the particular detainer proceeding was one in which the landlord sought to recover past due rent, personal service would be required by Kentucky law, but argue that such claims are unusual in such proceedings, and that in the case before us the landlord claimed only a right to recover possession. Tr. of Oral Arg. 19–21.

As in *Mullane*, we decline to resolve the constitutional question based upon the determination whether the particular action is more properly characterized as one *in rem* or *in personam*. 339 U. S., at 312. See *Shaffer* v. *Heitner*, *supra*, at 206. That is not to say that the nature of the action has no bearing on a constitutional assessment of the reasonableness of the procedures employed. The character of the action reflects the extent to which the court purports to extend its power, and thus may roughly describe the scope of potential adverse consequences to the person claiming a right to more effective notice. But "'[a]ll proceedings, like all rights, are really against persons.'"[3] In this case, appellees

[3] *Shaffer* v. *Heitner*, 433 U. S. 186, 207, n. 22 (1977), quoting *Tyler* v. *Court of Registration*, 175 Mass. 71, 76, 55 N. E. 812, 814 (Holmes, C. J.), writ of error dism'd, 179 U. S. 405 (1900).

have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes.[4] In light of this deprivation, it will not suffice to recite that because the action is *in rem*, it is only necessary to serve notice "upon the thing itself."[5] The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925).

It is, of course, reasonable to assume that a property owner will maintain superintendence of his property, and to presume that actions physically disturbing his holdings will come to his attention. See *Mullane*, *supra*, at 316.[6] The

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[4] The dissent directs our attention to the "nature and purpose," of Kentucky's forcible entry and detainer action. *Post*, at 457. Such proceedings are designed to offer an expeditious means of determining who is entitled to retain possession of an apartment. But that hardly explains why we may dispense with the constitutional requirement of adequate notice. After all, detainer proceedings, while in some sense "summary," are *proceedings* in which issues of fact and law are to be resolved, and important interests in property determined. We can agree with the dissent's observation that the "means chosen for making service of process . . . must be prompt and certain." *Ibid.* But it is difficult to see how, from the perspective of the landlord, any of the likely supplements to the form of service currently provided under § 454.030 will render the procedure markedly less prompt or certain. More significantly, *from the perspective of the tenant*, it is difficult to see how a means of serving process that fails to afford actual notice in a "not insubstantial" number of cases can be deemed *either* prompt or certain.

[5] *The Mary*, 9 Cranch 126, 144 (1815).

[6] As we noted in *Mullane:*

"The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or propri-

frequent restatement of this rule impresses upon the property owner the fact that a failure to maintain watch over his property may have significant legal consequences for him, providing a spur to his attentiveness, and a consequent reinforcement to the empirical foundation of the principle. Upon this understanding, a State may in turn conclude that in most cases, the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency of proceedings possibly affecting his interests.

The empirical basis of the presumption that notice posted upon property is adequate to alert the owner or occupant of property of the pendency of legal proceedings would appear to make the presumption particularly well founded where notice is posted at a residence. With respect to claims affecting the continued possession of that residence, the application of this presumption seems particularly apt: If the tenant has a continuing interest in maintaining possession of the property for his use and occupancy, he might reasonably be expected to frequent the premises; if he no longer occupies the premises, then the injury that might result from his not having received actual notice as a consequence of the posted notice is reduced. Short of providing personal service, then, posting notice on the door of a person's home would, in many

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etary rights. Hence, . . . entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. . . . A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized." 339 U. S., at 316.

Of course, the *Mullane* discussion of the special notice rules with respect to proceedings affecting property ownership focused on the forms of notice that might be appropriate as a supplement to the direct disturbance of the property itself. But where the State has reason to believe the premises to be occupied or under the charge of a caretaker, notice posted on the premises, if sufficiently apparent, is itself a form of disturbance, likely to come to the attention of the occupants or the caretaker.

or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.

But whatever the efficacy of posting in many cases, it is clear that, in the circumstances of this case, merely posting notice on an apartment door does not satisfy minimum standards of due process. In a significant number of instances, reliance on posting pursuant to the provisions of § 454.030 results in a failure to provide actual notice to the tenant concerned. Indeed, appellees claim to have suffered precisely such a failure of actual notice. As the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were "not infrequently" removed by children or other tenants before they could have their intended effect.[7] Under these conditions, notice by

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[7] The depositions before the District Court included the following statements by the process servers:

"The children—we had problems with children. They would take [the writs] off.

"They never took them off when we were present, but we, you know, assume—the Housing Authority told us that they would take them off, so we always put them up high." App. 74.

"Q. Did you ever see kids pulling them off?

"A. Yes.

"Q. You did?

"A. Uh-huh.

"Q. Did you see many?

"A. No, not too many. I did see it in one place over there.

"Q. Where was that?

"A. Village West.

"Q. How many times did you see that happen?

"A. Well, probably a couple of times." *Id.*, at 80.

"Q. . . . Were you aware of there being any problem with children ripping the Writs off?

"A. Oh, we had plenty of trouble.

[Footnote 7 is continued on p. 454]

posting on the apartment door cannot be considered a "reliable means of acquainting interested parties of the fact that their rights are before the courts." *Mullane*, 339 U.S., at 315.

Of course, the reasonableness of the notice provided must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the form of notice chosen. *Ibid.* In this connnection, we reject appellants' characterization of the procedure contemplated by § 454.030 as one in which "'posting' is used as a method of service only as a last resort." Brief for Appellants 7. To be sure, the statute requires the officer serving notice to make a visit to the tenant's home and to attempt to serve the writ personally on the tenant or some member of his family. But if no one is at home at the time of that visit, as is apparently true in a "good percentage" of cases,[8] posting follows forthwith. Neither the statute, nor the practice of the process servers, makes provision for even a second attempt at personal service, perhaps at some time of day when the tenant is more likely to be at home. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be held constitutionally adequate. Cf. *Mullane*, 339 U. S., at 317–318.

"Q. You had trouble?

"A. With kids, yeah. Yeah.

"Q. Did you ever see kids ripping them off?

"A. Yeah. I have seen them take them off of the door and I would go back and tell them to put it back. They don't know. They didn't know. They just—

. . . . .

"Q. Were there any particular places where you saw kids ripping them off the doors?

"A. Well most of that was in Village West." *Id.*, at 82.

[8] *Id.*, at 76 (deposition of process server).

As noted by the Court of Appeals, and as we noted in *Mullane*, the mails provide an "efficient and inexpensive means of communication," *id.*, at 319, upon which prudent men will ordinarily rely in the conduct of important affairs, *id.*, at 319–320. Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy.[9] Particularly where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings. We need not go so far as to insist that in order to "dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required," *McDonald* v. *Mabee*, 243 U. S., at 92, in order to recognize that where an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service is not notice "reasonably calculated to reach those who could

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[9] The dissent apparently wishes to dispute the District Court's finding that "notices posted on apartment doors are often removed," and further questions our reliance on the observation in *Mullane* that the mails are a reliable means of communication—in light of its own observation that "unattended mailboxes are subject to plunder." *Post*, at 460. The dissent misconstrues the constitutional standard. In light of the findings of the courts below, we hold only that posted notice pursuant to § 454.030 is constitutionally inadequate. It is not our responsibility to prescribe the form of service that the Commonwealth should adopt. But even conceding that process served by mail is far from the ideal means of providing the notice the Due Process Clause of the Fourteenth Amendment requires, we have no hesitation in concluding that posted service *accompanied by* mail service, is constitutionally preferable to posted service alone.

easily be informed by other means at hand." *Mullane*, *supra*, at 319.[10]

III

We conclude that in failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State has deprived them of property without the due process of law required by the Fourteenth Amendment. The judgment of the Court of Appeals is therefore

Affirmed.

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

Today, the Court holds that the Constitution prefers the use of the Postal Service to posted notice. The Court reaches this conclusion despite the total absence of any evidence in the record regarding the speed and reliability of the mails. The sole ground for the Court's result is the scant and conflicting testimony of a handful of process servers in Kentucky. On this flimsy basis, the Court confidently overturns the work of the Kentucky Legislature and, by implication, that of at least 10 other States. I must respectfully dissent.

At a minimum, the Fourteenth Amendment requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The question before the Court is whether the notice provided by Kentucky's statute meets this standard. In answering that question, the first "circumstances"

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[10] "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U. S., at 318. See *Schroeder* v. *City of New York*, 371 U. S. 208, 213 (1962).

to be considered are the nature and purpose of the action for which notice is required.

Kentucky's forcible entry and detainer action is a summary proceeding for quickly determining whether or not a landlord has the right to immediate possession of leased premises and, if so, for enabling the landlord speedily to obtain the property from the person in wrongful possession. Ky. Rev. Stat. §§ 383.200, 383.210 (1972). As this Court has recognized, such circumstances call for special procedures:

> "There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property." *Lindsey* v. *Normet*, 405 U. S. 56, 72–73 (1972).

The means chosen for making service of process, therefore, must be prompt and certain, for otherwise the principal purpose of a forcible entry and detainer action could be thwarted before the judicial proceedings even began.

The Kentucky statute meets this need. It directs the process server to attempt personal service on the tenant at his residence. Ky. Rev. Stat. § 454.030 (1975). If the process server cannot find the tenant on the premises, the statute directs the server to explain and leave a copy of the notice

with a family member over the age of 16. *Ibid.* If both of these attempts fail, Kentucky authorizes the server, as a last resort, to post a copy of the notice in a conspicuous place on the premises. *Ibid.*

As the Court recognizes, notice procedures like Kentucky's, though "less rigorous" than mandatory personal service, nonetheless "have enjoyed substantial acceptance throughout our legal history." *Ante*, at 449. The weight of historical precedent is reinforced by the collective wisdom of the legislatures of the at least 11 States authorizing notice in summary eviction proceedings solely by posting or by leaving the notice at the tenant's residence.[1] The Court itself acknowledges that "posting notice on the door of a person's home would, in many or perhaps most instances, constitute . . . a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him." *Ante*, at 452–453.

The Court nonetheless rejects these established procedures as unconstitutional, though it does not cite a single case, other than the decision below, supporting its position that notice by posting is constitutionally inadequate in summary eviction proceedings. Instead, the Court relies solely on the deposition testimony of a few Kentucky process servers.

The testimony is hardly compelling. For example, one process server, Mr. S. Carter Bacon, reported having seen children in the Village West housing development pull down posted writs "probably a couple of times." App. 80; App. in No. 79–3477 (CA6), p. 103. The Court neglects to mention,

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[1] See Ala. Code §§ 6–6–332, 35–9–82 (1975); Colo. Rev. Stat. § 13–40–112 (1973); Fla. Stat. § 48.183 (1979); Kan. Stat. Ann. § 61–1805 (1976); Ky. Rev. Stat. § 454.030 (1975); La. Code Civ. Proc. Ann., Art. 4703 (West 1961); Miss. Code Ann. § 89–7–33 (1972); Neb. Rev. Stat. § 25–508 (1979); N. H. Rev. Stat. Ann. §§ 510:2, 540:5 (Supp. 1979); N. C. Gen. Stat. § 42–29 (1976); W. Va. Code § 56–2–1 (1966), W. Va. Rule Civ. Proc. 4(d)(1) (1982).

however, that another process server, Mr. Gilbert Brutscher, cast doubt on Mr. Bacon's testimony by stating:

> "I had been warned beforehand that, by Mr. Bacon, Carter Bacon, that he suspected—he wasn't certain, but he suspected that on some occasions the Writs had been torn off the doors by kids. This is what he told me. Whether that is true or not, I don't know. And I don't think that he observed that, and the six months I was working at it there was no occasion where I saw anyone tear the Writs off of the door." *Id.*, at 112–113.

The Court also neglects to mention that another process server testified that in order to avoid problems with children, the process servers "always put [the writs] up high. So we never had any problems with that." App. 74. Corroborating this testimony, moreover, is the testimony of yet another process server, who asserted: "we always try to put the paper up above where, a, say a small child can't reach it." App. in No. 79–3477 (CA6), p. 74. This server, asked whether he had "had complaints about small children ripping them off," answered that he had never had a complaint and had never seen a child try to rip a notice off. *Ibid.*

Plainly, such conflicting testimony falls well short of what this Court should require before rushing to scrap Kentucky's considered legislative judgment that, as a last resort, posted notice is an appropriate form of service of process for forcible entry and detainer actions.

The Court, however, holds that notice via the mails is so far superior to posted notice that the difference is of constitutional dimension.[2] How the Court reaches this judgment re-

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[2] The Court gives lipservice to the principle that "[i]t is not our responsibility to prescribe the form of service that [Kentucky] should adopt," *ante*, at 455, n. 9, but then goes on to do just that, first by explaining to the state legislature that, unlike notice by posting, notice by mail "would surely go a long way toward" satisfying the Court, *ante*, at 455, and then by remarking that, in the Court's view, the combination of posted service and mail service would be "constitutionally preferable" to posted service alone, *ante*, at 455, n. 9.

mains a mystery, especially since the Court is unable, on the present record, to evaluate the risks that notice mailed to public housing projects might fail due to loss, misdelivery, lengthy delay, or theft. Furthermore, the advantages of the mails over posting, if any, are far from obvious. It is no secret, after all, that unattended mailboxes are subject to plunder by thieves. Moreover, unlike the use of the mails, posting notice at least gives assurance that the notice has gotten as far as the tenant's door.

In sum, the Court has chosen to overturn Kentucky's procedures on the basis of a wholly inadequate record. In so doing, the Court apparently indulges a presumption that the state legislation challenged here is unconstitutional until proven otherwise. Regrettably, the Court seems to forget that we have long since discarded the concept that "due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963). I respectfully dissent.

KREMER *v.* CHEMICAL CONSTRUCTION CORP.

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

No. 80-6045. Argued December 7, 1981—Decided May 17, 1982

Title 28 U. S. C. § 1738 (as did its predecessors dating back to 1790) requires federal courts to afford the same full faith and credit to state court judgments that would apply in the State's own courts. Petitioner filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, and the EEOC, as required by the Act, referred the charge to the New York State Division of Human Rights (NYHRD), the agency charged with enforcing the New York law prohibiting employment discrimination. The NYHRD rejected the claim as meritless and was upheld on administrative appeal. The Appellate Division of the New York Supreme Court affirmed. Subsequently, a District Director of the EEOC ruled that there was no reasonable cause to believe that the discrimination charge was true and issued a right-to-sue letter. Petitioner then brought a Title VII action in Federal District Court. Ultimately, the District Court dismissed the complaint on res judicata grounds, and the Court of Appeals affirmed.

Held: The District Court was required under 28 U. S. C. § 1738 to give preclusive effect to the state court decision upholding the state administrative agency's rejection of the employment discrimination claim. Pp. 466–485.

(a) Where under New York law the New York court's determination precludes petitioner from bringing any other action based on the same grievance in the New York courts, § 1738, by its terms, precludes him from relitigating the same question in federal courts. Pp. 466–467.

(b) There is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that an employment discrimination claim is unproved. An exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal. *Allen* v. *McCurry*, 449 U. S. 90. Here, there is no claim that Title VII expressly repealed § 1738, and no implied repeal is evident from the language, operation, or legislative history of Title VII, there being no manifest incompatibility between Title VII and § 1738. Pp. 468–476.

(c) While *initial resort* to state administrative remedies does not deprive an individual of a right to a federal trial *de novo* on a Title VII claim, this does not mean that a prior state court judgment can be disregarded. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, distin-

guished. The comity and federalism interests embodied in § 1738 are not compromised by the application of res judicata and collateral estoppel in Title VII cases. Rather, to deprive state judgments of finality not only would violate basic tenets of comity and federalism but also would reduce the incentive for States to work toward effective and meaningful systems prohibiting employment discrimination. Pp. 476–478.

(d) The procedures provided in New York for the determination of employment discrimination claims, complemented by administrative as well as judicial review, offer a full and fair opportunity to litigate the merits and thus are sufficient under the Due Process Clause of the Fourteenth Amendment. State proceedings need do no more than satisfy the minimum procedural requirements of the Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. Section 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments, but rather goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. Here, petitioner received all the process that was constitutionally required in rejecting his employment discrimination claim. Pp. 479–485.

623 F. 2d 786, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 486. STEVENS, J., filed a dissenting opinion, *post*, p. 508.

David A. Barrett argued the cause for petitioner. With him on the brief was *Frederick A. O. Schwarz, Jr.*

Robert Layton argued the cause and filed a brief for respondent.

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Joshua I. Schwartz*, *Constance L. Dupre*, *Philip B. Sklover*, and *Sandra G. Bryan*.*

JUSTICE WHITE delivered the opinion of the Court.

As one of its first acts, Congress directed that all United

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts. Act of May 26, 1790, ch. 11, 1 Stat. 122, 28 U. S. C. § 1738. More recently, Congress implemented the national policy against employment discrimination by creating an array of substantive protections and remedies which generally allows federal courts to determine the merits of a discrimination claim. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV). The principal question presented by this case is whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738. Specifically, we decide whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the State's own courts.

I

Petitioner Rubin Kremer emigrated from Poland in 1970 and was hired in 1973 by respondent Chemical Construction Corp. (Chemico) as an engineer. Two years later he was laid off, along with a number of other employees. Some of these employees were later rehired, but Kremer was not although he made several applications. In May 1976, Kremer filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), asserting that his discharge and failure to be rehired were due to his national origin and Jewish faith. Because the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter, § 706(c), 42 U. S. C. § 2000e–5(c),[1] the Commission re-

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[1] The statute provides that

"[i]n the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local law prohibiting the unlawful employ-

ferred Kremer's charge to the New York State Division of Human Rights (NYHRD), the agency charged with enforcing the New York law prohibiting employment discrimination. N. Y. Exec. Law §§ 295(6), 296(1)(a) (McKinney 1972 and Supp. 1981–1982).

After investigating Kremer's complaint,[2] the NYHRD concluded that there was no probable cause to believe that Chemico had engaged in the discriminatory practices complained of. The NYHRD explicitly based its determination on the findings that Kremer was not rehired because one employee who was rehired had greater seniority, that another employee who was rehired filled a lesser position than that previously held by Kremer, and that neither Kremer's creed nor age was a factor considered in Chemico's failure to rehire him. The NYHRD's determination was upheld by its Appeal Board as "not arbitrary, capricious or an abuse of discretion." Kremer again brought his complaint to the attention of the EEOC and also filed, on December 6, 1977, a petition with the Appellate Division of the New York Supreme Court to set aside the adverse administrative determination. On February 27, 1978, five justices of the Appellate Division unanimously affirmed the Appeal Board's order. Kremer could have sought, but did not seek, review by the New York Court of Appeals.

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ment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." 42 U. S. C. § 2000e–5(c).

See also *Love* v. *Pullman Co.*, 404 U. S. 522 (1972); 29 CFR § 1601.13 (1981).

[2] Kremer's complaint filed with the NYHRD alleged discrimination on the basis of age and religion, and did not contain a separate claim concerning national origin.

Subsequently, a District Director of the EEOC ruled that there was no reasonable cause to believe that the charge of discrimination was true and issued a right-to-sue notice.[3] The District Director refused a request for reconsideration, noting that he had reviewed the case files and considered the EEOC's disposition as "appropriate and correct in all respects."

Kremer then brought this Title VII action in District Court, claiming discrimination on the basis of national origin and religion.[4] Chemico argued from the outset that Kremer's Title VII action was barred by the doctrine of res judicata. The District Court initially denied Chemico's motion to dismiss. 464 F. Supp. 468 (SDNY 1978). The court noted that the Court of Appeals for the Second Circuit had recently found such state determinations res judicata in an action under 42 U. S. C. § 1981, *Mitchell* v. *National Broadcasting Co.*, 553 F. 2d 265 (1977), but distinguished Title VII cases because of the statutory grant of *de novo* federal review. Several months later the Second Circuit extended the *Mitchell* rule to Title VII cases. *Sinicropi* v. *Nassau*

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[3] Sections 706(f)(1) and (3), 42 U. S. C. §§ 2000e–5f(1) and (3), provide that where the EEOC determines that there is no reasonable cause to believe that a charge is true, it must dismiss the charge and issue the complainant a statutory right-to-sue letter. Where the Commission has not filed a civil action against the employer, it must, if requested, issue a right-to-sue letter 180 days after the charge was filed. Within 90 days after receipt of the right-to-sue letter, the complainant may institute a civil action in federal district court against the party named in the charge.

[4] No further mention was made of age discrimination, which is not covered by Title VII. Nor has petitioner argued at any point that his national origin claim was in any sense distinct from his claim of religious discrimination. Of course, if Kremer desired to make such a claim, he was obligated to first bring it before the NYHRD. See n. 1, *supra*. Moreover, "[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." *Underwriters National Assur. Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Assn.*, 455 U. S. 691, 710 (1982); *Sherrer* v. *Sherrer*, 334 U. S. 343, 352 (1948).

County, 601 F. 2d 60 *(per curiam)*, cert. denied, 444 U. S. 983 (1979). The District Court then dismissed the complaint on grounds of res judicata. 477 F. Supp. 587 (SDNY 1979). The Court of Appeals refused to depart from the *Sinicropi* precedent and rejected petitioner's claim that *Sinicropi* should not be applied retroactively. 623 F. 2d 786 (1980).

A motion for rehearing en banc was denied, and petitioner filed for a writ of certiorari. We issued the writ, 452 U. S. 960 (1981), to resolve this important issue of federal employment discrimination law over which the Courts of Appeals are divided.[5] We now affirm.

II

Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.[6] Here the Appellate Division of the New York Supreme Court has issued a judgment affirming the decision of the NYHRD Appeals Board that the discharge and failure to rehire Kremer were not the product of the discrimination that he had alleged. There is no question

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[5] Three Courts of Appeals have held that a federal court may not attribute preclusive deference to prior state court decisions reviewing state agency determinations. *Smouse* v. *General Electric Co.*, 626 F. 2d 333 (CA3 1980) *(per curiam); Unger* v. *Consolidated Foods Corp.*, 657 F. 2d 909 (CA7 1981); *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d 1079 (CA8), cert. denied, 446 U. S. 966 (1980). The Fourth Circuit has held that issues decided in a *de novo* state judicial proceeding are not subject to redetermination in a subsequent Title VII action. *Moosavi* v. *Fairfax County Board of Education*, 666 F. 2d 58 (1981).

[6] In the Act of May 26, 1790, ch. 11, 1 Stat. 122, Congress required all federal courts to give such preclusive effect to state court judgments "as they have by law or usage in the courts of the state from [which they are] taken." In essentially unchanged form, the Act, now codified as 28 U. S. C. § 1738, provides that

"[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States

that this judicial determination precludes Kremer from bringing "any other action, civil or criminal, based upon the same grievance" in the New York courts. N. Y. Exec. Law § 300 (McKinney 1972). By its terms, therefore, § 1738 would appear to preclude Kremer from relitigating the same question in federal court.

Kremer offers two principal reasons why § 1738 does not bar this action. First, he suggests that in Title VII cases Congress intended that federal courts be relieved of their usual obligation to grant finality to state court decisions. Second, he urges that the New York administrative and judicial proceedings in this case were so deficient that they are not entitled to preclusive effect in federal courts and, in any

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and its Territories and Possessions as they have by law or usage in the courts of such State . . . ."

Accordingly the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. *Allen* v. *McCurry*, 449 U. S. 90, 96 (1980); *Montana* v. *United States*, 440 U. S. 147 (1979); *Angel* v. *Bullington*, 330 U. S. 183 (1947). Indeed, from *Cromwell* v. *County of Sac*, 94 U. S. 351 (1877), to *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Allen* v. *McCurry*, *supra*, at 94; *Cromwell* v. *County of Sac*, *supra*, at 352. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *Montana* v. *United States*, *supra*, at 153. *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326, n. 5 (1979). Thus, invocation of res judicata and collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen* v. *McCurry*, 449 U. S., at 94. When a state court has adjudicated a claim or issue, these doctrines also serve to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.*, at 96.

event, the rejection of a state employment discrimination claim cannot by definition bar a Title VII action. We consider this latter contention in Part III.

A

Allen v. *McCurry*, 449 U. S. 90, 99 (1980), made clear that an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal. There is no claim here that Title VII expressly repealed § 1738; if there has been a partial repeal, it must be implied. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored," *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976); *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976), and whenever possible, statutes should be read consistently. There are, however,

> "'two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . .'" *Radzanower* v. *Touche Ross & Co.*, *supra*, at 154, quoting *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936).

The relationship of Title VII to § 1738 does not fall within either of these categories. Congress enacted Title VII to assure equality of employment opportunities without distinction with respect to race, color, religion, sex, or national origin. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). To this end the EEOC was created and the federal courts were entrusted with ultimate enforcement responsibility. State antidiscrimination laws, however, play

an integral role in the congressional scheme. Whenever an incident of alleged employment discrimination occurs in a State or locality which by law prohibits such discrimination and which has established an "authority to grant or seek relief from such [discrimination] or to institute criminal proceedings with respect thereto," no charge of discrimination may be actively processed by the EEOC until the state remedy has been invoked and at least 60 days have passed, or the state proceedings have terminated. § 706(c), 42 U. S. C. § 2000e–5(c). Only after providing the appropriate state agency an opportunity to resolve the complaint may an aggrieved individual press his complaint before the EEOC. In its investigation to determine whether there is reasonable cause to believe that the charge of employment discrimination is true, the Commission is required to "accord substantial weight to final findings and orders made by State and local authorities in proceedings commenced under State or local law" pursuant to the limited deferral provisions of § 706, but is not bound by such findings. *Alexander* v. *Gardner-Denver Co.*, *supra*, at 48, n. 8. If the EEOC finds reasonable cause to believe that discrimination has occurred, it undertakes conciliation efforts to eliminate the unlawful practice; if these efforts fail, the Commission may elect to bring a civil action to enforce the Act. If the Commission declines to do so, or if the Commission finds no reasonable cause to believe that a violation has occurred, "a civil action" may be brought by an aggrieved individual. § 706(f)(1), 42 U. S. C. § 2000e–5(f)(1).

No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the Act specify the weight a federal court should afford a final judgment by a state court if such a remedy is sought. While we have interpreted the "civil action" authorized to follow consideration by federal and state administrative *agencies* to be a "trial *de novo*," *Chandler* v. *Roudebush*, 425 U. S. 840, 844–845 (1976); *Alexander* v. *Gardner-Denver Co.*, *supra*, at 38; *McDonnell Douglas Corp.* v. *Green*, *supra*, at

798–799, neither the statute nor our decisions indicate that the final judgment of a state *court* is subject to redetermination at such a trial. Similarly, the congressional directive that the EEOC should give "substantial weight" to findings made in state proceedings, § 706(b), 42 U. S. C. § 2000e–5(b), indicates only the minimum level of deference the EEOC must afford all state determinations; it does not bar affording the greater preclusive effect which may be required by § 1738 if judicial action is involved.[7] To suggest otherwise, to say that either the opportunity to bring a "civil action" or the "substantial weight" requirement implicitly repeals § 1738, is to prove far too much. For if that is so, even a full trial on the merits in state court would not bar a trial *de novo* in federal court and would not be entitled to more than "substantial weight" before the EEOC. The state courts would be placed on a one-way street; the finality of their decisions would depend on which side prevailed in a given case.[8]

Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatability between Title VII and § 1738 is enough to answer our inquiry. No different conclusion is suggested by the legislative history of Title VII. Although no inescapable

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[7] EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. *Batiste* v. *Furnco Constr. Corp.*, 503 F. 2d 447, 450, n. 1 (CA7 1974), cert. denied, 420 U. S. 928 (1975). Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts. *Garner* v. *Giarrusso*, 571 F. 2d 1330 (CA5 1978); *Batiste* v. *Furnco Constr. Corp.*, *supra;* *Cooper* v. *Philip Morris, Inc.*, 464 F. 2d 9 (CA6 1972); *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889 (CA2 1971), cert. denied, 406 U. S. 918 (1972).

[8] Section 706(b) guarantees that the outcome of both agency and judicial proceedings will be given substantial weight. JUSTICE BLACKMUN interprets that provision as a ceiling on the deference federal courts are obli-

conclusions can be drawn from the process of enactment,[9] the legislative debates surrounding the initial passage of Title VII in 1964 and the substantial amendment adopted in 1972 plainly do not demonstrate that Congress intended to over-

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gated to give state court judgments. *Post*, at 489. The "substantial weight" requirement, however, was added to Title VII in 1972 not because the EEOC was giving state administrative decisions too much weight, but because it was affording them too little significance. See *infra*, at 474–475, and n. 16. Finding an implied repeal of § 1738 in an amendment directed exclusively at increasing the deference to be given state decisions would be contrary to normal principles of statutory interpretation, let alone the more difficult test of demonstrating an implied repeal.

It is even more implausible to find an implied repeal in the limited deferral to pending state and local proceedings, § 706(c), 42 U. S. C. § 2000e–5(c). First, that provision does not even address the issue of the proper weight to be afforded state decisions. Moreover, because the section requires complainants to wait no longer than 60 days before initating federal proceedings, it is doubtful that Congress even contemplated that the provision applied after a complaint had run the full course of state administrative and judicial consideration. See, *e. g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 755 (1979) (Section 706(c) "is intended to give state *agencies* a limited opportunity to resolve problems of employment discrimination") (emphasis added); *Love* v. *Pullman Co.*, 404 U. S., at 526 (The purpose of § 706(c) is "to give state *agencies* a prior opportunity to consider discrimination complaints") (emphasis added).

For the same reasons, the EEOC's authority to enter work-sharing agreements with state agencies is irrelevant. This provision, like the limited deferral and "substantial weight" requirements, is directed at increasing, not reducing, the authority of state agencies to resolve employment discrimination disputes. All of these provisions are directed toward administrative cooperation, and lend no evidence of congressional intent to compromise or circumscribe the validity of state *judicial* proceedings. Although JUSTICE BLACKMUN implies that work-sharing agreements constitute the one "narrow exception for possible exclusive state agency jurisdiction," *post*, at 496, left by Congress, neither the statute nor its background so indicates. Indeed, it is no "exception" at all; even though the EEOC declines to process a charge under a work-sharing agreement, the statute does not prevent the complainant from subsequently filing suit in federal court.

[9] Interpretation of Title VII is hampered by the fact that there are no authoritative legislative reports. The House Civil Rights bill went directly to the Senate floor without committee consideration in hopes that it

ride the historic respect that federal courts accord state court judgments.[10]

At the time Title VII was written, over half of the States had enacted some form of equal employment legislation.[11] Members of Congress agreed that the States should play an important role in enforcing Title VII, but also felt the federal system should defer only to adequate state laws.[12] Congress considered a number of possible ways of achieving these goals, ranging from limiting Title VII's jurisdiction to States without fair employment laws to having Congress

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would be approved without change. This did not happen. The bill including Title VII, was amended 87 times during the 83-day debate in the Senate. Upon being returned to the House, the bill was not subjected to the usual conference procedure. Instead, the House voted acceptance of the Senate measure. See EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 9–11 (1968) (hereafter 1964 Leg. Hist.).

[10] JUSTICE BLACKMUN reads the legislative history differently, *post*, at 494–499, seizing upon doubts expressed concerning the adequacy of state remedies. It does not follow, however, that an implied repeal of § 1738 has been demonstrated. For that, the intent of Congress "must be clear and manifest." *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976). JUSTICE BLACKMUN never claims that this rigorous standard is satisfied. Nor would such a claim be persuasive. Similar expressions of congressional concern with state remedies were unsuccessfully mustered in *Allen* v. *McCurry*, 449 U. S. 90 (1980), where we refused to find an implied repeal of § 1738 in the passage of 42 U. S. C. § 1983. See *infra*, at 476. JUSTICE BLACKMUN also claims too much from the refusal of Congress to place employment discrimination within the exclusive jurisdiction of the States, 22 of whom lacked any fair employment laws at the time Title VII was enacted. Reluctance to rely entirely on the States does not require a departure from traditional rules of res judicata when a state fair employment law exists, a state agency has investigated and processed a grievance, and a state court has upheld the agency's decision as procedurally fair and substantively justified.

[11] See Bureau of National Affairs, State Fair Employment Laws and Their Administration (1964). See also 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark).

[12] In their interpretive memorandum, Senators Clark and Case, floor managers of the bill, stated that

"Title VII specifically provides for the continued effectiveness of state and local laws and procedures for dealing with discrimination in employment"

or the President assess the adequacy of state laws. As Title VII emerged from the House, it empowered the EEOC to assess the adequacy of state laws and procedures. § 708(b), H. R. 7152, 88th Cong., 2d Sess. (1964). The Senate bill that was finally signed into law widened the state role by guaranteeing all States with fair employment practices laws an initial opportunity to resolve charges of discrimination. 42 U. S. C. § 2000e–5(c). Senator Humphrey, an advocate of strong enforcement, emphasized the state role under the legislation:

> "We recognized that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and equal employment opportunity. We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government." 110 Cong. Rec. 12725 (1964).

Indeed, New York's fair employment laws were referred to in the congressional debates by proponents of the legislation as an example of existing state legislation effectively combating employment discrimination.[13]

Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court. While striving to craft an optimal

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and that "it will not override any state law or municipal ordinance which is not inconsistent." *Id.*, at 7214, 7216.

See also *id.*, at 7205 (remarks of Sen. Clark); *id.*, at 12725 (remarks of Sen. Humphrey). See generally Jackson, Matheson, & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 Mich. L. Rev. 1485, 1493–1497 (1981) (hereinafter Jackson, Matheson, & Piskorski).

[13] 110 Cong. Rec. 1635–1636 (1964), reprinted in 1964 Leg. Hist. 3345–3346 (remarks of Cong. Reid) ("The New York State Commission for Human Rights has pioneered effectively and it has now been copied in 22 States . . ."); 110 Cong. Rec. 1643 (1964), 1964 Leg. Hist. 3258–3259

niche for the States in the overall enforcement scheme, the legislators did not envision full litigation of a single claim in both state and federal forums.[14] Indeed, the requirement of a trial *de novo* in federal district court following EEOC proceedings was added primarily to protect employers from overzealous enforcement by the EEOC. A memorandum signed by seven Representatives accompanying the compromise measure ultimately adopted, concluded that "we believe the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in district court proceedings." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Similar views were expressed in 1972 when Congress reconsidered whether to give the EEOC adjudicatory and enforcement powers.[15] There is also reason to believe that Congress required that the EEOC give state findings "substantial weight" because the Commission had

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(remarks of Cong. Ryan); 110 Cong. Rec. 12595 (1964), 1964 Leg. Hist. 3066 (remarks of Sen. Clark).

[14] Senator Dirksen, the principal drafter of the Senate bill, stated in no uncertain terms his desire to avoid multiple suits arising out of the same discrimination:

"What a layering upon layer of enforcement. What if the court orders differed in their terms or requirements? There would be no assurance that they would be identical. Should we have the Federal forces of justice pull on the one arm, and the State forces of justice tug on the other? Should we draw and quarter the victim?" 110 Cong. Rec. 6449 (1964).

[15] See, *e. g.*, 117 Cong. Rec. 42026 (1971), reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, p. 571 (1972) (hereafter 1972 Leg. Hist.) (remarks of Sen. Allen); 118 Cong. Rec. 932 (1972), 1972 Leg. Hist. 807 (same); 118 Cong. Rec. 311, 933 (1972), 1972 Leg. Hist. 632, 809 (remarks of Sen. Ervin); 118 Cong. Rec. 595 (1972), 1972 Leg. Hist. 682 (remarks of Sen. Tower); 118 Cong. Rec. 699–703 (1972), 1972 Leg. Hist. 698–709 (remarks of Sen. Fannin).

Opponents successfully objected to combining investigatory, adjudicatory, and enforcement power in a single agency. A compromise, sponsored by Senator Dominick, was adopted which gave the EEOC the power to bring suit but retained a trial *de novo* in federal district court so that employers and other defendants would receive "an impartial judicial deci-

too freely ignored the determinations handed down by state agencies.[16]

An important indication that Congress did not intend Title VII to repeal § 1738's requirement that federal courts give full faith and credit to state court judgments is found in an exchange between Senator Javits, a manager of the 1972 bill, and Senator Hruska. Senator Hruska, concerned with the potential for multiple independent proceedings on a single discrimination charge, had introduced an amendment which would have eliminated many of the duplicative remedies for employment discrimination. Senator Javits argued that the amendment was unnecessary because the doctrine of res judicata would prevent repetitive litigation against a single defendant:

> "[T]here is the real capability in this situation of dealing with the question on the basis of res judicata. In other words once there is a litigation—a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual—the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted." 118 Cong. Rec. 3370 (1972).[17]

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sion free from accusation of institutional bias." S. Rep. No. 92–415, p. 86 (1971), 1972 Leg. Hist. 464 (views of Sen. Dominick).

[16] Prior to the 1972 amendments, the EEOC was free to ignore state administrative decisions. In the Senate debates, Senator Montoya asked Senator Williams, the floor manager of the amendments, and Senator Ervin, an opponent, to explain the purpose of the "substantial weight" directive. Senator Ervin responded that the provision's purpose was to prevent the EEOC from reversing state decisions "peremptorily." The Commission would be required to "give due respect to the findings of the State or local authorities." 118 Cong. Rec. 310 (1972), 1972 Leg. Hist. 627. Senator Williams did not dispute this answer. See also Jackson, Matheson, & Piskorski, *supra* n. 12, at 1504–1505.

[17] We reject petitioner's suggestion, repeated by JUSTICE BLACKMUN, *post*, at 499–501, that since the Hruska amendment excluded state pro-

Senator Williams, another proponent of the 1972 bill, echoed Senator Javits' remarks: "I do not believe that the individual claimant should be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again." *Id.*, at 3372. After Senator Javits and Senator Williams spoke, an evenly divided Senate refused to approve the Hruska amendment.

It is sufficiently clear that Congress, both in 1964 and 1972, though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws. We conclude that neither the statutory language nor the congressional debates suffice to repeal § 1738's longstanding directive to federal courts.

B

Our finding that Title VII did not create an exception to § 1738 is strongly suggested if not compelled by our recent decision in *Allen* v. *McCurry* that preclusion rules apply in 42 U. S. C. § 1983 actions and may bar federal courts from freshly deciding constitutional claims previously litigated in state courts. Indeed, there is more in § 1983 to suggest an implied repeal of § 1738 than we have found in Title VII. In *Allen*, we noted that "one strong motive" behind the enactment of § 1983 was the "grave congressional concern that the state courts had been deficient in protecting federal rights." 449 U. S., at 98–99. Nevertheless, we concluded that "much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Id.*, at 99.

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ceedings, Senator Javits' comments "should in context also be read as excluding state proceedings from any application of res judicata in Title VII suits." Reply Brief for Petitioner 9, n. **. Not only is the idea that even a full state judicial proceeding be excluded from res judicata effect implausible on its face, but Senator Javits prefaced his res judicata statement by discussing the very New York employment discrimination laws under which Kremer proceeded. 118 Cong. Rec. 3370 (1972).

Because Congress must "clearly manifest" its intent to depart from § 1738, our prior decisions construing Title VII in situations where § 1738 is inapplicable are not dispositive. They establish only that *initial resort* to state administrative remedies does not deprive an individual of a right to a federal trial *de novo* on a Title VII claim. In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Chandler* v. *Roudebush*, 425 U. S. 840 (1976), we held that the "civil action" in federal court following an EEOC decision was intended to be a trial *de novo*. This holding, clearly supported by the legislative history, is not a holding that a prior state court judgment can be disregarded.

The petitioner and the Courts of Appeals which have denied res judicata effect to such judgments rely heavily on our statement in *Alexander* v. *Gardner-Denver* that "final responsibility for enforcement of Title VII is vested with federal courts." 415 U. S., at 44.[18] We did not say, and our language should not be read to imply, that by vesting "final responsibility" in one forum, Congress intended to deny finality to decisions in another. The context of the statement makes this clear. In describing the operation of Title VII, we noted that the EEOC cannot adjudicate claims or impose sanctions; that responsibility, the "final responsibility for enforcement," must rest in federal court.

The holding in *Gardner-Denver* was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts. Arbitration decisions, of course, are not subject to the mandate of § 1738. Furthermore, unlike arbitration hearings under collective-bargaining agreements, state fair employment practice laws are explicitly made part of the Title VII enforcement scheme. Our decision in *Gardner-Denver* explicitly recognized the "distinctly separate nature of these contractual and statutory rights."

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[18] See, *e. g.*, *Smouse* v. *General Electric Co.*, 626 F. 2d, at 334–335; *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d, at 1082–1083.

Id., at 50. Here we are dealing with a state statutory right, subject to state enforcement in a manner expressly provided for by the federal Act.

Gardner-Denver also rested on the inappropriateness of arbitration as a forum for the resolution of Title VII issues. The arbitrator's task, we recognized, is to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Id.*, at 56–57. The arbitrator's specialized competence is "the law of the shop, not the law of the land," and "the factfinding process in arbitration usually is not equivalent to judicial factfinding." *Ibid.* These characteristics cannot be attributed to state administrative boards and state courts. State authorities are charged with enforcing laws, and state courts are presumed competent to interpret those laws.

Finally, the comity and federalism interests embodied in § 1738 are not compromised by the application of res judicata and collateral estoppel in Title VII cases. Petitioner maintains that the decision of the Court of Appeals will deter claimants from seeking state court review of their claims ultimately leading to a deterioration in the quality of the state administrative process. On the contrary, stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by state officials. Depriving state judgments of finality not only would violate basic tenets of comity and federalism, *Board of Regents* v. *Tomanio*, 446 U. S. 478, 488, 491–492 (1980), but also would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems.[19]

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[19] Here JUSTICE BLACKMUN's dissent rests on two dubious premises: that plaintiffs will be deterred from seeking state judicial review of administrative decisions and that the more such cases are subject to judicial review the better the system becomes. Obvious incentives remain for an individual with a truly meritorious claim to proceed. In New York. judi-

III

The petitioner nevertheless contends that the judgment should not bar his Title VII action because the New York courts did not resolve the issue that the District Court must hear under Title VII—whether Kremer had suffered discriminatory treatment—and because the procedures provided were inadequate. Neither contention is persuasive. Although the claims presented to the NYHRD and subsequently reviewed by the Appellate Division were necessarily based on New York law, the alleged discriminatory acts are prohibited by both federal and state laws.[20] The elements of a successful employment discrimination claim are virtually identical; petitioner could not succeed on a Title VII claim

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cial review of "no probable cause" determinations is rigorous in both a procedural and substantive sense, see *infra*, at 479–485, and n. 21. Forgoing such review ensures considerable delay and lengthening of the adjudicatory process. And the reward for such forbearance is a federal proceeding in which the existing adverse state decision must be given "substantial weight." JUSTICE BLACKMUN assumes, without supporting evidence, that this "strategy" is wise and very likely to be pursued in many cases. Even were this assumption plausible, it hardly follows that state proceedings are improved by the sheer quantity of administrative adjudications brought before them.

[20] The New York law is at least as broad as Title VII. Title 42 U. S. C. § 2000e–2(a) provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."

New York Exec. Law § 296(1) (McKinney Supp. 1981–1982) provides:

"It shall be an unlawful discriminatory practice:

"(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual."

We, of course, do not decide in this case whether jurisdiction to entertain Title VII claims is limited to the federal courts.

consistently with the judgment of the NYHRD that there is no reason to believe he was terminated or not rehired because of age or religion. The Appellate Division's affirmance of the NYHRD's dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless.[21]

The more serious contention is that even though administrative proceedings and judicial review are legally sufficient to be given preclusive effect in New York, they should be deemed so fundamentally flawed as to be denied recognition under § 1738. We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim

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[21] JUSTICE BLACKMUN and JUSTICE STEVENS wrongly assert that the New York court's holding does not constitute a finding "one way or the other" on the merits of petitioner's claim. *Post*, at 492 (BLACKMUN, J., dissenting); *post*, at 509 (STEVENS, J., dissenting). When the NYHRD summarily dismisses a complaint, the Appellate Division must find that the petitioner's "complaint lacks merit as a matter of law." *Flah's, Inc.* v. *Schneider*, 71 App. Div. 2d 993, 420 N. Y. S. 2d 283, 284 (1979). See also *New York State Div. for Youth* v. *State Human Rights Appeal Board*, 83 App. Div. 2d 972, 973, 442 N. Y. S. 2d 813, 814 (1981) ("Since the investigation as conducted by the division involved separate meetings without hearings, it must appear in such instance that, as a matter of law, the complaint lacks merit in order for the division to dismiss the complaint"); *State Div. of Human Rights* v. *Blanchette*, 73 App. Div. 2d 820, 821, 423 N. Y. S. 2d 745, 746 (1979) ("[T]he division may not determine that there is no probable cause for the complaint and dismiss it when the facts revealed in the investigation do not 'generate conviction in and persuade a fair and detached fact finder' that that there is no substance in the complaint"); *Stasiak* v. *Montgomery Ward & Co.*, 66 App. Div. 2d 962, 411 N. Y. S. 2d 700, 701 (1978) ("In order to sustain a dismissal of a complaint before the complainant has had his opportunity to present his case in a formal manner, it must appear virtually as a matter of law that the complaint lacks merit"); *Altiery* v. *State Div. of Human Rights*, 61 App. Div. 2d 780, 781, 402 N. Y. S. 2d 405, 406 (1978) ("It cannot be said as a matter of law, that the complaint . . .

or issue, *Allen* v. *McCurry*, 449 U. S., at 95; *Montana* v. *United States*, 440 U. S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 328–329 (1971).[22] "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana* v. *United States*, *supra*, at 164, n. 11. Cf. *Gibson* v. *Berryhill*, 411 U. S. 564 (1973).

Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the ef-

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lacked merit"). Decisions applying the standard employed in the foregoing cases are decisions on the merits, just as was the decision in *State Div. of Human Rights* v. *New York State Drug Abuse Comm'n*, 59 App. Div. 2d 332, 336, 399 N. Y. S. 2d 541, 544 (1977) (when a complainant has a "full opportunity to present his evidence and exhibits, under oath if he so requests," the presence of a "rational basis in the record" for that decision will suffice). It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect. *CIBA Corp.* v. *Weinberger*, 412 U. S. 640, 644 (1973); *Grubb* v. *Public Utilities Comm'n*, 281 U. S. 470, 475–477 (1930). There is no requirement that judicial review must proceed *de novo* if it is to be preclusive. Furthermore, as we have explained, Congress did not draft the *de novo* requirement in order to deny preclusive effect to state decisions. See *supra*, at 474.

[22] While our previous expressions of the requirement of a full and fair opportunity to litigate have been in the context of collateral estoppel or issue preclusion, it is clear from what follows that invocation of res judicata or claim preclusion is subject to the same limitation.

The lower courts did not discuss whether it is the doctrine of res judicata or collateral estoppel that applies here. Section 1738 requires dismissal of

fect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. *McElmoyle* v. *Cohen*, 13 Pet. 312, 326 (1839); *Mills* v. *Duryee*, 7 Cranch 481, 485 (1813). As we recently noted in *Allen* v. *McCurry*, *supra*, "though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." 449 U. S., at 96.

The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment,[23] and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the State from which the judgment emerged. In such a case, there

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petitioner's Title VII suit whether his Title VII claim is precluded by the New York judgment or whether he is collaterally estopped by that judgment from complaining that Chemico had discriminated against him. Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes, *Nash County Bd. of Ed.* v. *Biltmore Co.*, 640 F. 2d 484, 488 (CA4), cert. denied, 454 U. S. 878 (1981). See also Restatement (Second) of Judgments § 61(1) (Tent. Draft No. 5, Mar. 10, 1978); Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 340–341 (1978). It may be that petitioner would be precluded under res judicata from pursuing a Title VII claim. However that may be, it is undebatable that petitioner is at least estopped from relitigating the issue of employment discrimination arising from the same events.

[23] Cf. *McDonald* v. *Mabee*, 243 U. S. 90, 92 (1917) ("[A]n ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it"); *Haddock* v. *Haddock*, 201 U. S. 562, 567, 568 (1906).

could be no constitutionally recognizable preclusion at all.[24]

We have little doubt that Kremer received all the process that was constitutionally required in rejecting his claim that he had been discriminatorily discharged contrary to the statute. We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 610 (1974); *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710 (1945). "'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Mitchell* v. *W. T. Grant Co.*, *supra*, at 610 (quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961)). Under New York law, a claim of employment discrimination requires the NYHRD to investigate whether there is "probable cause" to believe that the complaint is true. Before this determination of probable cause is made, the claimant is entitled to a "full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony." *State Div. of Human Rights* v. *New York State Drug Abuse Comm'n*, 59 App. Div. 2d 332, 336, 399 N. Y. S. 2d 541, 544 (1977). The complainant also is entitled to an opportunity "to rebut evidence submitted by or obtained from the respondent." 9 N. Y. C. R. R. § 465.6 (1977). He may have an attorney assist him and may ask the division to issue subpoenas. 9 N. Y. C. R. R. § 465.12(c) (1977).

If the investigation discloses probable cause and efforts at conciliation fail, the NYHRD must conduct a public hearing

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[24] The Court's decisions enforcing the Full Faith and Credit Clause of the Constitution, Art. IV, § 1, also suggest that what a full and fair opportunity to litigate entails is the procedural requirements of due process. *Sherrer* v. *Sherrer*, 334 U. S., at 348 ("there is nothing in the concept of due process which demands that a defendant be afforded a second opportu-

to determine the merits of the complaint. N. Y. Exec. Law § 297(4)(a) (McKinney Supp. 1981–1982). A public hearing must also be held if the Human Rights Appeal Board finds "there has not been a full investigation and opportunity for the complainant to present his contentions and evidence, with a full record." *State Div. of Human Rights* v. *New York State Drug Abuse Comm'n*, *supra*, at 337, 399 N. Y. S. 2d, at 544–545.[25] Finally, judicial review in the Appellate Division is available to assure that a claimant is not denied any of the procedural rights to which he was entitled and that the NYHRD's determination was not arbitrary and capricious. N. Y. Civ. Prac. Law § 7803 (McKinney 1981). See *Gregory* v. *New York State Human Rights Appeal Board*, 64 App. Div. 2d 775, 776, 407 N. Y. S. 2d 256, 257 (1978); *Tenenbaum* v. *State Div. of Human Rights*, 50 App. Div. 2d 257, 259, 376 N. Y. S. 2d 542, 544 (1975).

We have no hesitation in concluding that this panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause.[26]

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nity to litigate the existence of jurisdictional facts"); *Baldwin* v. *Iowa Traveling Men's Assn.*, 283 U. S. 522, 524 (1931); *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, 30 (1917). Section 1738 was enacted to implement the Full Faith and Credit Clause, *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 437 (1943), and specifically to insure that federal courts, not included within the constitutional provision, would be bound by state judgments. *Davis* v. *Davis*, 305 U. S. 32, 40 (1938) ("The Act extended the rule of the Constitution to all courts, federal as well as state"). See also *Underwriters National Assur. Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Assn.*, 455 U. S. 691 (1982). It is therefore reasonable that § 1738 be subject to no more restriction than the Full Faith and Credit Clause.

[25] The Human Rights Appeal Board is authorized to reverse or remand any order that is not "supported by substantial evidence on the whole record" or that is "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." N. Y. Exec. Law §§ 297–a(7)(d) and (e) (McKinney 1972).

[26] Certainly, the administrative nature of the factfinding process is not dispositive. In *United States* v. *Utah Construction & Mining Co.*, 384

Only where the evidence submitted by the claimant fails, as a matter of law, to reveal any merit to the complaint may the NYHRD make a determination of no probable cause without holding a hearing. *Flah's, Inc.* v. *Schneider*, 71 App. Div. 2d 993, 420 N. Y. S. 2d 283, 284 (1979). See n. 21, *supra*. And before that determination may be reached, New York requires the NYHRD to make a full investigation, wherein the complainant has full opportunity to present his evidence, under oath if he so requests. *State Div. of Human Rights* v. *New York State Drug Abuse Control Comm'n*, *supra*, at 336, 399 N. Y. S. 2d, at 544. The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy. Cf. *Juidice* v. *Vail*, 430 U. S. 327, 337 (1977).

IV

In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress.[27] Because there is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits, the judgment of the Court of Appeals is

Affirmed.

U. S. 394 (1966), we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity." *Id.*, at 422.

[27] One example is the authorization for federal courts to reexamine state findings upon a request for a writ of habeas corpus. 28 U. S. C. § 2254.

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

Today the Court follows an isolated Second Circuit approach and holds that a discrimination complainant cannot bring a Title VII suit in federal court after unsuccessfully seeking state court "review" of a state antidiscrimination agency's unfavorable decision. The Court embraces a rule that has been subject to challenge within the Second Circuit[1] and that has been "vigorously attacked and soundly rejected by other courts."[2] The Court reaches this result because it purports to find nothing in Title VII inconsistent with the application of the general preclusion rule of 28 U. S. C. § 1738 to the state court's affirmance of the state agency's decision. For a compelling array of reasons, the Court is wrong.

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[1] Before the Court of Appeals addressed the issue, one District Court in the Second Circuit held that a state court affirmance of a decision by the New York State Division of Human Rights did not preclude a subsequent Title VII suit. *Benneci* v. *Department of Labor, New York State Division of Employment*, 388 F. Supp. 1080 (SDNY 1975). Then in *Mitchell* v. *National Broadcasting Co.*, 553 F. 2d 265 (1977), the Second Circuit ruled, over a strong dissent, that a state court affirmance of a state agency decision barred a subsequent civil rights suit under 42 U. S. C. § 1981. Later, in a brief *per curiam* decision, *Sinicropi* v. *Nassau County*, 601 F. 2d 60, cert. denied, 444 U. S. 983 (1979), the Circuit concluded that *Mitchell* dictated the same res judicata result for Title VII, despite the significant differences between § 1981 and the complex structure of Title VII, which expressly addresses the role of state proceedings in the resolution of discrimination claims. The District Judge in this case appropriately felt himself bound by *Sinicropi*, but he wrote a persuasive opinion questioning its wisdom. 477 F. Supp. 587, 591–594 (SDNY 1979). On appeal, a panel of the Second Circuit also found the outcome in this case dictated by *Sinicropi*. 623 F. 2d 786 (1980). Two judges of that court voted for rehearing en banc. App. 80.

[2] *Unger* v. *Consolidated Foods Corp.*, 657 F. 2d 909, 914, n. 5 (CA7 1981). All other Courts of Appeals that have considered the issue have disagreed with the Second Circuit. In addition to *Unger*, see *Smouse* v. *General Electric Co.*, 626 F. 2d 333, 336 (CA3 1980) (expressly rejecting

I

The Court, as it must, concedes that a state *agency* determination does not preclude a trial *de novo* in federal district court. *Ante*, at 468–470, and n. 7. Congress made it clear beyond doubt that state agency findings would not prevent the Title VII complainant from filing suit in federal court.

Title VII provides that no charge may be filed until 60 days "after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." § 706(c), 42 U. S. C. § 2000e–5(c). After a charge is filed, the Equal Employment Opportunity Commission (EEOC) may take action and, eventually, the complainant may file suit, §§ 706(b) and (f)(1). By permitting a charge to be filed after termination of state proceedings, the statute expressly contemplates that a plaintiff may bring suit despite a state finding of no discrimination.[3]

Sinicropi); *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d 1079, 1084 (CA8) ("questioning" *Sinicropi*), cert. denied, 446 U. S. 966 (1980). See also *Aleem* v. *General Felt Industries, Inc.*, 661 F. 2d 135, 137 (CA9 1981) ("*Sinicropi* is inconsistent with the Supreme Court's decision in *Alexander* [v. *Gardner-Denver Co.*, 415 U. S. 36 (1974)]").

Commentators, too, agree that the Second Circuit's rule is ill-conceived. See Note, Res Judicata in Successive Employment Discrimination Suits, 1980 U. Ill. Law Forum 1049, 1099; Comment, 15 Harv. Civ. Rights-Civ. Lib. L. Rev. 29, 266–276 (1980) (criticizing application of Second Circuit's rule to 42 U. S. C. § 1981); Comment, 31 Rutgers L. Rev. 973 (1979) (same); Comment, 6 Ford. Urban L. J. 481, 492–494 (1978) (same); Comment, 62 Minn. L. Rev. 987 (1978); Note, 53 N. Y. U. L. Rev. 187 (1978). See also Jackson, Matheson, & Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 Mich. L. Rev. 1485, 1519–1520 (1981) (rejecting application of res judicata when, as in this case, the state court affirms a state agency finding of no probable cause); Comment, 30 Vand. L. Rev. 1260 (1977); Richards, Alexander v. Gardner-Denver: A Threat to Title VII Rights, 29 Ark. L. Rev. 129, 158 (1975) (interpreting Title VII contrary to Second Circuit's decisions, but before the relevant Second Circuit cases were decided).

[3] See also § 706(f)(1) (permitting the district court to stay a Title VII suit for not more than 60 days pending termination of "State or local pro-

This fact is also made clear by § 706(b). In 1972, by Pub. L. 92–261, § 4, 86 Stat. 104, Congress amended that section by directing that the EEOC "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law."[4] If the original version of Title VII had given the outcomes of state "proceedings" preclusive effect, Congress would not have found it necessary to amend the statute in 1972 to direct that they be given "substantial weight." And if in 1972 Congress had intended final decisions in state "proceedings" to have preclusive effect, it certainly would not have instructed that they be given "substantial weight."[5]

Thus, Congress expressly recognized in both § 706(b) and § 706(c) that a complainant could bring a Title VII suit in federal court despite the conclusion of state "proceedings." And, as the Court must acknowledge, see *ante*, at 470–471, n. 8, when Congress referred to state "proceedings," it referred to both state agency proceedings and state judicial

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ceedings," without suggesting that the termination would bar further district court proceedings).

[4] By indicating that final decisions in state proceedings have no preclusive effect on the EEOC, Congress also indicated that final decisions in state proceedings do not preclude a subsequent Title VII suit in federal court. "It would be meaningless for Congress to set up standards for E. E. O. C. examination of cases after determinations were made in state proceedings if Congress intended that those cases be barred from consideration in federal court," because the EEOC, "which lacks enforcement power, would be attempting to mediate with defendants who were already protected from any further legal action." *Batiste* v. *Furnco Constr. Corp.*, 503 F. 2d 447, 450, n. 1 (CA7 1974), cert. denied, 420 U. S. 928 (1975).

[5] Congress simply would have inserted the words "preclusive effect" instead of "substantial weight." The legislative history of the "substantial weight" amendment indicates that Congress intended for the EEOC to refrain only from overturning state decisions "peremptorily" and for the EEOC simply to give them "due respect." 118 Cong. Rec. 310 (1972) (remarks of Sen. Ervin).

review of those agency proceedings. "[T]hroughout Title VII the word 'proceeding,' or its plural form, is used to refer to all the different types of proceedings in which the statute is enforced, state and federal, administrative and judicial." *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 62–63 (1980).

Yet the Court nevertheless finds that petitioner's Title VII suit is precluded by the termination of state "proceedings." In this case, the New York State Division of Human Rights (NYHRD) found no probable cause to believe that petitioner had been a victim of discrimination. Under the Court's own rule, that determination in itself does not bar petitioner from filing a Title VII suit in federal district court. According to the Court, however, petitioner lost his opportunity to bring a federal suit when he unsuccessfully sought review of the state agency's decision in the New York courts. As the Court applies preclusion principles to Title VII, the state court affirmance of the state agency decision—*not* the state agency decision itself—blocks any subsequent Title VII suit.

The Court reaches this result through a schizophrenic reading of § 706(b). See *ante*, at 469–470, and n. 8. According to the Court, when Congress amended § 706(b) so that state "proceedings" would be accorded "substantial weight," it meant two different things at the same time: it intended state agency "proceedings" to be accorded only "substantial weight," while, simultaneously, state judicial "proceedings" in review of those agency "proceedings" would be accorded "substantial weight and more"—that is, "preclusive effect." But the statutory language gives no hint of this hidden double meaning. Instead of reading an unexpressed intent into § 706(b), the Court should accept the plain language of the statute. All state "proceedings," whether agency proceedings or state judicial review proceedings, are entitled to "substantial weight," not "preclusive effect." As the Court implicitly concedes when it permits suit despite the conclusion

of agency proceedings, "substantial weight" is a very different concept from "preclusive effect," and Congress thus did not intend for the termination of any state "proceeding" to foreclose a subsequent Title VII suit.

In addition, the Court must disregard the clear import of § 706(c). That section explicitly contemplates that a complainant can bring a Title VII suit despite the termination of state "proceedings." Once again, the statute contains no suggestion that any state "proceeding" has preclusive effect on a subsequent Title VII suit. Nonetheless, contrary to § 706(c), the Court bars petitioner's Title VII suit because of the termination of state "proceedings."[6]

The Court's attempt to give § 706(b) a double meaning and to avoid the language of § 706(c) is made all the more awkward because the Court's decision artificially separates the proceedings before the reviewing state court from the state administrative process. Indeed, if Congress meant to permit a Title VII suit despite the termination of state agency proceedings, it is only natural to conclude that Congress also intended to permit a Title VII suit after the agency decision has been simply affirmed by a state court.

State court review is merely the last step in the administrative process, the final means of review of the state *agency's* decision. For instance, in New York, the NYHRD "is primarily responsible for administering the law and to that end has been granted broad powers to eliminate discriminatory practices." *Imperial Diner, Inc.* v. *State Human Rights Appeal Bd.*, 52 N. Y. 2d 72, 77, 417 N. E. 2d 525, 528 (1980). When, as in this case, the NYHRD finds no probable cause, a reviewing court must affirm the Division's decision unless it is "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," see

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[6] The Court observes that this section does not address the issue of the proper weight to be afforded state decisions. See *ante*, at 471, n. 8. It is

N. Y. Exec. Law § 297–a(7)(e) (McKinney 1972),[7] that is, unless the decision is "devoid of a rational basis." *State Office of Drug Abuse Servs.* v. *State Human Rights Appeal Bd.*, 48 N. Y. 2d 276, 284, 397 N. E. 2d 1314, 1318 (1979). If the agency decides to hold a hearing, its decision must be affirmed if it is "supported by substantial evidence on the whole record." N. Y. Exec. Law § 297–a(7)(d) (McKinney 1972). See *State Division of Human Rights* v. *Syracuse University*, 46 App. Div. 2d 1002, 362 N. Y. S. 2d 104 (1974). See generally N. Y. Exec. Law § 298 (McKinney Supp. 1981–1982).

This review, therefore, is not *de novo* in the state courts. When it affirms the agency's decision, the reviewing court does not determine that the Division was correct. In fact, the court may not "substitute its judgment for that of the [NYHRD]," *State Division of Human Rights* v. *Mecca Kendall Corp.*, 53 App. Div. 2d 201, 203–204, 385 N. Y. S. 2d 665, 666–667 (1976); the court is "not empowered to find new facts or take a different view of the weight of the evidence if the [NYHRD's] determination is supported by substantial evidence," *State Division of Human Rights* v. *Columbia University*, 39 N. Y. 2d 612, 616, 350 N. E. 2d 396, 398 (1976), cert. denied *sub nom. Gilinsky* v. *Columbia University*, 429 U. S. 1096 (1977). In affirming, the reviewing court finds only that the agency's conclusion "was a reason-

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true that § 706(c) does not specify the precise amount of deference due a state decision. But by permitting a complainant to file charges with the EEOC and ultimately to bring suit despite the termination of state proceedings, § 706(c) does provide that the termination of state proceedings will not have preclusive effect.

Section 706(f)(1) follows the same path. It permits the federal court to stay a Title VII suit pending termination of state "proceedings," without suggesting that the termination of state proceedings will preclude further action in the Title VII suit.

[7] Sections 297–a(7)(d) and (e) describe the scope of review by the New York Human Rights Appeal Board. Those standards also apply to review

able one and thus may not be set aside by the courts although a contrary decision may 'have been reasonable and also sustainable.'" *Imperial Diner, Inc.* v. *State Human Rights Appeal Bd.*, 52 N. Y. 2d, at 79, 417 N. E. 2d, at 529, quoting *Mize* v. *State Division of Human Rights*, 33 N. Y. 2d 53, 56, 304 N. E. 2d 231, 233 (1973).[8]

The Court purports to give preclusive effect to the New York court's decision. But the Appellate Division made no finding one way or the other concerning the *merits* of petitioner's discrimination claim. The NYHRD, not the New York court, dismissed petitioner's complaint for lack of probable cause. In affirming, the court merely found that the *agency's* decision was not arbitrary or capricious. Thus, although it claims to grant a state *court* decision preclusive ef-

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by the New York courts of NYHRD decisions. See *Mize* v. *State Division of Human Rights*, 33 N. Y. 2d 53, 57, 304 N. E. 2d 231, 233 (1973); N. Y. Civ. Prac. Law § 7803 (McKinney 1981); Gabrielli & Nonna, Judicial Review of Administrative Action in New York: An Overview and Survey, 52 St. John's L. Rev. 361, 369–373 (1978).

[8] Despite these express statutory provisions and explanations from New York's highest courts, this Court seems to insist that New York courts pass upon the merits of a complainant's discrimination claim. See *ante*, at 480–481, n. 21. If this is the basis for the Court's decision giving the New York court's ruling preclusive effect, then today's decision is much less important than some might think at first glance. If a state court in fact adheres to a pure arbitrary and capricious standard, the Court might not grant such a state court decision preclusive effect.

On the other hand, the Court may be stating only that use of an arbitrary and capricious standard involves some examination of the merits, because the reviewing court must look at the evidence to determine if the agency acted in an arbitrary fashion. If this is the gist of the Court's argument, the Court advances its case very little. When a court reviews an agency record under a deferential standard of review, the agency, not the court, decides the merits of the claim.

The Court states that "[t]here is no requirement that judicial review must proceed *de novo* if it is to be preclusive." *Ante*, at 481, n. 21. Whether that conclusion is correct in the usual case or not, it certainly cannot stand in the context of Title VII. As the Court itself holds, Congress

fect, in fact the Court bars petitioner's suit based on the state *agency's* decision of no probable cause. The Court thereby disregards the express provisions of Title VII, for, as the Court acknowledges, Congress has decided that an adverse state agency decision will not prevent a complainant's subsequent Title VII suit.[9]

Finally, if the Court is in fact giving preclusive effect only to the state *court* decision, the Court misapplies 28 U. S. C. § 1738 by barring petitioner's suit. The state reviewing court never considered the merits of petitioner's discrimination claim, the subject matter of a Title VII suit in federal court. It is a basic principle of preclusion doctrine, see *ante*, at 481–482, n. 22, that a decision in one judicial proceeding cannot bar a subsequent suit raising issues that were not relevant to the first decision. "If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation." *Commissioner* v. *Sunnen*, 333 U. S. 591, 600 (1948). See also *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980). Here, the state court decided only whether the state agency decision was arbitrary or capricious. Since the discrimination claim, not the validity of the state agency's decision, is the issue before the federal court, under § 1738 the state court's decision by itself cannot preclude a federal Title VII suit.

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expressly intended that a state agency's determination would not bar a Title VII suit. When the state court does not conduct a *de novo* review, it accepts the determination of the state agency. When the Court gives such a state court affirmance preclusive effect, it thereby forecloses a Title VII suit based on a state agency's resolution of the complainant's discrimination charge—a result that Title VII condemns.

[9] The primacy of the state agency's decision is underscored by the source of the preclusion rule upon which the Court relies. To determine the preclusive effect the state court affirmance would have in the New York courts, the Court quotes N. Y. Exec. Law § 300 (McKinney 1972). *Ante*, at 467. But § 300 makes no reference to state court decisions; it prevents state suit after a final decision in any proceeding brought before the

Thus, the Court is doing one of two things: either it is granting preclusive effect to the state agency's decision, a course that it concedes would violate Title VII, or it is misapplying § 1738 by giving preclusive effect to a state court decision that did not address the issue before the federal court. Instead of making one of these two mistakes, the Court should accept the fact that the New York state court judicial review is simply the end of the state administrative process, the state "proceedings." The Court searches in vain for a partial repeal of § 1738 in Title VII because it is blind to the fact that judicial review is a part—indeed, a distinctly secondary part—of the administration of discrimination claims filed before the NYHRD.[10]

II

A

The Court's decision also flies in the face of Title VII's legislative history. Under the Court's ruling, a complainant is foreclosed from pursuing his federal Title VII remedy if he unsuccessfully seeks judicial correction of the state agency's adverse disposition of his discrimination charge. Thus, state proceedings are the complainant's sole remedy when he unsuccessfully pursues judicial review on the state side. But Title VII's legislative history makes clear that Congress never intended the outcome of state agency proceedings to be the discrimination complainant's exclusive remedy.

One of the principal issues during congressional consideration of Title VII in 1964 was the proper role of state fair employment practices commissions. See, *e. g.*, 110 Cong. Rec. 7216 (1964). At various times, Congress considered proposals to give the state commissions exclusive jurisdiction over

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NYHRD. Thus, for the purposes of state preclusion, a state court affirmance of the state agency's final decision is mere happenstance.

[10] One reason for the Court's decision is its fear that a state court affirmance of a state agency decision cannot be distinguished from a full state

discrimination charges. But, repeatedly, Congress rejected those proposals.

When Title VII was before the House for the first time, the House twice rejected attempts to prevent the application of Title VII in States that were enforcing adequate fair employment laws. See 110 Cong. Rec. 2727 (1964); *id.*, at 2828. In the end, the House provided for exclusive jurisdiction in the States, but only under certain conditions. Under the House version, the EEOC would have been given authority to determine the adequacy of state agency procedures. If it found the procedures to be adequate, the EEOC was directed to enter into a written agreement with the state agency. In States covered by those agreements, the EEOC would not bring civil actions in cases referred to in the agreements *and* the complainants would likewise be barred from bringing a civil suit in federal court. H. R. 7152, 88th Cong., 2d Sess., § 708(b) (1964). See 110 Cong. Rec. 7214 (1964).

But when the bill went to the Senate, the House approach was discarded for the present provisions of the statute.

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court trial of a discrimination claim. See *ante*, at 469–470. This fear is unfounded.

When Congress permitted a complainant to bring a Title VII suit despite the termination of his state proceedings, it had proceedings connected with state antidiscrimination agencies clearly in mind. See §§ 706(c) and 709(b). Thus, the Court easily could hold that Congress referred to state administrative processing of discrimination claims, including judicial review of agency decisions, when it referred to "proceedings" in §§ 706(b) and (c), and, at the same time, could refuse to hold that Congress intended to include a state court trial on the merits of the complainant's claim within the term "proceedings."

Such a decision would be buttressed by the fact that the procedures available in state court closely approximate those available in federal court. Moreover, the policies favoring preclusion under 28 U. S. C. § 1738 would be considerably stronger if the merits of the discrimination claim had been settled by the state court itself. The Fourth Circuit recently had no difficulty distinguishing a state court trial on a discrimination claim from a

Senator Dirksen presented the explanation of the changes. *Id.*, at 12817. Among these was the statement that the exclusive-jurisdiction provision of the House bill "which provides for the ceding of Federal jurisdiction is deleted." *Id.*, at 12819. Instead, "it has been replaced by the new provisions of section 706 which provide that where there is a State or local law prohibiting the alleged unlawful employment practice, the State or local authorities are given exclusive jurisdiction *for a limited period of time*" (emphasis added). *Ibid.* Thus, after state proceedings had terminated, the complainant was free to seek federal remedies. See *id.*, at 12721 (remarks of Sen. Humphrey); *id.*, at 12595 (remarks of Sen. Clark) (accepting final version because complainant can "eventually" pursue federal remedies after applying for state relief).

Congress left open only a narrow exception for possible exclusive state agency jurisdiction. The EEOC was empowered to enter into worksharing agreements with state agencies. A worksharing agreement did not automatically foreclose a complainant from filing a federal civil suit, but the EEOC was free to include such a provision in a worksharing agreement if it considered that course wise. *Id.*, at 12820. See § 709(b).

Thus, in the end, Congress expressly decided that no discrimination complainant should be left solely to his remedies before state fair employment commissions, unless the EEOC agreed otherwise. Yet, contrary to this congressional choice, the Court would deny some discrimination victims any federal remedy and would make the decisions of state commissions their exclusive redress, even in the absence of an EEOC agreement. When a state court refuses to overturn a state commission's rejection of a complainant's dis-

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state court affirmance of a state agency's determination. *Moosavi* v. *Fairfax County Bd. of Educ.*, 666 F. 2d 58 (1981).

crimination claim, the Court declares the state remedy to be exclusive.

B

But the Court qualifies its holding. The Court permits the state agency's decision to be the complainant's exclusive remedy only if the agency's procedures satisfy the minimal requirements of due process. *Ante*, at 481–485. The Court surveys the procedures of the NYHRD and concludes that they are in accord with due process. *Ante*, at 483–485.[11] This discussion by itself demonstrates the fallacy of the Court's attempt to differentiate between the state agency's decision and the state court's affirmance of that decision. By relying more heavily on the adequacy of the state *agency's* procedures than on the adequacy of the state *court's* procedures, the Court underscores that it is, in fact, granting preclusive effect to a state administrative decision.

It is important, also, to note that in two different ways the Court's inquiry violates the congressional intent. First, the Court undertakes to determine whether the state procedures are adequate when Congress has expressly left that decision to the EEOC. Congress explicitly permitted a state complainant to file suit in federal court despite a final state agency decision, unless the EEOC has signed a worksharing agreement with the state agency foreclosing subsequent federal suits. If the EEOC agreed with the Court that minimal due process in agency procedures justified barring subsequent Title VII suits when the state agency's decision had been affirmed by a state court, the EEOC could sign worksharing agreements with state agencies on those terms. By assuming the authority to make that decision, the Court usurps a role that Congress reserved to the EEOC.

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[11] The Court is quite correct in holding that a state decision must satisfy at least due process before it can be given preclusive effect in the federal courts. Indeed, this aspect of the Court's decision follows directly from

Second, throughout its consideration of Title VII, Congress was concerned that state agency procedures were not the equivalent of those that it intended federal authorities to employ. Senator Clark told the Senate that "State and local FEPC laws vary widely in effectiveness." 110 Cong. Rec. 7205 (1964). He continued: "In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget." *Ibid.* Unlike the Court, Congress realized that no legal doctrine could accurately gauge the effectiveness of state agencies and laws in eliminating discrimination. In their interpretative memorandum, Senators Clark and Case[12] explained:

> "It has been suggested . . . that there should be some provision automatically providing for exclusive State jurisdiction where adequate State remedies for discrimination in employment exist. Such a proposal is unworkable. Congress cannot determine nor can we devise a formula for determining which State laws and procedures are adequate. . . . An antidiscrimination law cannot be evaluated simply by an examination of its provisions, 'for the letter killeth, but the spirit giveth life.'" *Id.*, at 7214.

Yet the Court concludes that minimal due process standards provide safeguards sufficient to warrant denying a discrimination victim federal remedies if a state court rejects his request to overturn an adverse state agency decision. In Title VII, Congress wanted to assure discrimination victims more than bare due process; it wanted them to have the benefit of a vigorous effort to eliminate discrimination. See *Al-*

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our decision earlier this term in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982).

[12] The Clark-Case memorandum is a particularly authoritative source for determining the congressional intent behind Title VII. See *Teamsters* v. *United States*, 431 U. S. 324, 350–352, and 351, n. 35 (1977).

exander v. *Gardner-Denver Co.*, 415 U. S. 36, 44–45 (1974). By affording some discrimination complainants less, the Court contravenes the congressional intent behind Title VII.

C

The Court's search of the legislative history uncovers only a single bit of concrete support for its interpretation of Title VII.[13] But, ironically, the legislative history cited by the Court actually undercuts its position. During the 1972 debates over changes in Title VII, Senator Hruska proposed an amendment that would have made Title VII the exclusive remedy for a discrimination victim, with certain exceptions. One of the exceptions permitted concurrent state proceedings. The Senator explained: "[T]here would be a further exception and that would be proceedings in a State agency. Those proceedings could continue notwithstanding the pendency of an employee's action under section 706 of title VII.

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[13] The Court also cites legislative materials indicating that congressional defenders of employers and unions preferred trial *de novo* in federal court over conclusive administrative proceedings before the EEOC. See *ante*, at 473–475. But the Court focuses on the wrong choice. The question is not why Congress chose federal trial *de novo* over conclusive EEOC proceedings, but why Congress chose to provide a federal remedy rather than relying on state remedies. The reason is that Congress wanted to provide a federal remedy, whether before a federal court or the EEOC, separate from and independent of the antidiscrimination procedures afforded by the States.

Furthermore, the Court's decision is contrary to its own reading of the legislative history. Presumably, if the complainant prevails before the state agency and also before the state courts, the Court would give that decision in his favor preclusive effect. Thus, if state law provides the complainant with an inadequate remedy, evidently he will be able to bring a Title VII suit in federal court asserting the state decision as res judicata on the issue of the employer's liability. Yet the Court insists that Congress intended that employers not be bound by administrative findings but instead intended that employers have the protection of a trial *de novo* in federal court. *Ibid.*

It seems to me and others that this is only fair." 118 Cong. Rec. 3369 (1972). Thus, even Senator Hruska would not have prevented duplicative state and federal proceedings. Here is strong evidence of a congressional consensus that state and federal remedies should exist independently of each other.

The Court quotes part of Senator Javits' response to Senator Hruska's proposal. See *ante*, at 475. What the Court fails to point out is that the bulk of Senator Javits' response rejected the suggestion that the number of discrimination remedies should be reduced. Senator Javits quoted with approval from the testimony of an official of the Department of Justice:

> "In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination. . . .
>
> "At this juncture, when we are all agreed that some improvement in the enforcement of Title VII is needed, it would be . . . unwise to diminish in any way the variety of enforcement means available to deal with discrimination in employment." 118 Cong. Rec. 3369–3370 (1972).

Thus, since Senator Javits was responding to a proposed amendment that expressly provided for separate federal and state proceedings, he certainly did not suggest that state proceedings should bar Title VII suits when he spoke of res judicata. See *ante*, at 475.[14] At the most, he may have been

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[14] The Court finds it significant that Senator Javits referred to New York state administrative proceedings during his remarks. *Ante*, at 475–476, n. 17. But Senator Javits cited New York proceedings only to show that businessmen had not been subject to harassment through discrimination complaints; he did not mention state proceedings during his discussion of res judicata. See 118 Cong. Rec. 3370 (1972). Furthermore, when Senator Javits discussed res judicata, he spoke of litigation instigated by the EEOC, the Attorney General, and an individual. See *ante*, at 475. Thus, Senator Javits was addressing only federal proceedings; he was not sug-

referring to suits brought under overlapping federal statutes. And, given his reluctance to reduce the number of available antidiscrimination remedies, it is not clear that his remarks were intended to reach even that far.[15] In no sense can the defeat of Senator Hruska's amendment be interpreted as a congressional endorsement of the Court's decision to bar a complainant's Title VII suit based on a state court affirmance of an adverse state agency decision.[16] In Senator Javits' own words, "[w]e should not cut off the range of remedies which is available." 118 Cong. Rec. 3370 (1972).[17]

III

The Court's opinion today is also contrary to the rationales underlying its past Title VII decisions. Time and again, the Court has held that Congress did not intend to foreclose a

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gesting that the outcome of state proceedings might have res judicata effect. The EEOC and the Attorney General of the United States obviously do not participate in proceedings before the New York state agency.

[15] Since Senator Javits specifically mentioned successive suits brought by the EEOC, the Attorney General, and an individual, see *ibid.*, he may have been referring only to successive suits brought under Title VII. See also 118 Cong. Rec. 3371–3372 (1972) (remarks of Sen. Williams) (rejecting Hruska amendment and insisting that 42 U. S. C. § 1981 and Title VII should not be mutually exclusive).

[16] The Court quotes Senator Williams' statement that "the individual claimant should [not] be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again." 118 Cong. Rec. 3372 (1972). See *ante*, at 476. But the Court fails to quote Senator Williams' immediately succeeding statement: "I do feel that where one form of relief proves unresponsive or impractical, . . . [the complainant] should have that right." 118 Cong. Rec. 3372 (1972). Indeed, the feared unresponsiveness of some state agencies was a principal reason for the enactment of Title VII. See 110 Cong. Rec. 7214 (1964); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 48, n. 9 (1974).

[17] This reading of the statute is fully supported by the original legislative history of Title VII. In 1964, Senator Tower offered an amendment similar to Senator Hruska's 1972 amendment, making Title VII the exclusive federal employment discrimination remedy. 110 Cong. Rec. 13650 (1964). Like Senator Hruska's amendment, Senator Tower's made an exception for state proceedings. *Ibid.* There was no mention of res judicata during the

Title VII suit because of the conclusion of proceedings in another forum.

The case list begins with *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), when the Court refused to prevent a plaintiff from bringing suit in federal court because of an EEOC determination of no reasonable cause. The Court cited "the large volume of complaints before the Commission and the nonadversary character of many of its proceedings," *id.*, at 799; noted that Title VII "does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause," *id.*, at 798; and refused to "engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts," *id.*, at 798–799. The Court today could just as easily have written about "the nonadversary character" of state agency proceedings and the fact that Title VII does not "restrict a complainant's right to sue" to those charges as to which a state court has not affirmed the state agency's findings.

In *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), the Court repeated the same theme by permitting a Title VII suit despite a prior adverse arbitration under a collective-bargaining agreement. The Court emphasized that Congress intended a scheme of overlapping, independent, supplementary discrimination remedies:

> "[L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII provides for consideration of employment-discrimination claims in several forums. . . . *And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative his-*

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debates, see *id.*, at 13650–13652, and the Senate rejected the amendment by a vote of 29 to 59. *Id.*, at 13652.

> *tory of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.*" *Id.*, at 47–48 (footnotes omitted) (emphasis added).

The Court today disregards the congressional intent described in *Alexander* when it makes state agency proceedings the exclusive remedy for those complainants who unsuccessfully pursue state judicial review.

Finally, in two subsequent decisions, the Court adhered to *Alexander*. In *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 461 (1975), it held that Title VII and 42 U. S. C. § 1981, although "related" and "directed to most of the same ends," provide "separate, distinct, and independent" discrimination remedies. And in *Chandler* v. *Roudebush*, 425 U. S. 840 (1976), the Court permitted a federal employee to bring a Title VII suit even though the Civil Service Commission had affirmed a federal agency's rejection of the employee's discrimination claim.

In each of these four cases, the Court refused to close the doors of the federal courthouse to the Title VII plaintiff. The Court has allowed Title VII plaintiffs to sue in federal court, though they had failed before the EEOC, an arbitrator, and a federal agency. And even today's majority must add another forum to this list, namely, a state antidiscrimination agency. Until now, it has been "clear from [the] scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination." *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S., at 65. The Court departs from the reasoning of an unbroken line of its prior decisions when it bars a discrimination complainant from suing under Title VII simply because he unsuccessfully sought state judicial "review" of an adverse state agency decision.

IV

Perhaps the most disturbing aspect of the Court's decision is its tendency to cut back upon two critical policies underlying Title VII.

First, Congress intended that state antidiscrimination procedures be an integral part of the Nation's battle against discrimination. For that reason, Congress did not pre-empt state antidiscrimination agencies, see 110 Cong. Rec. 7216 (1964), and instead gave state and local authorities an initial opportunity to resolve discrimination complaints. See, *e. g.*, *id.*, at 12725 (remarks of Sen. Humphrey).

The Court's decision is directly contrary to this congressional intent. The lesson of the Court's ruling is: *An unsuccessful state discrimination complainant should not seek state judicial review.*[18] If a discrimination complainant pursues state judicial review and loses—a likely result given the deferential standard of review in state court—he forfeits his right to seek redress in a federal court. If, however, he simply bypasses the state courts, he can proceed to the EEOC and ultimately to federal court. Instead of a deferential review of an agency record, he will receive in federal court a *de novo* hearing accompanied by procedural aids such as broad discovery rules and the ability to subpoena witnesses. Thus, paradoxically, the Court effectively has eliminated state reviewing courts from the fight against discrimination in an entire class of cases. Consequently, the state courts will not have a chance to correct state agency errors when the agencies rule against discrimination victims, and the quality of

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[18] Indeed, a prudent discrimination complainant may make every effort to *prevent* the state agency from reaching a final decision. If the complainant prevails after a full hearing, he runs the risk that his adversary may seek judicial review. He could then find himself closed out of federal court if a state court decides that the agency's decision is unsupported by sufficient evidence. See *Gunther* v. *Iowa State Men's Reformatory*, 612 F. 2d, at 1084. In some future case, the Court may find such a result inimical to Title VII but, given today's decision, no complainant could safely predict

state agency decisionmaking can only deteriorate.[19] It is a perverse sort of comity that eliminates the reviewing function of state courts in the name of giving their decisions due respect.

This argument against preclusion is not novel. In prior decisions, the Court has refused to set up incentives for discrimination complainants to abandon alternative remedies. In *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 59, it concluded: "Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII

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that the Court would not apply § 1738. For a complainant with some evidence to support his claim, the wiser course might well be to thwart all state proceedings and wait for EEOC attempts at conciliation and the full procedural advantages of federal court adjudication.

[19] The Court's response to this is unconvincing. The Court argues that, if it does not give the state court affirmance preclusive effect, it will "lesse[n] the incentive for full participation by the parties and for searching review by state officials." *Ante*, at 478. It is difficult to see how this result will come about, when a complainant can win a ruling in his favor if he succeeds on judicial review and when his adversary risks losing the state court judgment if he does not rebut the complainant's arguments. Moreover, the parties will have another incentive to litigate vigorously during state judicial review, because no one disputes that state court affirmances "may be admitted as evidence and accorded such weight as the [federal] court deems appropriate." *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 60, that is, "substantial weight," see § 706(b).

The Court also insists that a reversal in this case would "reduce the incentive for States to work towards effective and meaningful antidiscrimination systems." *Ante*, at 478. This fact will undoubtedly surprise state officials in the 47 States outside the Second Circuit—States which have not been governed by the preclusion rule currently followed only in that Circuit. See n. 2, *supra*. These state officials unquestionably recognize, as did Congress when it passed Title VII, that state procedures can provide efficient dispute resolution, even if the possibility of a subsequent Title VII suit exists. In any event, the Court hardly increases the quality of state decisionmaking when it effectively writes the state courts out of a large number of administrative cases.

claims would thus be reduced, and the result could well be more litigation, not less." In *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S., at 65, the Court addressed state proceedings directly, explaining: "Complainants unable to recover fees in state proceedings may be expected to wait out the 60-day deferral period, while focusing efforts on obtaining federal relief. . . . Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme." In this case, the Court has chosen preclusion over common sense, with the result that the state courts will decline, not grow, in importance.[20]

Second, the Court, for a small class of discrimination complainants, has undermined the remedial purpose of Title VII. Invariably, there will be some complainants who will not be aware of today's decision. The Court has thus constructed a rule that will serve as a trap for the unwary *pro se* or poorly represented complainant. For these complainants, their sole remedy lies in the state administrative processes. Yet, inevitably those agencies do not give all discrimination complaints careful attention. Often hampered by "inadequate

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[20] Thus, when the Court labels this line of reasoning "dubious," see *ante*, at 478, n. 19, it is doubting not only the logic of this dissent, but also the logic of two prior decisions of this Court. In addition, it seems unlikely that many discrimination complainants will find the "delay," see *ante*, at 479, n. 19, of a Title VII suit a measurable burden when they take into account the procedural advantages of federal court litigation as compared with state judicial review of agency decisions.

The Court also questions whether the state decisionmaking process will improve through practice. See *ante*, at 478–479, n. 19. Although some might argue the point, it seems that state agencies will be more careful if their decisions are subject to state court review and that state decisionmakers will learn from experience. But even if the quality of state decisionmaking does not decline as fewer complainants seek state judicial review, a reduction in the number of discrimination cases handled by state courts obviously carries with it a reduction in the role of state authorities in resolving discrimination charges. This result is directly contrary to the congressional intent.

procedures" or "an inadequate budget," see 110 Cong. Rec. 7205 (1964), the state antidiscrimination agency may give a discrimination charge less than the close examination it would receive in federal court.[21] When, as in this case, the state agency dismisses for lack of probable cause, the discrimination complainant is particularly at risk, because inadequate staffing of state agencies can lead to "a tendency to dismiss too many complaints for alleged lack of probable cause."[22] Though state courts may be diligent in reviewing agency dismissals for no probable cause, the nature of the agency's deliberations combined with deferential judicial review can lead only to discrimination charges receiving less careful consideration than Congress intended when it passed Title VII. The Court's decision thus cannot be squared with the congressional intent that the fight against discrimination be a policy "of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 402 (1968).[23]

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[21] See *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 57–58 (concluding that the informal procedures used during arbitration "mak[e] arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts").

[22] Bonfield, An Institutional Analysis of the Agencies Administering Fair Employment Practices Laws (Part II), 42 N. Y. U. L. Rev. 1035, 1048–1049 (1967). "[T]he vagueness of the probable cause concept makes it a flexible tool in the hands of a commissioner"; "[b]y tightening it he can cut the Agency's caseload, perhaps to allow the Agency to devote its resources to cases that may be expected to produce a higher return in terms of job opportunities, or perhaps only to disguise his own personal timidity." Note, The California FEPC: Stepchild of the State Agencies, 18 Stan. L. Rev. 187, 191 (1965).

The risk is heightened by the fact that the complainant evidently must present more proof to establish probable cause than to survive a summary judgment motion in federal court. Probable cause exists when there is "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated." See *Goldberg* v. *State Commission for Human Rights*, 54 Misc. 2d 676, 680, 283 N. Y. S. 2d 347, 352 (1966).

[23] There is one final irony in the Court's decision. While the Court holds that a New York court's affirmance of an adverse state agency decision

V

For all these reasons, the Court's decision is neither "strongly suggested" nor "compelled" by *Allen* v. *McCurry*, 449 U. S. 90 (1980). See *ante*, at 476. In *McCurry*, the Court found only "the most equivocal support," 449 U. S., at 99, for an argument that Congress intended to override the general preclusion rule of § 1738 when it enacted 42 U. S. C. § 1983. But here, the language, the legislative history, and the fundamental policies of Title VII all demonstrate that Congress contemplated relitigation of a discrimination claim in federal court, even though a state court had refused to disturb a state agency decision adverse to the complainant.

And no drastic consequences would flow from a decision finding § 1738 inapplicable in this case. The Court would not be forced to permit a subsequent Title VII suit in federal court if the complainant already had lost a trial on the merits in state court. See n. 10, *supra*. Furthermore, the state court affirmance of the state agency's decision would not be discarded. The state decision could be "admitted as evidence and accorded such weight as the court deems appropriate," *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 60, that is, "substantial weight," see § 706(b).

But despite the reasonableness of the rule followed by other Courts of Appeals, see n. 2, *supra*, the Court improperly applies § 1738 to bar petitioner from bringing a Title VII suit in federal court. I dissent.

JUSTICE STEVENS, dissenting.

The issue that divides the Court is fairly narrow. The majority concedes that state agency proceedings will not bar a

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precludes a complainant from bringing a federal Title VII suit, a New York court has held that an unsuccessful Title VII suit in federal court does *not* preclude a proceeding before the NYHRD. *State Division of Human Rights* v. *County of Monroe*, 88 Misc. 2d 16, 386 N. Y. S. 2d 317 (1976). Citing *Alexander* v. *Gardner-Denver Co.*, *supra*, the court noted that "dual or overlapping remedies were contemplated and expressly intended

federal claim under Title VII, *ante*, at 470, n. 7, and JUSTICE BLACKMUN assumes, *arguendo*, that a state court decision on the merits of a discrimination claim would create such a bar, *ante*, at 494–495, n. 10, and 508 (dissenting opinion). Thus, the area of dispute is limited to cases in which an adverse agency decision has been reviewed and upheld by a state court.

The proper resolution of the dispute depends, I believe, on the character of the judicial review to which the agency decision is subjected. If it is the equivalent of a *de novo* trial on the merits, then I would agree that the analysis in the Court's opinion leads to the conclusion that 28 U. S. C. § 1738 forecloses a second lawsuit in a federal court. But as JUSTICE BLACKMUN has demonstrated, *ante*, at 490–493, that is not the character of the relevant judicial review in New York. The New York court's holding that the agency decision was not arbitrary or capricious merely establishes as a matter of law that a rational adjudicator might have resolved the discrimination issue either way.* It is therefore entirely

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by Congress in Title VII," 88 Misc. 2d, at 19, 386 N. Y. S. 2d, at 320, and held that "neither res judicata nor collateral estoppel applies," *id.*, at 20, 386 N. Y. S. 2d, at 321.

*In the two cases cited in *Flah's, Inc.* v. *Schneider*, 71 App. Div. 2d 993, 420 N. Y. S. 2d 283 (1979), the Appellate Division had developed the standard for reviewing agency dismissals for lack of probable cause. According to *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 App. Div. 2d 310, 307 N. Y. S. 2d 691, motion for leave to appeal dism'd, 26 N. Y. 2d 962, 259 N. E. 2d 477 (1970), the test is whether the agency determination "was arbitrary, capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." 33 App. Div. 2d, at 313, 307 N. Y. S. 2d, at 694 (paraphrasing N. Y. Exec. Law § 297–a(7)(e) (McKinney 1972)). The Appellate Division observed that "[f]or the [Divison of Human Rights] to dismiss his complaint under such circumstances it must appear virtually that as a matter of law the complaint lacks merit." 33 App. Div., at 313, 307 N. Y. S. 2d, at 695.

In *State Div. of Human Rights* v. *New York State Drug Abuse Control Comm'n*, 59 App. Div. 2d 332, 399 N. Y. S. 2d 541 (1977), the Division of Human Rights had dismissed the complaint after an investigation but with-

consistent with § 1738 for a federal district court to accept the New York judgment as having settled that proposition, and then to proceed to resolve the discrimination issue in a *de novo* trial.

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out a hearing. The Appeal Board had reversed and remanded for further proceedings. In sustaining the Human Rights Division, the Appellate Division clarified its holding in *Mayo:*

"In *[Mayo]* it was not our intention to deprive the commissioner [of the Division of Human Rights] of his statutory duty to [determine whether there is a reasonable basis for sustaining the complaint, based upon complainant's evidence, and for requiring the employer to answer and submit to a hearing]. Thus, after the commissioner has made a full investigation, wherein the complainant has had full opportunity to present his evidence and exhibits, under oath if he so requests, if the commissioner determines that complainant has not shown probable cause for his complaint, the appeal board has no authority to reverse such determination and order a [hearing], provided that the commissioner's determination is rationally supported by the record before him." *Id.*, at 336–337, 399 N. Y. S. 2d, at 544 (citations omitted).

These cases demonstrate that the issue before a New York court reviewing an agency dismissal of a discrimination complaint is not the equivalent of the merits issue in a Title VII action.

The Court's citations to New York cases, *ante*, at 480–481, n. 21, simply do not support the general proposition that a New York court's affirmance of an agency's dismissal of a complaint necessarily determines that the complaint lacked merit as a matter of law. It is true that some of those cases contain language similar to the observation in *Mayo* that the agency may summarily dismiss a complaint only if it appears "virtually that as a matter of law the complaint lacks merit." As in *Mayo*, however, other language in those cases refutes the notion that only complaints meritless as a matter of law are permitted to be dismissed without hearings by the agency. See, *e. g.*, *New York State Division for Youth* v. *State Human Rights Appeal Board*, 83 App. Div. 2d 972, 973, 442 N. Y. S. 2d 813, 814 (1981) ("We conclude that here, absent a full investigation including an opportunity for confrontation, the determination of the division was based on a record which was inadequate to meet the test of substantial evidence and was, therefore, arbitrary and capricious"); *State Division of Human Rights* v. *Blanchette*, 73 App. Div. 2d 820, 821, 423 N. Y. S. 2d 745 (1979) ("After the State Division of Human Rights has conducted an investigation of a complaint, with full opportunity to the complainant to support his or her claims of discrimination, the Division's determination of no probable

Both the text of Title VII and its legislative history indicate that Congress intended the claimant to have at least one opportunity to prove his case in a *de novo* trial in court. Thus, while I agree with the Court that Title VII did not impliedly repeal § 1738, I cannot accept the Court's construction of § 1738 in this case. In New York, as JUSTICE BLACKMUN demonstrates, the judicial review is simply a part of the "proceedings" that are entitled to "substantial weight" under Title VII.

Accordingly, I respectfully dissent.

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cause and dismissal of the complaint may not be vacated by the Appeal Board or the court if it is supported by substantial evidence"). The facts of the cases also demonstrate that allegations that clearly state a cause of action are not necessarily sufficient to avoid dismissal without a hearing. See, *e. g.*, *Stasiak* v. *Montgomery Ward & Co.*, 66 App. Div. 2d 962, 411 N. Y. S. 2d 700 (1978). Moreover, it is perfectly clear that the New York courts do not reach an independent conclusion on the merits of a discrimination claim that has been adjudicated against the claimant by the agency after a formal hearing.

NORTH HAVEN BOARD OF EDUCATION ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL.

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

No. 80-986. Argued December 9, 1981—Decided May 17, 1982

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "no person," on the basis of sex, shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Section 902 authorizes each agency awarding federal financial assistance to any education program to promulgate regulations ensuring that aid recipients adhere to § 901(a), and as a sanction for noncompliance provides for termination of federal funds limited to the particular program, or part thereof, in which such noncompliance has been found. Pursuant to § 902, the Department of Health, Education, and Welfare (HEW), interpreting "person" in § 901(a) to encompass employees as well as students, issued regulations (Subpart E) prohibiting federally funded education programs from discriminating on the basis of sex with respect to employment. Petitioners, federally funded public school boards, when threatened with enforcement proceedings for alleged violations of § 901(a) with respect to board employees, brought separate suits challenging HEW's authority to issue the Subpart E regulations on the alleged ground that § 901(a) was not intended to apply to employment practices, and seeking declaratory and injunctive relief. The District Court in each case granted the school board's motion for summary judgment. In a consolidated appeal, the Court of Appeals reversed, holding that § 901(a) was intended to prohibit employment discrimination and that the Subpart E regulations were consistent with § 902.

Held:

1. Employment discrimination comes within Title IX's prohibition. Pp. 520–535.

(a) While § 901(a) does not expressly include employees within its scope or expressly exclude them, its broad directive that "no person" may be discriminated against on the basis of gender, on its face, includes employees as well as students. Pp. 520–522.

(b) Title IX's legislative history corroborates the conclusion that employment discrimination was intended to come within its prohibition. Pp. 523–530.

(c) Title IX's postenactment history provides additional evidence of Congress' desire to ban employment discrimination in federally financed education programs. Pp. 530–535.

2. The Subpart E regulations are valid. Pp. 535–540.

(a) An agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901(a) and 902. The Subpart E regulations are not inconsistent with this restriction. Pp. 535–539.

(b) But whether termination of petitioners' federal funds is permissible under Title IX is a question that must be answered by the District Court in the first instance. Pp. 539–540.

629 F. 2d 773, affirmed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 540.

Susan K. Krell argued the cause for petitioner North Haven Board of Education. *Paul E. Knag* argued the cause for petitioner Trumbull Board of Education. With them on the briefs were *Clifford R. Oviatt, Jr.*, and *Richard W. Rutherford.*

Solicitor General Lee argued the cause for the federal respondents. With him on the brief were *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Elinor Hadley Stillman*, *Brian K. Landsberg*, and *Marie E. Klimesz*. *Beverly J. Hodgson* argued the cause and filed a brief for respondent Linda Potz.*

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*Briefs of *amici curiae* urging reversal were filed by *Robert E. Williams* and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *Gordon C. Coffman* and *John Michael Facciola* for Hillsdale College.

Briefs of *amici curiae* urging affirmance were filed by *Margaret A. Kohn* for the American Association of University Women et al.; by *Joseph Onek* for Birch Bayh et al.; and by *Barbara D. Underwood* and *Burke Marshall* for the Yale Law Women's Association.

JUSTICE BLACKMUN delivered the opinion of the Court.

At issue here is the validity of regulations promulgated by the Department of Education pursuant to Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* These regulations prohibit federally funded education programs from discriminating on the basis of gender with respect to employment.

I

Title IX proscribes gender discrimination in education programs or activities receiving federal financial assistance. Patterned after Title VI of the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 252, 42 U. S. C. § 2000d *et seq.* (1976 ed. and Supp. IV), Title IX, as amended, contains two core provisions. The first is a "program-specific" prohibition of gender discrimination:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." § 901(a), 20 U. S. C. § 1681(a).

Nine statutory exceptions to § 901(a)'s coverage follow. See §§ 901(a)(1)–(9).[1]

The second core provision relates to enforcement. Section 902, 20 U. S. C. § 1682, authorizes each agency awarding federal financial assistance to any education program to promulgate regulations ensuring that aid recipients adhere to § 901(a)'s mandate. The ultimate sanction for noncompliance is termination of

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[1] Section 901(a)(1) provides that, with respect to admissions, § 901(a) applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education. Specific exceptions are made for the admissions policies of schools that begin admitting students of both sexes for the first time,

federal funds or denial of future grants.[2] Like § 901, § 902 is program-specific:

> "[S]uch termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding [of noncompliance] has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . . ."[3]

In 1975, the Department of Health, Education, and Welfare (HEW) invoked its § 902 authority to issue regulations

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§ 901(a)(2); religious schools, § 901(a)(3); military schools, § 901(a)(4); the admissions policies of public institutions of undergraduate higher education that traditionally and continually have admitted students of only one gender, § 901(a)(5); social fraternities and sororities, and voluntary youth service organizations, § 901(a)(6); Boys/Girls State/Nation conferences, § 901(a)(7); father-son and mother-daughter activities at educational institutions, § 901(a)(8); and scholarships awarded in "beauty" pageants by institutions of higher education, § 901(a)(9).

[2] Funding may not be terminated, however, until after the agency determines that noncompliance cannot be achieved by voluntary means; the recipient is given a hearing before an administrative law judge, who makes a recommendation subject to administrative and judicial review; and a report is filed with the appropriate House and Senate committees and no action is taken on that report for 30 days. See §§ 902, 903; 34 CFR §§ 106.71, 100.6–100.11, pt. 101 (1980).

[3] Section 902 provides in full:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an

governing the operation of federally funded education programs.[4] These regulations extend, for example, to policies involving admissions, textbooks, and athletics. See 34 CFR pt. 106 (1980).[5] Interpreting the term "person" in § 901(a) to encompass employees as well as students, HEW included among the regulations a series entitled "Subpart E," which deals with employment practices, ranging from job classifications to pregnancy leave. See 34 CFR §§ 106.51–106.61 (1980). Subpart E's general introductory section provides:

> "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment,

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express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report." 86 Stat. 374 (emphasis in original).

[4] HEW's functions under Title IX were transferred in 1979 to the Department of Education by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 96–88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). Because many of the relevant actions in this case were taken by HEW prior to reorganization, both agencies are referred to herein as HEW.

[5] The regulations initially appeared at 34 CFR pt. 86 (1972), but were recodified in connection with the establishment of the Department of Education. 45 Fed. Reg. 30802 (1980). See n. 4, *supra*.

consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance." § 106.51(a)(1).[6]

II

Petitioners are two Connecticut public school boards that brought separate suits challenging HEW's authority to issue the Subpart E regulations. Petitioners contend that Title IX was not meant to reach the employment practices of educational institutions.

A. *The North Haven case.* The North Haven Board of Education (North Haven) receives federal funds for its education programs and activities and is therefore subject to Title IX's prohibition of gender discrimination. Since the 1975–1976 school year, North Haven has devoted between 46.8% and 66.9% of its federal assistance to the salaries of its employees; this practice is expected to continue.[7]

In January 1978, Elaine Dove, a tenured teacher in the North Haven public school system, filed a complaint with HEW, alleging that North Haven had violated Title IX by refusing to rehire her after a one-year maternity leave. In response to this complaint, HEW began to investigate the school board's employment practices and sought from petitioner information concerning its policies on hiring, leaves of absence, seniority, and tenure. Asserting that HEW lacked authority to regulate employment practices under Title IX, North Haven refused to comply with the request.

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[6] The Department of Agriculture also has issued regulations implementing Title IX. These include employment practices provisions that track the regulations at issue here. See 7 CFR §§ 15a.51–15a.61 (1980). In addition, the Small Business Administration has promulgated regulations prohibiting employment discrimination, which are based in part on Title IX. See 13 CFR § 113.3 (1981). See generally Comment, 129 U. Pa. L. Rev. 417, 418, nn. 7 and 8 (1980).

[7] See *North Haven Bd. of Ed.* v. *Hufstedler*, 629 F. 2d 773, 774–775 (CA2 1980).

When HEW then notified petitioner that it was considering administrative enforcement proceedings, North Haven brought this action in the United States District Court for the District of Connecticut. The complaint sought a declaratory judgment that the Subpart E regulations exceeded the authority conferred on HEW by Title IX, and an injunction prohibiting HEW from attempting to terminate the school district's federal funds on the basis of those regulations. The parties filed cross-motions for summary judgment, and on April 24, 1979, the District Court granted North Haven's motion. App. to Pet. for Cert. 51A. Agreeing with petitioner that Title IX was not intended to apply to employment practices, the court invalidated the employment regulations and permanently enjoined HEW from interfering with North Haven's federal funds because of noncompliance with those regulations.

B. *The Trumbull case.* The Trumbull Board of Education (Trumbull) likewise receives financial support from the Federal Government and must therefore adhere to the requirements of Title IX and appropriate implementing regulations. In October 1977, HEW began investigating a complaint filed by respondent Linda Potz, a former guidance counselor in the Trumbull school district. Potz alleged that Trumbull had discriminated against her on the basis of gender with respect to job assignments, working conditions, and the failure to renew her contract. In September 1978, HEW notified Trumbull that it had violated Title IX and warned that corrective action, including respondent's reinstatement, must be taken.

Trumbull then filed suit in the United States District Court for the District of Connecticut, contending that HEW's Title IX employment regulations were invalid and seeking declaratory and injunctive relief. On the basis of its decision in *North Haven*, the District Court granted Trumbull's motion for summary judgment on May 24, 1979. App. to Pet. for

Cert. 76A.[8] The court subsequently amended the judgment, on Trumbull's request, to include injunctive and declaratory relief similar to that ordered in North Haven's case. *Id.*, at 77A, 91A–92A.

C. *The appeal.* The two cases were consolidated on appeal, and the Court of Appeals for the Second Circuit reversed. *North Haven Bd. of Ed.* v. *Hufstedler*, 629 F. 2d 773 (1980). Finding the language of § 901 inconclusive, the court examined the legislative history and concluded that the provision was intended to prohibit employment discrimination. The court also found the Subpart E regulations consistent with § 902, which the court read as directing only that "any *termination* of funds be limited to the particular program or programs in which noncompliance with § 901 is found . . . ." 629 F. 2d, at 785 (emphasis added). Section 902, the Second Circuit held, does not circumscribe HEW's authority to issue *regulations* prohibiting gender discrimination in employment and does not require the Department "to specify prior to termination which particular programs receiving financial assistance are covered by its regulations." *Ibid.* Because HEW had not exercised its § 902 authority to terminate federal assistance to either North Haven or Trumbull, the court declined to decide whether HEW could do so in these cases. The court remanded the cases to the District Court to determine whether petitioners had violated the HEW regulations and, if so, what remedies were appropriate.

Because other federal courts have invalidated the employ-

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[8] Because the court awarded summary judgment in petitioner's favor before respondent Potz had an opportunity to reply to Trumbull's motion, Potz filed a motion to set aside the judgment and a cross-motion for summary judgment. On September 13, 1979, the court denied both motions, rejecting Potz' contention that the judgment was inconsistent with this Court's opinion in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979). App. to Pet. for Cert. 77A.

ment regulations as unauthorized by Title IX,[9] we granted certiorari to resolve the conflict. 450 U. S. 909 (1981).

III

A

Our starting point in determining the scope of Title IX is, of course, the statutory language. See *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U. S. 322, 330 (1978). Section 901(a)'s broad directive that "no person" may be discriminated against on the basis of gender appears, on its face, to include employees as well as students. Under that provision, employees, like other "persons," may not be "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" education programs receiving federal financial support.

Employees who directly participate in federal programs or who directly benefit from federal grants, loans, or contracts clearly fall within the first two protective categories described in § 901(a). See *Islesboro School Comm.* v. *Califano*, 593 F. 2d 424, 426 (CA1), cert. denied, 444 U. S. 972

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[9] Four Courts of Appeals and several District Courts have so held. See *Seattle University* v. *HEW*, 621 F. 2d 992 (CA9), cert. granted *sub nom. United States Dept. of Ed.* v. *Seattle Univ.*, 449 U. S. 1009 (1980); *Romeo Community Schools* v. *HEW*, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979); *Junior College Dist. of St. Louis* v. *Califano*, 597 F. 2d 119 (CA8), cert. denied, 444 U. S. 972 (1979); *Islesboro School Comm.* v. *Califano*, 593 F. 2d 424 (CA1), cert. denied, 444 U. S. 972 (1979); *Grove City College* v. *Harris*, 500 F. Supp. 253 (WD Pa. 1980), appeal pending, Nos. 80–2383, 80–2384 (CA3); *Kneeland* v. *Bloom Township High School Dist.*, 484 F. Supp. 1280 (ND Ill. 1980); *McCarthy* v. *Burkholder*, 448 F. Supp. 41 (Kan. 1978).

But see *Piascik* v. *Cleveland Museum of Art*, 426 F. Supp. 779, 781, n. 1 (ND Ohio 1976). Cf. *Dougherty Cty. School System* v. *Harris*, 622 F. 2d 735 (CA5 1980), cert. pending *sub nom. Bell* v. *Dougherty Cty. School System*, No. 80–1023. The Fifth Circuit invalidated the Subpart E regulations on the ground that they do not apply only to specific programs that receive federal financial assistance, but ruled that Title IX permits the Secretary to regulate at least some employment practices.

(1979). In addition, a female employee who works in a federally funded education program is "subjected to discrimination under" that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues. See *Dougherty Cty. School System* v. *Harris*, 622 F. 2d 735, 737–738 (CA5 1980), cert. pending *sub nom. Bell* v. *Dougherty Cty. School System*, No. 80–1023.

There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." *United States* v. *Price*, 383 U. S. 787, 801 (1966); see also *Griffin* v. *Breckenridge*, 403 U. S. 88, 97 (1971); *Daniel* v. *Paul*, 395 U. S. 298, 307–308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437 (1968); *Piedmont & Northern R. Co.* v. *ICC*, 286 U. S. 299, 311–312 (1932). Because § 901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these "persons" unless other considerations counsel to the contrary. After all, Congress easily could have substituted "student" or "beneficiary" for the word "person" if it had wished to restrict the scope of § 901(a).[10]

Petitioners, however, point to the nine exceptions to § 901(a)'s coverage set forth in §§ 901(a)(1)–(9). See n. 1, *supra*. The exceptions, the school boards argue, are directed only at students, and thus indicate that § 901(a) similarly applies only to students. But the exceptions are not concerned solely with students and student activities: two of them exempt an entire class of institutions—religious and military schools—and are not limited to student-related activities at such schools. See §§ 901(a)(3), (4). Moreover, petitioners' argument rests on an inference that is by no means compelled; in fact, the absence of a specific exclusion for em-

[10] According to the dissent, the ease with which any confusion "could have been avoided by the legislative draftsman . . ." suggests that "person" should be given its ordinary meaning. *Post*, at 551.

ployment among the list of exceptions tends to support the Court of Appeals' conclusion that Title IX's broad protection of "person[s]" does extend to employees of educational institutions. See *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 616–617 (1980).[11]

Although the statutory language thus seems to favor inclusion of employees, nevertheless, because Title IX does not expressly include or exclude employees from its scope, we turn to the Act's legislative history for evidence as to whether Congress meant somehow to limit the expansive language of § 901.[12]

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[11] Nor does § 901(b) qualify the broad language of § 901(a). Section 901(b) repeats the language identifying certain of the categories of persons listed in § 901(a); it provides no clearer indication of the intended scope of § 901(a) than does that section itself.

[12] In construing a statute, this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration. See, *e. g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969). But the administrative interpretation of Title IX has changed, and a split has occurred between the federal agencies responsible for promulgating Title IX regulations. On July 27, 1981, respondent Bell, Secretary of Education, wrote to the Attorney General expressing his dissatisfaction with the existing Subpart E regulations and his belief that they were ultra vires. The Secretary sought to amend the regulations to make them parallel with the Department of Education regulations implementing Title VI of the Civil Rights Act of 1964. See 34 CFR pt. 100 (1980). Specifically, Secretary Bell proposed to have the regulations cover employment practices "only when the complaint shows a clear nexus between the alleged employment discrimination and discrimination against the students, or when the complaint shows that the complainant is a beneficiary of a program in which a primary objective of the Federal financial assistance is to provide employment." Letter from Terrel H. Bell to William French Smith, reprinted in Daily Labor Report, No. 150, p. A–5 (Aug. 5, 1981). Cf. 34 CFR § 100.3(c) (1980). In response, the Attorney General, to whom the President has delegated the authority given him by § 902 to approve regulations promulgated pursuant to Title IX, refused to approve the Department's suggestion and continues to defend the existing regulations. See Brief for Federal Respondents 37, n. 26; Tr. of Oral Arg. 18–19.

B

In the early 1970's, several attempts were made to enact legislation banning discrimination against women in the field of education. Although unsuccessful, these efforts included prohibitions against discriminatory employment practices.[13]

The Department of Education has withdrawn its request to the Attorney General pending this Court's decision in this case. See *id.*, at 17–18. Because the Subpart E regulations therefore are still in effect, respondent Bell's changed view does not moot the litigation. See *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 505, n. 25 (1981). It, however, does undercut the argument that the regulations are entitled to deference as the interpretation of the agency charged with Title IX's enforcement. See *Southeastern Community College* v. *Davis*, 442 U. S. 397, 412, n. 11 (1979).

[13] Title IX grew out of hearings on gender discrimination in education, held in 1970 by a special House Subcommittee on Education chaired by Representative Green. See Discrimination Against Women: Hearings on Section 805 of H. R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970) (1970 Hearings). Much of the testimony focused on discrimination against women in employment. See generally, *e. g.*, Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L. J. 49, 59–60 (1976); Comment, 1976 B. Y. U. L. Rev. 133, 140–141. The proposal on which the hearings were held, however, never emerged from committee. That provision, § 805 of H. R. 16098, would have extended the prohibitions of Title VI of the Civil Rights Act of 1964 to discrimination based on gender by adding the word "sex" to § 601; would have made Title VII of the Civil Rights Act of 1964 applicable to public school employees and education employees generally; would have amended the Civil Rights Act of 1957 to include gender discrimination within the jurisdiction of the Civil Rights Commission; and would have extended the application of the Equal Pay Act to executive, administrative, and professional employees.

Then, in 1971, Senator Bayh introduced an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971, which would have prohibited recipients of federal education funds from discriminating against women. The amendment, which Senator Bayh characterized as identical to the prohibition against discrimination on the basis of race contained in Title VI of the Civil Rights Act of 1964, plainly was meant to proscribe discrimination in employment. See 117 Cong. Rec. 30155, 30403 (1971); see also *id.*, at 30411 (Sen. McGovern announces his intent to support Sen. Bayh's "similar amendment" rather than introducing his own,

In 1972, the provisions ultimately enacted as Title IX were introduced in the Senate by Senator Bayh during debate on the Education Amendments of 1972. In addition to prohibiting gender discrimination in federally funded education programs and threatening termination of federal assistance for noncompliance, the amendment included provisions extending the coverage of Title VII and the Equal Pay Act to educational institutions. Summarizing his proposal, Senator Bayh divided it into two parts—first, the forerunner of § 901(a), and then the extensions of Title VII and the Equal Pay Act:

> "Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . *[T]he heart of this amendment* is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment*, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women." 118 Cong. Rec. 5803 (1972) (emphasis added).

The Senator's description of § 901(a), the "heart" of his amendment, indicates that it, as well as the Title VII and Equal Pay Act provisions, was aimed at discrimination in employment.[14]

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which explicitly forbade gender discrimination in employment). The amendment never came to a vote on the floor of the Senate, however, because it was ruled nongermane. See *id.*, at 30415.

[14] Senator Bayh's 1971 proposal, see n. 13, *supra*, did not include provisions amending Title VII and the Equal Pay Act. His statements that the

Similarly, in a prepared statement summarizing the amendment, Senator Bayh discussed the general prohibition against gender discrimination:

> "Central to my amendment are sections 1001–1005, which would prohibit discrimination on the basis of sex in federally funded education programs. . . .
>
> . . . . .
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> "This portion of the amendment covers discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators*, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth." 118 Cong. Rec. 5807 (1972) (emphasis added).

Petitioners observe that the discussion of this portion of the amendment appears under the heading "A. Prohibition of Sex Discrimination in Federally Funded Education Programs," while the provisions involving Title VII and the Equal Pay Act are summarized under the heading "B. Prohibition of Education-Related Employment Discrimination." But we are not willing to ascribe any particular significance to these headings. The Title VII and Equal Pay Act portions of the Bayh amendment are more narrowly focused on employment discrimination than is the general ban on gender discrimination, and the headings reflect that difference. Especially in light of the explicit reference to employment practices in the description of the amendment's general provision, however, the headings do not negate Senator Bayh's intent that employees as well as students be protected by the first portion of his amendment.[15]

1971 amendment nevertheless would prohibit employment discrimination thus rebut petitioners' contention that the Senator's discussion of employment discrimination during debate on the 1972 version of his amendment referred solely to the provisions regarding Title VII and the Equal Pay Act.

[15] The headings and corresponding divisions of Senator Bayh's summary of his amendment do suggest, however, that the Senator's reference to

The final piece of evidence from the Senate debate on the Bayh amendment appears during a colloquy between Senator Bayh and Senator Pell, chairman of the Senate Subcommittee on Education and floor manager of the education bill. In response to Senator Pell's inquiry about the scope of the sections that in large part became §§ 901(a) and (b), Senator Bayh stated:

> "As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and *discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *"In the area of employment, we permit no exceptions."* *Id.*, at 5812 (emphasis added).[16]

Although the statements of one legislator made during debate may not be controlling, see, *e. g.*, *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 311 (1979), Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted,

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"sections 1001–1005" in describing the prohibition of discrimination in federally funded education programs is of little significance. Although, as the dissent points out, *post*, at 548, § 1005 of the amendment comprised the Title VII provisions, the detailed discussion of the Title VII amendments in part B of the summary, the absence of any further mention of those provisions in part A's description of Title IX, and the fact that the Title VII provisions were not limited to "federally funded education programs" indicate that the Senator's reference to § 1005 in part A was inadvertent.

[16] Moreover, in reply to Senator Pell's questions regarding Title IX's application to the faculty of religious and military schools, Senator Bayh made clear that such institutions were explicitly excepted from the reach of § 901(a). See 118 Cong. Rec. 5813 (1972). His response makes no sense if Senator Bayh thought that the provision was not aimed at protecting any employees; in that event, he could have answered Senator Pell's questions simply by stating that employment discrimination was dealt with in the Title VII and Equal Pay Act portions of the amendment, rather than in § 901.

are an authoritative guide to the statute's construction. See, *e. g.*, *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 564 (1976) (such statements "deserv[e] to be accorded substantial weight . . ."); *NLRB* v. *Fruit Packers*, 377 U. S. 58, 66 (1964); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395 (1951). And, because §§ 901 and 902 originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902.

The legislative history in the House is even more sparse. H. R. 7248, 92d Cong., 1st Sess. (1971), the Higher Education Act of 1971, contained, as part of its Title X, a general prohibition against gender discrimination in federally funded education programs that was identical to the corresponding section of the Bayh amendment and to § 901(a) as ultimately enacted. But § 1004 of Title X, like § 604 of Title VI, see 42 U. S. C. § 2000d–3, provided that nothing in Title X authorized action "by any department or agency with respect to any employment practice . . . except where a primary objective of the Federal financial assistance is to provide employment." The debate on Title X included no discussion of this limitation. See 117 Cong. Rec. 39248–39263 (1971).[17]

When the House and Senate versions of Title IX were sub-

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[17] Portions of that debate suggest, however, that, despite § 1004, Members of the House thought that the ban on discrimination protected employees. In discussing a proposed amendment to § 1001 of the bill, the section similar to § 901(a) of Title IX, Representative Smith quoted § 1001, described it as containing the "effective provisions" of Title X, and observed that the amendment "would exempt out of this title all undergraduate schools and would leave the prohibition against sex discrimination to apply to graduate education and faculty employment and salaries." 117 Cong. Rec. 39255 (1971); see also *id.*, at 39260 (remarks of Rep. Erlenborn); *id.*, at 39262 (remarks of Rep. Quie). Despite the explicit exclusion of employment discrimination in § 1004, then, there was at least some feeling on the

mitted to the Conference Committee, § 1004 was deleted. The Conference Reports simply explained:

> "[T]he House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes." S. Conf. Rep. No. 92–798, p. 221 (1972); H. R. Conf. Rep. No. 92–1085, p. 221 (1972).

Expressly a conscious choice, therefore, the omission of § 1004 suggests that Congress intended that § 901 prohibit gender discrimination in employment.

Petitioners and the dissent contend, however, that § 1004 was deleted in order to avoid an inconsistency: Title IX included provisions relating to the Equal Pay Act,[18] which obviously concerned employment, and § 1004 conflicted with those portions of the Act. See Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 409 (1975) (1975 Hearings) (remarks of Rep. O'Hara) (arguing that Title IX was a "cut and paste job," using "a Xerox" of Title VI, and that § 1004 "got in through a drafting error"). As the Court of Appeals observed, however, the Conference Committee could easily have altered the wording of § 1004 to make clear that its limitation applied only to § 901[19] or could have noted in the Con-

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floor of the House that employment discrimination was nonetheless prohibited by the provision that would become § 901(a).

[18] The proposed amendments to Title VII had been deleted because identical provisions had already been enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103, 42 U. S. C. § 2000e(a).

[19] The Court of Appeals suggested the following language: "'Nothing in § 901 shall apply to any employees of any educational institution subject to

ference Reports that the omission was necessitated by the apparent inconsistency. Instead, by stating that "[t]he House recedes," the Reports suggest that the Senate version of Title IX, which was intended to ban discriminatory employment practices, prevailed for substantive reasons. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–200 (1974) (deletion of a provision by a Conference Committee "militates against a judgment that Congress intended a result that it expressly declined to enact"); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S., at 391–392. Identical language—"The House recedes" or "The Senate recedes"—appears in the Conference Reports with respect to all other changes made in Title IX during the conference. See S. Conf. Rep. No. 92–798, pp. 221–222 (1972). See also 118 Cong. Rec. 18437 (1972) (letters printed in the record during the Senate debate on the Conference Report, which imply that employment discrimination is prohibited by § 901).

Petitioners insist additionally that a specific exclusion for employment, such as that contained in § 1004, was unnecessary to limit the scope of § 901. Pointing out that Title IX was patterned after Title VI of the Civil Rights Act of 1964, the school boards contend that the addition of § 604 to Title VI was not viewed by Congress as diminishing the scope of the Act; rather, petitioners argue, it was agreed that Title VI would not prohibit employment discrimination even before § 604 made the exclusion explicit.

This focus on the history of Title VI—urged by petitioners and adopted by the dissent—is misplaced. It is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 710–711 (1979). The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation. Moreover,

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this title except where a primary objective of the Federal financial assistance is to provide employment.'" 629 F. 2d, at 783.

whether § 604 clarified or altered the scope of Title VI,[20] it is apparent that § 601 alone was not considered adequate to exclude employees from the statute's coverage. If Congress had intended that Title IX have the same reach as Title VI, therefore, we assume that it would have enacted counterparts to both § 601 and § 604. For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them. See *Lorillard* v. *Pons*, 434 U. S. 575, 584–585 (1978).

In our view, the legislative history thus corroborates our reading of the statutory language and verifies the Court of Appeals' conclusion that employment discrimination comes within the prohibition of Title IX.[21]

C

The postenactment history of Title IX provides additional evidence of the intended scope of the Title and confirms Con-

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[20] Petitioners oversimplify the role of § 604. Some Members of Congress did not find the language of § 601 clearly limited to a certain class of beneficiaries. See 110 Cong. Rec. 2484 (1964) (remarks of Rep. Poff); Civil Rights: Hearings on H. R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., 228 (1964) (colloquy between Rep. Avery and Rep. McCulloch); *id.*, at 143 (remarks of Rep. Celler); *id.*, at 197–198 (colloquy between Rep. Avery and Rep. Celler); *id.*, at 379–380 (remarks of Rep. Poff). Section 604 was thereafter added in the Senate, as part of the Dirksen-Mansfield substitute bill; although the provision has been viewed as merely clarifying the scope of Title VI, see 110 Cong. Rec. 12714, 12720 (1964) (remarks of Sen. Humphrey); Kuhn, 65 Geo. L. J., at 53, it has also been considered a substantive change, see 110 Cong. Rec. 14219–14220 (1964) (remarks of Sen. Holland); Comment, 129 U. Pa. L. Rev., at 447 ("The employment exemption in title VI was amended onto the statute as part of a substitute written during informal bargaining between the Senate's Democratic and Republican leadership with the intention of providing a compromise that would garner enough votes to end the ongoing filibuster").

[21] Thus, we do not, as the dissent charges, "rel[y] on legislative history to add omitted words . . . ." *Post*, at 550. Rather, we use the legislative history as a guide to interpreting the "critical words" that Congress did include in Title IX. *Ibid.* It is the dissent that uses the legislative history—of a different statute—to rewrite Title IX so as to restrict its reach.

gress' desire to ban employment discrimination in federally financed education programs. Following the passage of Title IX, Senator Bayh published in the Congressional Record a summary of the final version of the bill. That description expressly distinguishes Title VI of the Civil Rights Act of 1964 with respect to employment practices:

> "Title VI . . . specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). *There is no similar exemption for employment* in the sex discrimination provisions relating to federally assisted education programs." 118 Cong. Rec. 24684, n. 1 (1972) (first emphasis in original; second emphasis added).

See also 120 Cong. Rec. 39992 (1974) (remarks of Sen. Bayh).

Then, in June 1974, HEW published proposed Title IX regulations pursuant to § 902. See 39 Fed. Reg. 22228 (1974). Included among these regulations was Subpart E, containing provisions prohibiting discriminatory employment practices in federally funded education programs. During the comment period, nearly 10,000 formal responses to the regulations were submitted, reputedly the most HEW had ever received on one of its proposals. See Salomone, Title IX and Employment Discrimination: A Wrong in Search of a Remedy, 9 J. Law & Ed. 433, 436 (1980). But not one suggested that § 901 was not meant to prohibit discriminatory employment practices. See 1975 Hearings 479 (statement of Peter E. Holmes, Director of the Office for Civil Rights).

On June 4, 1975, HEW published its final Title IX regulations, see 40 Fed. Reg. 24128 (1975), and, as required by § 431(d)(1) of the General Education Provisions Act, Pub. L. 93–380, 88 Stat. 567, as amended, 20 U. S. C. § 1232(d)(1), submitted the regulations to Congress for review. This "laying before" provision was designed to afford Congress an opportunity to examine a regulation and, if it found the regulation "inconsistent with the Act from which it derives its au-

thority . . . ," to disapprove it in a concurrent resolution. If no such disapproval resolution was adopted within 45 days, the regulation would become effective.

Resolutions of disapproval were introduced in both Houses of Congress. The two Senate resolutions, which did not mention the employment regulations, were not acted upon.[22] In the House, the Subcommittee on Postsecondary Education of the House Committee on Education and Labor held six days of hearings to determine whether the HEW regulations were "consistent with the law and with the intent of the Congress in enacting the law." 1975 Hearings 1 (remarks of Rep. O'Hara). One witness expressed opposition to the employment regulations, interpreting the legislative history much as petitioners have. *Id.*, at 406–408 (statement of Janet L. Kuhn); see also Kuhn, 65 Geo. L. J., at 49. Senator Bayh testified, however, that the regulations, "as the Congress mandated, call for equality in admissions . . . and in the case of teachers and other educational personnel, employment, pay and promotions." 1975 Hearings 169.[23] And HEW Secretary Weinberger stated that he did not see "any way you can find that employees do not participate in education programs and activities receiving Federal assistance, and, therefore, they are within the protected class . . . ." *Id.*, at 478. See also *id.*, at 140 (statement of Jean Simmons,

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[22] Senator Laxalt introduced a resolution disapproving the regulations governing athletic programs. S. Con. Res. 52, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 22940 (1975). Senator Helms' resolution was a blanket disapproval of the HEW regulations, S. Con. Res. 46, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 17300 (1975), but he did voice disapproval specifically of the employment regulations when he introduced the resolution. *Id.*, at 17301. Senator Helms later explained that the Committee on Labor and Public Welfare had met in executive session on his resolution but had decided not to report it to the full Senate. *Id.*, at 23846.

[23] Senator Bayh also stressed the similarity between Title IX and Title VI, see 1975 Hearings 169–171, thereby confirming that his references to Title VI during the debate on his amendment did not indicate an intent that employment discrimination be excluded from its coverage.

President, Federation of Organizations for Professional Women); 154–155 (statement of Rep. Carr); 164 (statement of Rep. Mink); 329 (statement of Dr. Bernice Sandler, Director, Project of the Status and Education of Women, Association of American Colleges).

Following the hearings, members of the Subcommittee on Postsecondary Education introduced concurrent resolutions disapproving certain portions of the HEW regulations, but not referring specifically to the employment regulations. H. R. Con. Res. 329, 94th Cong., 1st Sess. (1975); H. R. Con. Res. 330, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 21687 (1975). Representatives Quie and Erlenborn introduced an amendment to H. R. Con. Res. 330 that explicitly sought to disapprove the employment regulations as inconsistent with Title IX. See Unpublished Amendment to H. R. Con. Res. 330, quoted in 629 F. 2d, at 783.[24] Neither resolution was passed, and HEW's regulations went into effect on July 21, 1975.

Admittedly, Congress' failure to disapprove the HEW regulations does not necessarily demonstrate that it consid-

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[24] H. R. Con. Res. 330 was referred to the House Committee on Education and Labor, which in turn submitted it to its Subcommittee on Equal Opportunities. That Subcommittee held a one-day hearing on the resolution, see Hearing on House Concurrent Resolution 330 (Title IX Regulation) before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975) (H. R. Con. Res. 330 Hearing), and then voted to recommend against passage of the resolution. Interestingly, Representative O'Hara testified at this hearing, but, despite his remarks during the hearings conducted by his own Subcommittee, see 1975 Hearings 408–409, he did not challenge the employment regulations. See H. R. Con. Res. 330 Hearing 2–21, 33–34, 38.

In addition to the two concurrent resolutions mentioned in the text, Representative Martin introduced two resolutions in the House—one broad resolution disapproving all the Title IX regulations, H. R. Con. Res. 310, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 19209 (1975), and one focusing on the sections governing athletic programs, H. R. Con. Res. 311, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 19209 (1975). Neither referred to the employment regulations. No action was taken on the Martin resolutions.

ered those regulations valid and consistent with the legislative intent. See § 431(d)(1) of the General Education Provisions Act (as amended approximately four months after the Title IX regulations went into effect), 20 U. S. C. § 1232(d)(1). But the postenactment history of Title IX does indicate that Congress was made aware of the Department's interpretation of the Act and of the controversy surrounding the regulations governing employment, and it lends weight to the argument that coverage of employment discrimination was intended. See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14–16 (1941); Comment, 1976 B. Y. U. L. Rev., at 153–157. And the relatively insubstantial interest given the resolutions of disapproval that were introduced seems particularly significant since Congress has proceeded to amend § 901 when it has disagreed with HEW's interpretation of the statute.[25] While amending these other portions of § 901, however, Congress has not seen fit to disturb the Subpart E regulations.

In fact, Congress has refused to pass bills that would have amended § 901 to limit its coverage of employment discrimination. On the day the 45-day review period for the HEW regulations expired, Senator Helms introduced a bill that would have added a provision to Title IX stating that "[n]othing in [§ 901] shall apply to employees of any educational institution subject to this title." S. 2146, § 2(1), 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 23845–23847 (1975). No action was taken on the bill. Similarly, Senator McClure

[25] In 1974, Congress, by adding § 901(a)(6), excepted social fraternities and sororities and voluntary youth service organizations from the reach of § 901(a). Pub. L. 93–568, § 3(a), 88 Stat. 1862. See 120 Cong. Rec. 41390–41391 (1974) (remarks of Reps. Green, Steiger, Perkins, Quie, and Ashbrook). The amendment was enacted prior to the period of regulations review, but after HEW had published for comment the Title IX regulations, including those pertaining to employment practices. Then, in 1976, Congress added three new exceptions, §§ 901(a)(7)–(9). See 122 Cong. Rec. 27979–27987 (1976) (remarks of Sens. Fannin, Dole, Thurmond, Bayh, Humphrey, and Eagleton).

sponsored an amendment to S. 2657, 94th Cong., 2d Sess. (1976), the Education Amendments of 1976, which would have restricted the meaning of the term "educational program or activity" in § 901(a) to the "curriculum or graduation requirements of the institutions . . ." receiving federal funds. 122 Cong. Rec. 28136 (1976). Senator Bayh successfully opposed the amendment, in part on the ground that it "would exempt those areas of traditional discrimination against women that are the reason for the congressional enactment of title IX[,]" including "employment and employment benefits . . . ." *Id.*, at 28144. The McClure amendment was rejected. *Id.*, at 28147.

Although postenactment developments cannot be accorded "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX . . . ." *Cannon* v. *University of Chicago*, 441 U. S., at 687, n. 7. Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U. S. 544, 554, n. 10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489 (1940). See also *Cannon* v. *University of Chicago*, 441 U. S., at 702–703; *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956). These subsequent events therefore lend credence to the Court of Appeals' interpretation of Title IX.[26]

IV

Although we agree with the Second Circuit's conclusion that Title IX proscribes employment discrimination in feder-

[26] Petitioners' final two arguments rely on policy judgments: the school boards insist that the victims of employment discrimination have remedies other than those available under Title IX and that terminating all federal

ally funded education programs, we find that the Court of Appeals paid insufficient attention to the "program-specific" nature of the statute. The court acknowledged that, under § 902, termination of funds "shall be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found," but implied that the Department's authority to issue regulations is considerably broader. See 629 F. 2d, at 785–786.[27] We disagree.

It is not only Title IX's funding termination provision that

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funds to an education program because of discrimination suffered by one employee will injure numerous innocent students. These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of Title IX even were we to disagree with the legislative choice.

Moreover, even if alternative remedies are available and their existence is relevant, but cf. *Cannon* v. *University of Chicago*, 441 U. S., at 711; Comment, 129 U. Pa. L. Rev., at 442–446, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination. See, *e. g.*, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 236–239 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47–49 (1974). And petitioners do not dispute that all funds may be terminated for an education program that discriminates against only one *student*.

Similarly, the views of the dissent as to the competence of the drafters of Title IX, the need for the legislation, the type of procedural, remedial, and enforcement provisions that should have been included, and the language that should have been used, see *post*, at 551–555, may be interesting, and may be the sorts of considerations that Congress should take into account in enacting legislation; but they are not relevant to the inquiry we must undertake in ascertaining legislative intent. Rather, in order to avoid the oft-criticized practice of second-guessing Congress, we must rely on the legislative history, however "truncated," *post*, at 551, and not on our perceptions of the soundness of the legislative judgment.

[27] To the extent that the Court of Appeals was suggesting only that regulations may be broadly worded and need not be directed at specific programs—as long as they are applied only to programs that receive federal funds—we do not dispute the court's conclusion. See § 902 (referring to "rules, regulations, or orders of general applicability").

is program-specific. The portion of § 902 authorizing the issuance of implementing regulations also provides:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 901 *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." (Emphasis added.)

Certainly, it makes little sense to interpret the statute, as respondents urge, to authorize an agency to promulgate rules that it cannot enforce. And § 901(a) itself has a similar program-specific focus: it forbids gender discrimination "under any education program or activity receiving Federal financial assistance . . . ."

Title IX's legislative history corroborates its general program-specificity. Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds. See 117 Cong. Rec. 30155–30157, 30408 (1971) (Sen. Bayh's 1971 amendment); H. R. 5191, 92d Cong., 1st Sess., § 1001(b) (1971) (administration proposal); 1970 Hearings 690–691 (Dept. of Justice's proposed alternative to § 805 of H. R. 16098); cf. Title IX, § 904 (proscribing discrimination against the blind by a recipient of federal assistance with no program-specific limitation). In contrast, Senator Bayh indicated that his 1972 amendment, which in large part was ultimately adopted, was program-specific. See 118 Cong. Rec. 5807 (1972) (observing that the amendment "prohibit[s] discrimination on the basis of sex in federally funded education programs," and that "[t]he effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found . . ."); cf. 117 Cong. Rec. 39256 (1971) (colloquies be-

tween Reps. Green and Waggoner and between Reps. Green and Steiger).

Finally, we note that language in §§ 601 and 602 of Title VI, virtually identical to that in §§ 901 and 902 and on which Title IX was modeled, has been interpreted as being program-specific. See *Board of Public Instruction* v. *Finch*, 414 F. 2d 1068 (CA5 1969). We conclude, then, that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902. Cf. *Cannon* v. *University of Chicago*, 441 U. S., at 690–693.

Examining the employment regulations with this restriction in mind, we nevertheless reject petitioners' contention that the regulations are facially invalid. Although their import is by no means unambiguous, we do not view them as inconsistent with Title IX's program-specific character. The employment regulations do speak in general terms of an educational institution's employment practices, but they are limited by the provision that states their general purpose: "to effectuate title IX . . . [,] which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education *program or activity* receiving Federal financial assistance . . . ." 34 CFR § 106.1 (1980) (emphasis added).[28]

HEW's comments accompanying publication of its final Title IX regulations confirm our view that Subpart E is consistent with the Act's program-specificity.[29] The Depart-

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[28] Similarly, for example, the specific Title IX regulations governing student admissions policies—which are indisputably covered by the statute—are phrased generally, providing that "[n]o person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient . . . ." 34 CFR § 106.21(a) (1980). The reach of those regulations is likewise limited by § 106.1 to conform to Title IX's program-specific nature. See also 45 CFR § 80.3(b)(1) (1980) (Title VI regulation providing that "[a] recipient under any program to which this part applies may not . . . [discriminate] on ground of race, color, or national origin . . .").

[29] In construing regulations, the Court normally defers to the agency's interpretation. See, *e. g.*, *INS* v. *Stanisic*, 395 U. S. 62, 72 (1969); *Udall* v.

ment recognized that § 902 limited its authority to terminate funds to particular programs that were found to have violated Title IX, and it continued:

> "Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it[30] receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in title VI, which holds that Federal funds may be terminated under title VI upon a finding that they 'are infected by a discriminatory environment . . .' *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F. 2d 1068, 1078–79 (5th Cir. 1969)." 40 Fed. Reg. 24128 (1975).

By expressly adopting the Fifth Circuit opinion construing Title VI as program-specific, HEW apparently indicated its intent that the Title IX regulations be interpreted in like fashion. So read, the regulations conform with the limitations Congress enacted in §§ 901 and 902.

Whether termination of petitioners' federal funds is per-

Tallman, 380 U. S. 1, 16–17 (1965). Here, however, that interpretation has fluctuated from case to case, and even as this case has progressed. See Brief for Federal Respondents 46; compare 1975 Hearings 485 (testimony of HEW Secretary Weinberger), and *Dougherty Cty. School System* v. *Harris*, 622 F. 2d, at 737, with Brief for Federal Respondents 44–46. Accordingly, there is no consistent administrative interpretation of the Title IX regulations for us to evaluate. Cf. n. 12, *supra*.

[30] Whether "it" refers to "recipient" or "education program or activity" is somewhat unclear, but we find the latter reading more plausible, especially given the approving citation to the Fifth Circuit's opinion in *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F. 2d 1068 (1969). Moreover, "a recipient of Federal financial assistance" by definition "receives or benefits from such assistance," whereas "an education program or activity . . . operated by a recipient" may not; the subordinate clause therefore adds nothing unless "it" means "program or activity." See also 34 CFR § 106.51(a) (1980) (prohibiting gender discrimination "under any education program or activity operated by a recipient *which* receives or benefits from Federal financial assistance" (emphasis added)).

missible under Title IX is a question that must be answered by the District Court in the first instance. Similarly, we do not undertake to define "program" in this opinion. Neither of the cases before us advanced beyond a motion for summary judgment, and the record therefore does not reflect whether petitioners' employment practices actually discriminated on the basis of gender or whether any such discrimination comes within the prohibition of Title IX. Neither school board opposed HEW's investigation into its employment practices on the grounds that the complaining employees' salaries were not funded by federal money, that the employees did not work in an education program that received federal assistance, or that the discrimination they allegedly suffered did not affect a federally funded program.[31] Instead, petitioners disputed the Department's authority to regulate any employment practices whatsoever, and the District Court adopted that view, which we find to be error. Accordingly, we affirm the judgment of the Court of Appeals but remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs and activities receiving federal funds. In 1975, the Department of Health, Education, and Welfare (HEW)[1] promulgated regulations prohibit-

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[31] Petitioner North Haven, for example, has conceded that it uses a substantial percentage of its federal funds to pay the salaries of its employees, including teachers. See App. 6, 18–20, 21–22, 24.

[1] As noted by the Court, *ante*, at 516, n. 4, HEW's duties under Title IX were transferred to the Department of Education in 1979 by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 96–88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). I follow the Court in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See *ante*, at 516, n. 4.

ing discrimination on the basis of gender in *employment* by fund recipients. 34 CFR § 106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several post-enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.[2]

I

Although the Court begins with the language of the statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Ante*, at 520. This is not what the statutory language provides.

In relevant part, the statute states:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Education Amendments of 1972, § 901(a), 20 U. S. C. § 1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or who are denied the benefits of, programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) de-

[2] The Court acknowledges that the postenactment events it discusses only "lend credence" to its interpretation of the statute. *Ante*, at 535.

nied *participation* in a program or activity;[3] (ii) denied the *benefits* of a program or activity; or (iii) subject to discrimination *under* an education program or activity. Moreover, Congress made no reference whatever to employers or employees in Title IX, in sharp contrast to quite explict language in other statutes regulating employment practices.[4]

It is noteworthy that not one of the other five Courts of Appeals to consider the question before us reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in *Islesboro School Committee* v. *Califano*, 593 F. 2d 424, 426, cert. denied, 444 U. S. 972 (1979), and that decision has been followed by most other Courts of Appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U. S. C. § 1681(a), on its face, is aimed at the beneficiaries of the federal monies, *i. e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.[5] *Ibid.*

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[3] I agree with the Court that employees who directly participate in a federal program, *i. e.*, teachers who receive federal grants, are, of course, protected by Title IX. See *ante*, at 520–521. Respondents Elaine Dove and Linda Potz were not, however, participants in any grant program or in any other federally funded program or activity. Elaine Dove was a teacher and Linda Potz a guidance counselor. Both alleged only discrimination in employment.

[4] See, *e. g.*, 42 U. S. C. § 2000e–2(a) (Title VII: "[i]t shall be an unlawful employment practice for an employer—"); 29 U. S. C. § 206(d)(1) (Equal Pay Act: "[n]o employer having employees . . .").

[5] The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeals' conclusion" that Title IX does protect employees. *Ante*, at 521–522. I am unable to follow this reasoning. The absence of employment-related exceptions may not be

In the next appellate decision, *Romeo Community Schools* v. *HEW*, 600 F. 2d 581, cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Sixth Circuit also rejected the interpretation of the statute now relied on by this Court, noting: "[A]s actually written, the statute is not nearly so broad. The words 'no person' are modified by later language which clearly limits their meaning." 600 F. 2d, at 584. The court concluded that the statute "reaches only those types of disparate treatment" that involve discrimination against program beneficiaries.[6] *Ibid.*

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conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U. S. C. § 2000e–2(h).

[6] The question also has been presented to the Courts of Appeals for the Fifth, Eighth, and Ninth Circuits. In *Junior College Dist. of St. Louis* v. *Califano*, 597 F. 2d 119, 121, cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Eighth Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in *Islesboro*. And in *Seattle University* v. *HEW*, 621 F. 2d 992, 993, cert. granted *sub nom. United States Dept. of Ed.* v. *Seattle Univ.*, 449 U. S. 1009 (1980), the Court of Appeals for the Ninth Circuit followed the three earlier Circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, and stated that the "language is more ambiguous than HEW suggests." 629 F. 2d 773, 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in *Dougherty Cty. School System* v. *Harris*, 622 F. 2d 735 (1980), cert. pending *sub nom. Bell* v. *Dougherty Cty. School System*, No. 80–1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, *e. g.*, if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case,

II

A

The Court acknowledges, as it must, that § 901 of Title IX "does not expressly include . . . employees." But it finds a strong negative inference in the fact that § 901 does not "exclude employees from its scope." *Ante*, at 522. The Court then turns to the legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination. *Ibid.* I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute operative language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unambiguously that Congress did intend what it failed to state.[7] The Court's elaborate exposition of the history of Title IX falls far short of this standard.

Title IX originated in a floor amendment sponsored by Senator Bayh to Senate bill S. 659, 92d Cong., 2d Sess. (1972). The amendment was intended to close loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See Discrimination Against Women: Hearings on Section 805 of H. R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st

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the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. 622 F. 2d, at 737–738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, *i. e.*, hourly employees, secretaries, and administrators as well as teachers.

[7] See, *e. g.*, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 412, n. 29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent").

Cong., 2d Sess. (1970). Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination "with respect to the employment of individuals to perform work connected with the educational activities of [educational] institutions." Pub. L. 88–352, Title VII, § 702, 78 Stat. 255. And the Equal Pay Act of 1963 banned discrimination in wages on the basis of sex, 29 U. S. C. § 206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers. See 29 U. S. C. § 213(a)(1) (1970 ed.) (no longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor amendment, No. 874, introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), closed these loopholes. Section 1005 amended Title VII to cover employment discrimination in educational institutions. *Ibid.* Sections 1009–1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. *Ibid.* And §§ 1001–1003 created a new Title IX banning discrimination on the basis of sex in federally funded *educational* programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in such programs.

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001–1003 of the Bayh amendment to proscribe such discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded educational programs and activities. This interpretation of Title IX is confirmed by the fact that it was modeled after Title VI, a statute limited in its scope to

discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients.[8] 42 U. S. C. § 2000d–3.[9] And, as this Court noted in *Cannon* v. *University of Chicago*, 441 U. S. 677, 694–701 (1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that "[i]t is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX." *Ante*, at 529 (citing *Cannon* v. *University of Chicago*, *supra*, at 710–711). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, *i. e.*, § 604, 42 U. S. C. § 2000d–3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination *per se*. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word "sex." In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment,

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[8] The operative language in the two provisions is virtually identical. Compare 42 U. S. C. § 2000d (Title VI) with 20 U. S. C. § 1681(a) (Title IX).

[9] Title 42 U. S. C. § 2000d–3 states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

Title VI itself might be "gutted" on the floor of the Congress. Sex Discrimination Regulations: Review of Regulations to Implement Title IX, Hearings Before the Subcommittee on Postsecondary Education and Labor of the House Committee on Education and Labor, 94th Cong., 1st Sess., 409 (1975) (1975 Hearings).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of the Senate's Bayh amendment originally contained a provision, § 1004, equivalent to § 604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. *Ante*, at 527–528. A strong argument, however, can be made that there was a nonsubstantive reason for eliminating § 1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at Conference simply to eliminate, as quietly as possible, a recently discovered drafting error. 1975 Hearings 409. Even without reference to Representative O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh amendment, § 1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, § 604, had been regarded as a mere clarification,[10] the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House recedes" reveals a substan-

[10] See, *e. g.*, 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H. R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., 198 (1964) (statement of Cong. Celler, House Floor Manager of Title VI).

tive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the Court is forced to rely primarily on the statements of a single Senator.[11] The first statement, *ante*, at 524 (quoting 118 Cong. Rec. 5803 (1972)), is ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but *prior* to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers paralleled those in Title VI. Yet Title VI has never provided for fund termination to redress discrimination in employment.

Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001–1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. *Ante*, at 525 (quoting 118 Cong. Rec. 5807 (1972)). But § 1005 of the Bayh amendment is the section amending Title VII and thus §§ 1001–1005 cover employment discrimination regardless of whether Title IX does.[12] Moreover, the Court uses an ellip-

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[11] The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

[12] See description of various sections of the Bayh amendment, *supra*, at 545. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

The Court argues against the relevance of the portion of Senator Bayh's statement that is inconsistent with its position, characterizing that portion as "inadvertent." See *ante*, at 526, n. 15. This hardly gives one confidence that the Senator's statements, selectively relied upon by the Court, are not also inadvertent. Moreover, the Court's decision concededly is

sis rather than include the following words from the second Bayh statement:

> "Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in ellipsis, *ante*, at 525).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI rather than as a substantial departure from Title VI.

In the third Bayh statement, *ante*, at 526 (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in *Islesboro:*

> "A fair reading both of the colloquy . . . , as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were

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based solely on discussion on the floor of the Senate. We note—as evidence of how little that discussion actually supports the Court—that the views of Courts of Appeals judges with respect to its import have ranged from viewing it as indicating *no intention* to include employment discrimination in Title IX to recognizing that, like most floor debates, the oral statements of Senators must be viewed with skepticism even when not ambiguous. See *Seattle University* v. *HEW*, 621 F. 2d, at 995; *Romeo Community Schools* v. *HEW*, 600 F. 2d 581, 585 (CA6), cert. denied, 444 U. S. 972 (1979); *Islesboro School Committee* v. *Califano*, 593 F. 2d 424, 428 (CA1), cert. denied, 444 U. S. 972 (1979).

specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form . . . ." 593 F. 2d, at 427.

Rather than supporting the Court's view, the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modeled after Title VI, which is explicitly so limited—and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.[13]

As indicated above, when critical words, in this case "employment discrimination," are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

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[13] The Court devotes considerable time to describing postenactment actions or inaction on the part of subsequent Congresses. See *ante*, at 530–535. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW's regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact, bills limiting Title IX's coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimination within Title IX.

III

As the sole issue before us is the meaning of § 901(a) of Title IX, I repeat the relevant language:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

The Court acknowledges that, in view of the lack of support for its position in this language, it must look to the legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination. *Ante*, at 522. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to congressional intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed, and provided remedies for, the conduct in question. When these factors are considered, there is no justification for reading sex employment discrimination language into § 901.

If there had been such an intent, no competent legislative draftsman would have written § 901 as above set forth. The draftsman would have been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier Congress, at the time Title IX was being drafted and considered Title VII and the Equal Pay Act also were amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex. Congress hardly would have enacted a *third* statute addressing this

problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of the latter with respect to remedies and procedures. Title VII is a comprehensive antidiscrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal-court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available unless discriminatory conduct falls within one of several exceptions. See 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV). This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify *employment* discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.[14]

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[14] It is interesting to note that, whereas Congress itself provided for administrative procedures to redress employment discrimination in Title VII, see 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), it enacted no comparable provisions in Title IX, see 20 U. S. C. § 1681 *et seq.* Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 CFR §§ 80.7–80.10 (1980).

The administrative procedures enacted by Congress in the United States Code and promulgated by HEW in the Code of Federal Regulations are quite different, though addressing a single problem. The HEW regulations provide for Administrative Procedure Act hearings, followed by judicial review. See 45 CFR §§ 80.9–80.11 (1980). In contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, if it so desires, as counsel for the victims of discrimination in subsequent *de novo* judicial proceedings. See 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV).

Compare 20 U. S. C. § 1681 *et seq.* (Title IX) with 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV) (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.[15] See Tr. of Oral Arg. 27.

Finally, Congress delegated the administration of Title IX to the Department of HEW. In contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.[16] The District Court in *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (ED Mich. 1977), aff'd, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979), correctly observed:

> "These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legisla-

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[15] An employee could presumably bring actions against the school district under Title VII and the Equal Pay Act, seeking redress of his or her wrong in the form of backpay and injunctive relief, and, in addition, request that funds be terminated under Title IX.

[16] The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief for Federal Respondents 37, n. 26, it will be required to maintain a staff of employees to enforce the antidiscrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time. At the present time, the HEW and EEOC procedures in the event of noncompliance are quite different. See discussion in text *supra*, at 552.

> tion has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the *Romeo* court thought was self-evident:

> "The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief for Federal Respondents 37, n. 26.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on five perceptions of congressional action that I am unable to share: (i) that Congress neglectfully or forgetfully failed to include language in § 901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a *third* statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; (iii) that Congress failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; (iv) that it vested the authority to enforce the third statute in HEW, a department that even the Solicitor General concedes lacks the experience and the qualifications to oversee and enforce employment legislation; and finally (v) that in Title IX, it gave a new "remedy" for sex discrimination in employment, but did not make that remedy available to those discriminated against on the basis of race.

In response to this dissent, see *ante*, at 536, n. 26, the Court states that the factors considered in this Part III, summarized above, "are *not* relevant" to "ascertaining legislative

intent." If this were a "plain language" case, this statement probably would be unobjectionable. But the Court recognizes that its position cannot be sustained solely by the plain language of the statute, and it therefore relies heavily on ambiguous and muddled oral statements made on the floor of the Senate. In these circumstances, it defies reason to say that a court should not consider what reasonable legislators surely would have considered. Where ambiguity exists it is not "irrelevant," to the process of ascertaining the intention of Congress, to consider specifically other statutes on the same subject. Nor must a court shun common sense in resolving ambiguities.[17]

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[17] See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 77 (1976) (when statute is ambiguous, Court must "draw upon 'those common-sense assumptions that must be made in determining direction without a compass'") (citation omitted); *Fairport R. Co.* v. *Meredith*, 292 U. S. 589, 595 (1934) (the interpretation that a reasonable Congress would have intended is adopted by the Court); 2A C. Sands, Sutherland on Statutory Construction § 456.12, p. 38 (4th ed. 1973) (legislative bodies presumed to act reasonably). See also *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974) ("When 'interpreting a statute, the court will look not merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law . . .'").

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP.

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

No. 80-1765. Argued January 13, 1982—Decided May 17, 1982

Petitioner, a nonprofit membership corporation with over 90,000 members drawn from all fields of mechanical engineering, promulgates codes for areas of engineering and industry. Much of its work is done through volunteers from industry and government. The codes, while only advisory, have a powerful economic influence, many of them being incorporated by reference in federal regulations and state and local laws. Respondent marketed a safety device for use in water boilers and secured a customer that previously had purchased the competing product of McDonnell & Miller, Inc. (M&M). One of M&M's officials, a vice president (James), was vice chairman of petitioner's subcommittee that drafted, revised, and interpreted the segment of petitioner's code governing the safety device in question. Subsequently he and other M&M officials met with the subcommittee's chairman (Hardin). As a result, M&M sent a letter to petitioner asking whether a safety device with a feature such as one contained in respondent's device satisfied the pertinent code requirements. The letter was referred to Hardin, as chairman of the subcommittee, and ultimately an "unofficial response" was issued, prepared by Hardin but mailed on petitioner's stationery over the signature of one of petitioner's full-time employees. The response in effect declared respondent's product unsafe. Thereafter, M&M's salesmen used the subcommittee's response to discourage customers from buying respondent's product. Respondent subsequently sought a correction from petitioner of the unofficial response; respondent continued to suffer market resistance after the pertinent committee replied. After James' part in the drafting of the original letter of inquiry became public, respondent filed suit in Federal District Court against petitioner (and others who settled), alleging violation of the Sherman Act. The trial court rejected respondent's request for jury instructions that petitioner could be held liable for its agents' conduct if they acted within the scope of their apparent authority. Instead, the jury was instructed that petitioner could be held liable only if it had ratified its agents' actions or if the agents had acted in pursuit of petitioner's interests. The jury, nonetheless, returned a verdict for respondent. The Court of Appeals affirmed, concluding that petitioner could be held liable if its agents had

acted within the scope of their apparent authority, and that thus the charge was more favorable to petitioner than the law required.

Held: Petitioner is civilly liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority. Pp. 565–576.

(a) Under general rules of agency law, principals are liable when their agents act with apparent authority and commit torts analogous to the antitrust violation presented here. An agent who appears to have authority to make statements for his principal gives to his statements the weight of the principal's reputation—in this case, the weight of petitioner's acknowledged expertise in boiler safety. Pp. 565–570.

(b) Petitioner's liability under a theory of apparent authority is consistent with the congressional intent behind the antitrust laws to encourage competition. Petitioner wields great power in the Nation's economy, and when it cloaks its subcommittee officials with the authority of its reputation, it permits those agents to affect the destinies of businesses and thus gives them the power—as illustrated by the facts of this case—to frustrate competition in the marketplace. A rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations. On the other hand, a ratification rule would have anticompetitive effects, encouraging petitioner to do as little as possible to oversee its agents since it could avoid liability by ensuring that it remained ignorant of its agents' conduct. And a rule whereby petitioner would not be liable unless its agents acted with an intent to benefit petitioner would be irrelevant to the antitrust laws' purposes. The anticompetitive practices of petitioner's agents are repugnant to the antitrust laws even if the agents act without any intent to aid petitioner, and petitioner should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in petitioner solely for their own benefit or the benefit of their employers. Pp. 570–574.

(c) Application of the theory of apparent authority is not improper on the asserted ground that treble damages for antitrust violations are punitive and that under traditional agency law the courts do not employ apparent authority to impose punitive damages upon a principal for the acts of its agents. Since treble damages also serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold petitioner liable for the acts of agents committed with apparent authority. Nor does the fact that petitioner is a nonprofit organization

weaken the force of the antitrust and agency principles that indicate that it should be liable for respondent's antitrust injuries. Pp. 574–576.

635 F. 2d 118, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 578. POWELL, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 578.

Harold R. Tyler, Jr., argued the cause for petitioner. With him on the briefs were *Richard D. Parsons*, *Frederick T. Davis*, and *Steven C. Charen*.

Carl W. Schwarz argued the cause for respondent. With him on the brief were *Stephen P. Murphy* and *William H. Barrett*.

Deputy Solicitor General Shapiro argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Barry Grossman*, and *Ernest J. Isenstadt*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner, the American Society of Mechanical Engineers, Inc. (ASME), is a nonprofit membership corporation organized in 1880 under the laws of the State of New York. This case presents the important issue of the Society's civil liability under the antitrust laws for acts of its agents performed

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*Briefs of *amici curiae* urging reversal were filed by *Michael D. Brown* for the American Association of Engineering Societies, Inc.; by *Lewis H. Van Dusen, Jr.*, for the American Society for Testing and Materials; by *Robert J. Siverd* for the Institute of Electrical and Electronics Engineers, Inc.; by *David Crump* for the Legal Foundation of America; and by *Daniel J. Piliero II* for the National Fire Protection Association.

Merle L. Royce and *James P. Chapman* filed a brief for ECOS Electronic Corp. as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Henry A. Field, Jr.*, for Adolph J. Ackerman; and by *Kim Zeitlin* for the National Commission for Health Certifying Agencies.

with apparent authority. Because the judgment of the Court of Appeals upholding civil liability is consistent with the central purposes of the antitrust laws, we affirm that judgment.

I

ASME has over 90,000 members drawn from all fields of mechanical engineering. It has an annual operating budget of over $12 million. It employs a full-time staff, but much of its work is done through volunteers from industry and government. The Society engages in a number of activities, such as publishing a mechanical engineering magazine and conducting educational and research programs.

In addition, ASME promulgates and publishes over 400 separate codes and standards for areas of engineering and industry. These codes, while only advisory, have a powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most States, the ordinances of major cities, and the laws of all the Provinces of Canada. See Brief for Petitioner 2. Obviously, if a manufacturer's product cannot satisfy the applicable ASME code, it is at a great disadvantage in the marketplace.

Among ASME's many sets of standards is its Boiler and Pressure Vessel Code. This set, like ASME's other codes, is very important in the affected industry; it has been adopted by 46 States and all but one of the Canadian Provinces. See *id.*, at 5. Section IV of the code sets forth standards for components of heating boilers, including "low-water fuel cutoffs." If the water in a boiler drops below a level sufficient to moderate the boiler's temperature, the boiler can "dry fire" or even explode. A low-water fuel cutoff does what its name implies: when the water in the boiler falls below a certain level, the device blocks the flow of fuel to the boiler before the water level reaches a dangerously low point. To prevent dry firing and boiler explosions, ¶ HG–605 of Section IV provides that each boiler "shall have an automatic low-water fuel cutoff so located as to automatically cut

off the fuel supply when the surface of the water falls to the lowest visible part of the water gage glass." Plaintiff's Exhibit 30A. See 635 F. 2d 118, 121 (CA2 1980).

For some decades, McDonnell & Miller, Inc. (M&M), has dominated the market for low-water fuel cutoffs. But in the mid-1960's, respondent Hydrolevel Corporation entered the low-water fuel cutoff market with a different version of this device. The relevant distinction, for the purposes of this case, was that Hydrolevel's fuel cutoff, unlike M&M's, included a time delay.[1]

In early 1971, Hydrolevel secured an important customer. Brooklyn Union Gas Company, which had purchased M&M's product for several years, decided to switch to Hydrolevel's probe. Not surprisingly, M&M was concerned.

Because of its involvement in ASME, M&M was in an advantageous position to react to Hydrolevel's challenge. ASME's governing body had delegated the interpretation, formulation, and revision of the Boiler and Pressure Vessel Code to a Boiler and Pressure Vessel Committee. See App. 120. That committee in turn had authorized subcommittees to respond to public inquiries about the interpretation of the code. An M&M vice president, John W. James, was vice chairman of the subcommittee which drafted, revised, and interpreted Section IV, the segment of the Boiler and Pressure Vessel Code governing low-water fuel cutoffs.

After Hydrolevel obtained the Brooklyn Union Gas account, James and other M&M officials met with T. R. Hardin,

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[1] M&M's fuel cutoff is a floating bulb that falls with the boiler's water level. When the level reaches the critical point, the bulb causes a switch to cut off the boiler's fuel supply. Hydrolevel's product, in contrast, was an immovable probe inserted in the side of the boiler; when the water level dropped below the probe, the fuel supply was interrupted. Because water in a boiler surges and bubbles, the level intermittently would seem to fall slightly below the probe even though the overall level remained safe. To prevent premature fuel cutoff because of these intermittent fluctuations, Hydrolevel's probe included a time delay that allowed the boiler to operate for a brief period after the water level dropped beneath the probe.

the chairman of the Section IV subcommittee.[2] The participants at the meeting planned a course of action. They decided to send an inquiry to ASME's Boiler and Pressure Vessel Committee asking whether a fuel cutoff with a time delay would satisfy the requirements of ¶ HG–605 of Section IV. James and Hardin, as vice chairman and chairman, respectively, of the relevant subcommittee, cooperated in drafting a letter, one they thought would elicit a negative response.

The letter was mailed over the name of Eugene Mitchell, an M&M vice president, to W. Bradford Hoyt, secretary of the Boiler and Pressure Vessel Committee and a full-time ASME employee. App. 62. Following ASME's standard routine, Hoyt referred the letter to Hardin, as chairman of the subcommittee. Under the procedures of the Boiler and Pressure Vessel Committee, the subcommittee chairman—Hardin—could draft a response to a public inquiry without referring it to the entire subcommittee if he treated it as an "unofficial communication."

As a result, Hardin, one of the very authors of the inquiry, prepared the response. *Id.*, at 63. Although he retained control over the inquiry by treating the response as "unofficial," the response was signed by Hoyt, secretary of the Boiler and Pressure Vessel Committee, and it was sent out on April 29, 1971, on ASME stationery. *Id.*, at 64. Predictably, Hardin's prepared answer, utilized verbatim in the Hoyt letter, condemned fuel cutoffs that incorporated a time delay:

> "A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG–602(b), it is the intent of Par. HG–605(a) that the low-water fuel

[2] Hardin was an executive vice president of Hartford Steam Boiler Inspection and Insurance Company. A controlling interest in Hartford was owned by International Telephone and Telegraph Corporation, which acquired M&M within the year. See 635 F. 2d 118, 122, n. 2 (CA2 1980).

cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.

"There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period." *Ibid.*

As the Court of Appeals in this case observed, the second paragraph of the response does not follow from the first: "If the cut-off is positioned sufficiently above the lowest permissible water level, a cut-off with a time-delay could assure, even allowing for the delay, that the fuel supply would stop by the time the water fell to the lowest visible part of the water-gauge glass." 635 F. 2d, at 122–123. Hoyt signed and mailed the response without checking its accuracy. See App. 124–126.

As anticipated, M&M seized upon this interpretation of Section IV to discourage customers from buying Hydrolevel's product. It instructed its salesmen to tell potential customers that Hydrolevel's fuel cutoff failed to satisfy ASME's code. See 635 F. 2d, at 123. And M&M's employees did in fact carry the message of the subcommittee's response to customers interested in buying fuel cutoffs. Thus, M&M successfully used its position within ASME in an effort to thwart Hydrolevel's competitive challenge.

Several months later, Hydrolevel learned of the subcommittee interpretation from a former customer. Hydrolevel wrote ASME for a copy of the April 29 response. On February 8, 1972, over the signature of the assistant secretary of the Boiler and Pressure Vessel Committee, ASME sent Hydrolevel a letter quoting the two paragraphs of the April 29 interpretation of Section IV. App. 66–67.

On March 23, Hydrolevel's president wrote Hoyt and demanded that ASME cure the effect of the April 29 letter by sending a correction to whomever might have received it.

Id., at 68–73. Hoyt placed Hydrolevel's complaint on the agenda for the meetings of the Boiler and Pressure Vessel Committee and Subcommittee to be held on May 4 and 5.

On May 4, the subcommittee voted to confirm the intent of the first quoted paragraph of the April 29 letter. James, by then the chairman of the subcommittee, reported this recommendation to the committee on May 5. *Id.*, at 82. Thereafter, the committee designated two persons to propose a response to Hydrolevel. *Id.*, at 83. In the end, on June 9 the committee mailed Hydrolevel a reply that "confirmed the intent" of the April 29 letter. *Id.*, at 84.[3] The committee's letter further advised that there was

> "no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG–605(a). This paragraph relates itself to Par. HG–602(b) which specifically delineates the location of the lowest visible part of the water gage glass." *Ibid.*

The committee concluded the letter with a warning paragraph suggested by James, see *id.*, at 111–112:

> "If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gage glass." *Id.*, at 84.

After this response to its complaint, Hydrolevel continued to suffer from market resistance. Two years later, the Wall Street Journal published an article describing Hydrolevel's predicament in trying to sell a fuel cutoff that many in the industry thought to be in violation of ASME's code. Wall Street Journal, July 9, 1974, p. 44, col. 1; App. 94–98. Re-

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[3] Actually, the committee "confirmed the intent" of ASME's February 8, 1972, letter to Hydrolevel. That letter, however, simply quoted the original April 29, 1971, response. See App. 66–67.

acting to this story, ASME's Professional Practice Committee opened an investigation. It never discovered that James had been involved with the original inquiry. In a resolution reporting the results of its investigation, the committee decided that all ASME officials had acted properly. Further, the Professional Practice Committee "commend[ed] [James] for conducting himself in a forthright manner." *Id.*, at 104.

Subsequently, James' part in drafting the original letter of inquiry became public because of his testimony in March 1975 before a Senate Subcommittee. See Voluntary Industrial Standards: Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 186–199 (1975) (testimony of John W. James of M&M (ITT)); see also *id.*, at 171–185 (testimony of Eugene Mitchell, Manager of Original Equipment Sales, ITT Fluid Handling Division). Within a few months, Hydrolevel filed suit against ITT, ASME, and Hartford in the United States District Court for the Eastern District of New York. Hydrolevel alleged that the defendants' actions had violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. App. 11. Prior to trial, Hydrolevel sold all its assets, except this suit, for salvage value. Ultimately, ITT and Hartford settled.

The lawsuit proceeded to trial against ASME, as the remaining defendant. Hydrolevel requested the trial court to instruct the jury that ASME could be held liable under the antitrust laws for its agents' conduct if the agents acted within the scope of their apparent authority. See *id.*, at 59. The District Court, however, rejected this approach and, instead, at ASME's suggestion, charged the jury that ASME could be held liable only if it had ratified its agents' actions or if the agents had acted in pursuit of ASME's interests. The District Court explained to the jury:

> "If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation,

> and this action was not ratified or adopted by the defendant [ASME], their misconduct cannot be considered that of the corporation with which they are associated." *Id.*, at 49.

The jury, nonetheless, returned a verdict for Hydrolevel.

Before the Court of Appeals, the parties disputed the sufficiency of the evidence to support a verdict based on the District Court's instruction. See 635 F. 2d, at 125. But the Court of Appeals chose not to decide whether the evidence was sufficient to demonstrate that ASME had ratified its agents' actions or that the agents had acted to advance ASME's interests. Instead, after surveying the law of agency and the policies underlying the antitrust laws, the Court of Appeals concluded that ASME could be held liable if its agents had acted within the scope of their apparent authority. *Id.*, at 124–127. Since, therefore, the District Court had delivered "a charge that was more favorable to the defendant than the law requires," *id.*, at 127, the Court of Appeals affirmed the judgment on liability, that is, the jury's finding that ASME was liable under § 1 of the Sherman Act for its agents' actions.[4]

Because the Court of Appeals' decision presents an important issue concerning the interpretation of the antitrust laws, we granted certiorari. 452 U. S. 937 (1981).

II

A

As the Court of Appeals observed, under general rules of agency law, principals are liable when their agents act with

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[4] The Court of Appeals remanded the case to the District Court after finding that the damages awarded Hydrolevel were excessive and that the District Court had made errors in its calculation of damages. 635 F. 2d, at 128–131. The damages issue is the subject of a pending cross-petition for certiorari, No. 80–1771, filed April 22, 1981. Hydrolevel's damages arguments are not now before us, and we express no opinion on that aspect of the Court of Appeals' decision.

apparent authority[5] and commit torts analogous to the antitrust violation presented by this case. See generally 10 W. Fletcher, Cyclopedia of the Law of Private Corporations ¶4886, pp. 400–401 (rev. ed. 1978); W. Seavey, Law of Agency § 92 (1964). For instance, a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority. See, *e. g.*, *Standard Surety & Casualty Co.* v. *Plantsville Nat. Bank*, 158 F. 2d 422 (CA2 1946), cert. denied, 331 U. S. 812 (1947). Similarly, a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within the scope of his apparent authority. Restatement (Second) of Agency §§ 249, 262 (1957) (Restatement); see *Rutherford* v. *Rideout Bank*, 11 Cal. 2d 479, 80 P. 2d 978 (1938). Also, if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement. Restatement §§ 247, 254. Finally, a principal is responsible if an agent acting with apparent authority tortiously injures the business relations of a third person. *Id.*, § 248 and Comment *b*, p. 548.

Under an apparent authority theory, "[l]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." *Id.*, § 261, Comment *a*, p. 571. See *Record* v. *Wagner*, 100 N. H. 419, 128 A. 2d 921 (1957). As with the April 29 letter issued by the Boiler and Pressure Vessel Subcommittee, the injurious statements are "effective, in part at least, because of the personality of the one

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[5] "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement (Second) of Agency § 8 (1957).

publishing it." Restatement § 247, Comment *c*, p. 545. In other words, "one who appears to have authority to make statements for the [principal] gives to his statements the weight of the [principal's] reputation," *ibid.*—in this case, the weight of ASME's acknowledged expertise in boiler safety. See generally W. Prosser, Law of Torts 467 (4th ed. 1971).

ASME's system of codes and interpretative advice would not be effective if the statements of its agents did not carry with them the assurance that persons in the affected industries could reasonably rely upon their apparent trustworthiness. Behind the principal's liability under an apparent authority theory, then, is "business expediency—the desire that third persons should be given reasonable protection in dealing with agents." Restatement § 262, Comment *a*, p. 572. See *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757 (CA2 1946). The apparent authority theory thus benefits both ASME and the public whom ASME attempts to serve through its codes: "It is . . . for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal." Restatement § 262, Comment *a*, p. 572.

The apparent authority theory has long been the settled rule in the federal system. See *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d, at 759. In *Friedlander* v. *Texas & Pacific R. Co.*, 130 U. S. 416 (1889), the Court held that an employer was not liable for the fraud of his agent, when the employer could derive no benefit from the agent's fraud. But *Gleason* v. *Seaboard Air Line R. Co.*, 278 U. S. 349 (1929), discarded that rule. In *Gleason*, a railroad's employee sought to enrich himself by defrauding a customer of the railroad through a forged bill of lading. The Court of Appeals had absolved the railroad from liability because the employee perpetrated the fraud solely for his own benefit. But this Court re-

versed, overruling *Friedlander*. 278 U. S., at 357. Noting that "there was . . . no want of authority in the agent," *id.*, at 355, the Court held the railroad liable despite the agent's desire to benefit only himself. It explained that "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Id.*, at 356.

In a wide variety of areas, the federal courts, like this Court in *Gleason*, have imposed liability upon principals for the misdeeds of agents acting with apparent authority. See, *e. g.*, *Dark* v. *United States*, 641 F. 2d 805 (CA9 1981) (federal tax liability); *National Acceptance Co.* v. *Coal Producers Assn.*, 604 F. 2d 540 (CA7 1979) (common-law fraud); *Holloway* v. *Howerdd*, 536 F. 2d 690 (CA6 1976) (federal securities fraud); *United States* v. *Sanchez*, 521 F. 2d 244 (CA5 1975) (bail bond fraud), cert. denied, 429 U. S. 817 (1976); *Kerbs* v. *Fall River Industries, Inc.*, 502 F. 2d 731 (CA10 1974) (federal securities fraud); *Gilmore* v. *Constitution Life Ins. Co.*, 502 F. 2d 1344 (CA10 1974) (common-law fraud).[6]

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[6] The dissent delves into the agency law of the late 19th century and concludes that "it was far from clear" that a principal could be held liable for the deliberate torts of his agent. *Post*, at 587. But in fact, while there was a division of authority, many courts had made it very clear that principals could be held liable for torts analogous to the antitrust violations committed by ASME's agents.

For instance, a treatise of that era noted that a "considerable number of American courts" had held the principal liable for the agent's fraud, though the agent acted solely for his own benefit, and praised a leading opinion for its "singular ability and lucidity." E. Huffcut, Elements of the Law of Agency § 155, p. 168 (1895). Indeed, the author commented that the cases holding a principal liable when his agent acted with apparent authority and for the agent's sole benefit were "too various to be referred to in detail." *Id.*, § 157.

In holding a telegraph company liable for the fraud of its agent committed solely for his personal benefit, one court summarized the reasoning that became widespread during the last half of the 19th century: "Persons receiving dispatches in the usual course of business, when there is nothing to

In the past, the Court has refused to permit broad common-law barriers to relief to constrict the antitrust private right of action. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968). It stated there that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat" to deter antitrust violations. *Id.*, at 139. In *Perma Life Mufflers*, the Court honored that purpose by denying defendants the right to invoke a common-law defense (the doctrine of *in pari delicto*) that was inconsistent with the antitrust laws. In this case, we can honor the statutory purpose best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981); *Perma Life*

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excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message." *McCord* v. *Western Union Tel. Co.*, 39 Minn. 181, 185, 39 N. W. 315, 317 (1888). See, *e. g.*, *Bank of Batavia* v. *New York, L. E. & W. R. Co.*, 106 N. Y. 195, 12 N. E. 433 (1887).

Thus, based on the agency law of the late 19th century, there is ample support for holding ASME liable, particularly since Congress intended that the antitrust laws be given broad, remedial effect. See, *e. g.*, *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 312–313 (1978). But, as we have made clear before, Victorian common law does not define the limits of the antitrust private action. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968) (refusing to apply the ancient defense of *in pari delicto* in antitrust cases). We look to the general principles of the common law for guidance in deciding the scope of the antitrust cause of action, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 688 (1978), but our decisions are determined by the congressional intent that led to the enactment of the antitrust laws, a desire to enhance competition, see *id.*, at 688, 691. Here, general agency principles would lead to a finding of liability if the violation in this case were a mere tort; and imposing liability on ASME in accord with those common-law principles honors the congressional intent behind the antitrust statutes.

Mufflers, 392 U. S., at 138. Our remaining inquiry, then, is whether ASME's liability under a theory of apparent authority is consistent with the intent behind the antitrust laws.[7]

B

We hold that the apparent authority theory is consistent with the congressional intent to encourage competition. ASME wields great power in the Nation's economy. Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as entire segments of an industry. H. R. Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968). ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 465 (1941). When it cloaks its subcommittee officials with the authority of its reputation,

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[7] Evidently, in recent years no Court of Appeals other than the Second Circuit has directly decided whether a principal can be held liable for antitrust damages based on an apparent authority theory. But cf. *Truck Drivers' Local No. 421* v. *United States*, 128 F. 2d 227 (CA8 1942). The dissent cites several cases, stating that they appear to reject antitrust liability based on apparent authority. See *post*, at 581–582, and n. 6. *United States* v. *Cadillac Overall Supply Co.*, 568 F. 2d 1078, 1090 (CA5), cert. denied, 437 U. S. 903 (1978); *United States* v. *Hilton Hotels Corp.*, 467 F. 2d 1000, 1004–1007 (CA9 1972), cert. denied *sub nom. Western International Hotels Co.* v. *United States*, 409 U. S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204 (CA3 1970), cert. denied, 401 U. S. 948 (1971). A fair reading of those cases, however, reveals that they did not discuss the merits of an apparent authority theory of antitrust liability. The dissent then dismisses other cases that also do not directly discuss the validity of the apparent authority theory, but that contain language approving apparent authority instructions, see *post*, at 583–584, n. 8. *United States* v. *Continental Group, Inc.*, 603 F. 2d 444, 468, n. 5 (CA3 1979), cert. denied, 444 U. S. 1032 (1980); *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 150–151 (CA6 1960).

ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace.

The facts of this case dramatically illustrate the power of ASME's agents to restrain competition. M&M instigated the submission of a single inquiry to an ASME subcommittee. For its efforts, M&M secured a mere "unofficial" response authored by a single ASME subcommittee chairman. Yet the force of ASME's reputation is so great that M&M was able to use that one "unofficial" response to injure seriously the business of a competitor.

Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes. Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes.[8]

Again, the facts of this case are illustrative. Hardin was able to issue an interpretation of ASME's Boiler and Pressure Vessel Code which in effect declared Hydrolevel's product unsafe. Hardin's interpretation of the code was sent out

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[8] For example, James' employer did not overlook his usefulness as an ASME official. In November 1973, even after the Hydrolevel events had taken place, an M&M executive recommended that James be retained by M&M. The recommendation stated:

"A major reason for the continued success at M&M is a result of [James'] efforts and skill in influencing the various code making bodies to 'legislate' in favor of M&M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M&M market penetration of 70 plus %." App. 86.

The writer emphasized a number of James' ASME activities, including: "Member of main boiler and pressure code committee" and "Chairman of the heating boiler sub-committee (section 4)." *Ibid.*

under Hoyt's name as secretary of the committee, though Hoyt exercised only ministerial duties and played no role in confirming the substance of the April 29, 1971, letter. See App. 125–126. Thus, without any meaningful safeguards,[9] ASME entrusted the interpretation of one of its codes to Hardin. As a result, M&M was able to use ASME's reputation to hinder Hydrolevel's competitive threat.

A principal purpose of the antitrust private cause of action, see 15 U. S. C. § 15, is, of course, to deter anticompetitive practices. *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 314 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S., at 139; see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 342–344 (1979). It is true that imposing liability on ASME's agents themselves will have some deterrent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. "[P]ressure [will be] brought on [the organization] to see to it that [its] agents abide by the law." *United States* v. *A & P Trucking Co.*, 358 U. S. 121, 126 (1958). Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps.[10] Thus, a rule that imposes liability on the

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[9] ASME suggests that Hardin's response did undergo a form of committee review, because he sent copies to the chairman and vice chairman of the full committee. Brief for Petitioner 8. But there is no indication that those officers carefully scrutinized Hardin's response. And certainly they will be encouraged to give responses a closer look in the future if ASME is subject to antitrust liability under an apparent authority theory.

[10] Permitting private plaintiffs to sue defendants like ASME will make that incentive especially powerful, because private suits are an important element of the Nation's antitrust enforcement effort:

"Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These pri-

standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.[11]

The wisdom of the apparent authority rule becomes evident when it is compared to the alternative approaches advanced by the District Court's instructions to the jury, see *supra*, at 564–565, and advocated by ASME.[12] First, ASME insists that it should not be held liable unless it ratified the actions of its agents. But a ratification rule would have anticompetitive effects, directly contrary to the purposes of the antitrust laws. ASME could avoid liability by ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents. Thus, ASME's ratification theory would actually enhance the likelihood that the Society's reputation would be used for anticompetitive ends.

Second, ASME contends that it should not be held liable unless its agents act with an intent to benefit the Society. This proposed rule falls short, though, because it is simply irrelevant to the purposes of the antitrust laws. Whether

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vate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344 (1979) (emphasis in original).

[11] The apparent authority rule is also consistent with the congressional desire that the antitrust laws sweep broadly. Congress extended antitrust liability to "[e]very person," 15 U. S. C. §§ 1, 2, and defined "person" to include corporations and associations, 15 U. S. C. § 7.

[12] ASME insists that the Court foreclosed imposition of civil antitrust liability based on apparent authority in *Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1922), and *Coronado Coal Co.* v. *Mine Workers*, 268 U. S. 295 (1925). Those cases, however, are not controlling here. The Court expressly pointed out: "Here it is not a question . . . of holding out an appearance of authority on which some third person acts." 259 U. S., at 395; 268 U. S., at 304–305. In fact, it noted: "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation." 259 U. S., at 395; 268 U. S., at 304.

they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit or the benefit of their employers.[13]

C

Finally, ASME makes two additional arguments in an attempt to avoid antitrust liability. It characterizes treble damages for antitrust violations as punitive, and urges that

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[13] The dissent argues, unconvincingly to us, that imposing antitrust liability on ASME will not advance enforcement of the antitrust laws.

The dissent claims that the apparent authority rule will "encourag[e] plaintiffs to seek recovery from nonprofit organizations, rather than from the commercial enterprises that benefited from the violation." *Post*, at 591. Here, the dissent engages in "curious reasoning," see *ibid.*, because today's decision does not encourage a plaintiff to sue any particular defendant to the exclusion of others; it merely lists organizations like ASME among the possible defendants in cases similar to this one. Indeed, although the litigation in this case ended with ASME as the only remaining defendant, it seems likely that, in general, a plaintiff will prefer to bring a corporate defendant like M&M (ITT) before a jury, rather than a nonprofit organization that understandably may appeal to a jury's sympathies and that may not provide so deep a pocket as a commercial enterprise.

In addition, the dissent insists that ASME and other such organizations cannot take steps to reduce the likelihood that antitrust violations like the one that occurred in this case will take place in the future. *Post*, at 591–592, n. 17. Evidently ASME does not agree, because it has instituted new procedures specifically in response to this suit. See n. 15, *infra*. The dissent simply refuses to accept that ASME and other such organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation.

under traditional agency law the courts do not employ apparent authority to impose punitive damages upon a principal for the acts of its agents. See *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101 (1893); *United States* v. *Ridglea State Bank*, 357 F. 2d 495 (CA5 1966); see also Restatement § 217C.[14] It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S., at 639. But treble damages were also designed to deter future antitrust violations. *Ibid.* Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486 (1977); see *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746–747 (1977). Treble damages "make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'" under the antitrust laws. *Brunswick Corp.*, *supra*, at 486, n. 10, quoting 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman). Since treble damages serve as a means of deterring

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[14] A majority of courts, however, have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification. See W. Prosser, Law of Torts 12 (4th ed. 1971). *E. g.*, *Kelite Products, Inc.* v. *Binzel*, 224 F. 2d 131, 144 (CA5 1955) ("[T]he jury may in its discretion assess punitive damages against a corporate defendant for oppressive acts of its agent done in the course of his employment, regardless of actual authority or ratification"); *Mayo Hotel Co.* v. *Danciger*, 143 Okla. 196, 200, 288 P. 309, 313 (1930) (holding corporate principal liable for punitive damages, noting that "the legal malice of the servant is the legal malice of the corporation"). In fact, the Court may have departed from the trend of late 19th-century decisions when it issued *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101 (1893), requiring the principal's participation, approval, or ratification. See *Singer Manufacturing Co.* v. *Holdfodt*, 86 Ill. 455, 459 (1877) ("if the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages"); see also *Pullman Palace Car Co.* v. *Lawrence*, 74 Miss. 782, 803–805, 22 So. 53, 57–59 (1897); *Goddard* v. *Grand Trunk R. Co.*, 57 Me. 202, 223–224 (1869).

antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold ASME liable for the acts of agents committed with apparent authority. See Restatement § 217C, Comment *c*, p. 474 (rule limiting principal's liability for punitive damages does not apply to special statutes giving triple damages).

In addition, ASME contends it should not bear the risk of loss for antitrust violations committed by its agents acting with apparent authority because it is a nonprofit organization, not a business seeking profit. But it is beyond debate that nonprofit organizations can be held liable under the antitrust laws. See, *e. g.*, *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961); *Associated Press* v. *United States*, 326 U. S. 1 (1945). Although ASME may not operate for profit, it does derive benefits from its codes, including the fees the Society receives for its code-related publications and services, the prestige the codes bring to the Society, the influence they permit ASME to wield, and the aid the standards provide the profession of mechanical engineering. Since the antitrust violation in this case could not have occurred without ASME's codes and ASME's method of administering them, it is not unfitting that ASME be liable for the damages arising from that violation. See W. Prosser, Law of Torts 459 (4th ed. 1971); W. Seavey, Law of Agency § 83 (1964). Furthermore, as shown above, ASME is in the best position to take precautions that will prevent future antitrust violations.[15] Thus, the fact that ASME is a nonprofit organization does not weaken the force of the antitrust and agency principles that indicate that ASME should be liable for Hydrolevel's antitrust injuries.

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[15] Indeed, ASME has initiated procedures to protect against similar misadventures in the future. After its experience with the Hydrolevel affair, ASME began issuing a publication containing all written technical inquiries pertaining to codes and their interpretations, a publication available through subscription. See ASME Court of Appeals Exhibit Volume,

III

We need not delineate today the outer boundaries of the antitrust liability of standard-setting organizations for the actions of their agents committed with apparent authority. There is no doubt here that Hardin acted within his apparent authority when he answered an inquiry about ASME's Boiler and Pressure Vessel Code as the chairman of the relevant ASME subcommittee. And in this case, we do not face a challenge to a good-faith interpretation of an ASME code reasonably supported by health or safety considerations. See *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963). We have no difficulty in finding that this set of facts falls well within the scope of ASME's liability on an apparent authority theory.

When ASME's agents act in its name, they are able to affect the lives of large numbers of people and the competitive fortunes of businesses throughout the country. By holding ASME liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority, we recognize the important role of ASME and its agents in the economy, and we help to ensure that standard-setting organizations will act with care when they permit their agents to

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p. 110; App. in Nos. 79–7254, 79–7260 (CA2), pp. 784 and 804. Apparently, ASME now gives its interpretations close scrutiny through the publication process. According to the publication's foreword, "[i]n some few instances, a review of the interpretation revealed a need for corrections of a technical nature." In those cases, ASME published "a corrected interpretation . . . immediately after the original reply." See Interpretations, ASME Boiler and Pressure Vessel Code, Foreword (No. 7: Replies to Technical Inquiries January 1, 1980, through June 30, 1980). In addition, the readers are advised that ASME may reconsider its interpretation "when or if additional information is available which the inquirer believes might affect the interpretation." *Ibid.*

ASME's new procedure illustrates that the standard-setting organization itself is in the best position to prevent antitrust violations committed by its agents acting with apparent authority, and therefore that the policies of antitrust and agency law call for imposition of liability upon ASME.

speak for them. We thus make it less likely that competitive challengers like Hydrolevel will be hindered by agents of organizations like ASME in the future.

The judgment of the Court of Appeals is affirmed.

So ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment. However, I do not agree with the reasoning that leads the Court to its conclusion. I agree with the result reached since petitioner permitted itself to be used to further the scheme which caused injury to respondent. At no time did petitioner disavow the challenged conduct of its members who misused their positions in the Society. Under the instructions approved by petitioner and given by the District Court, the jury found that petitioner had "ratified or adopted" the conduct in question.* On that basis the judgment against petitioner should be affirmed but no general rule can appropriately be drawn from the Court's holding.

JUSTICE POWELL, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

The Court today adopts an unprecedented theory of antitrust liability, one applied specifically to a nonprofit, standard-setting association but a theory with undefined boundaries that could encompass a broad spectrum of our country's nonprofit associations. The theory, based on the agency concept of "apparent authority," would impose the poten-

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*The District Court instructed the jury that it could find petitioner liable for the acts of its members only if they acted on behalf of the corporation within the scope of their actual authority or if the corporation thereafter ratified or adopted their acts. Judge Weinstein refused to give the apparent authority instruction proposed by respondent. Nevertheless, the Court of Appeals did not rest on the narrow ratification theory underlying the District Court judgment, but instead reached out to decide that petitioner is liable for the acts of its members if those acts are found to be within their apparent authority: the jury never found liability on that the-

tially crippling burden of treble damages. In this case, the Court specifically holds that standard-setting organizations may be held liable for the acts of their agents even though the organization never ratified, authorized, or derived any benefit whatsoever from the fraudulent activity of the agent and even though the agent acted solely for his private employer's gain. In my view such an expansive rule of strict liability, at least as applied to nonprofit organizations, is inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law that the Court purports to apply, and irrelevant to the achievement of the goals of the antitrust laws. Accordingly, I dissent.

I

The American Society of Mechanical Engineers (ASME) is a nonprofit, tax-exempt, membership corporation with over 90,000 members. Among its many activities, ASME drafts over 400 codes and standards. These codes have been developed through the voluntary efforts of ASME's members, and are a valuable public service. The Boiler and Pressure Vessel Code, relevant in this case, is some 18,000 pages in length. In addition to preparing codes and standards, ASME members—through committees—perform the further service of responding to public inquiries concerning interpretation of the codes. Some measure of the extent of this service can be gathered from the 20,000–30,000 inquiries a year received by the organization concerning just the Boiler and Pressure Vessel Code alone. As a result of a fraudulent answer given by an ASME subcommittee chairman to one of these thousands of inquiries, the entire organization has been exposed to potentially crippling liability.[1]

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ory and the Court of Appeals went "out of bounds." I regard that aspect of the Court of Appeals' opinion and that part of the Court's opinion today as dictum not essential to support the result reached.

[1] The District Court entered a judgment against ASME in an amount in excess of $7 million—a sum that would destroy many such organizations. By contrast McDonnell & Miller, Inc., and Hartford Steam Boiler Inspec-

Of course, nonprofit associations are subject to the antitrust laws. The Court has so held on several occasions. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975).[2] Yet the Court also has noted that the antitrust laws need not be applied to professional organizations in precisely the same manner as they are applied to commercial enterprises. In *Goldfarb*, *supra*, for example, the Court recognized that "[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts that originated in other areas."[3] *Id.*, at 788, n. 17. In view of this recognition, one would not have expected the Court to take

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tion and Insurance Co., commercial enterprises owned by International Telephone and Telegraph Corp., and the beneficiaries of the fraudulent conduct in this case, have settled for $725,000 and $75,000 respectively. Curiously, the Court speaks of the "wisdom" of a rule that encourages such an inequitable result. *Ante*, at 573. The Court correctly notes that the Court of Appeals reversed the damages award against ASME and remanded for a new estimation. Perhaps the final award against ASME will be substantially less than the $7.5 million judgment originally entered. Yet there is no assurance of this.

[2] Although associations now are viewed as being within the scope of the antitrust laws, to my knowledge this is the first case in which the Court has held explicitly that a nonprofit, tax-exempt association is subject to treble-damages liability. Cf. Areeda, Antitrust Immunity for "State Action" After *Lafayette*, 95 Harv. L. Rev. 435, 455 (1981) (footnote omitted) ("[A]ntitrust liability does not necessarily call for a damage remedy. . . . The Supreme Court may come to agree that antitrust liability may vary according to the remedies sought").

ASME refers to itself as a "society." I use the words "organization" and "association" interchangeably to describe a broad range of nonprofit, membership entities and tax-exempt organizations.

[3] *Goldfarb* "properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 699 (1978) (BLACKMUN, J., concurring in part and concurring in judgment). See *id.*, at 701 (stressing the need for "elbow-room for realistic application of the Sherman Act" to other than commercial enterprises).

the occasion of this case to promulgate an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization.

Indeed, the Court points to no case in which any court has held the apparent authority theory of liability applicable in an antitrust case. Nor does the Court cite a single decision in which the apparent authority theory of liability has been applied in a case involving treble or punitive damages and an agent who acts without any intention of benefiting the principal.[4] In a word, the Court makes *new* law, largely ignoring existing precedent.

In *Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1922), and *Coronado Coal Co.* v. *Mine Workers*, 268 U. S. 295 (1925), the Court held that the national union was not liable as principal for the antitrust violations of the local union. The Court was hesitant to impose treble-damages liability on a membership organization in the absence of clear evidence showing ratification or authorization.[5] Even in the context

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[4] The Court cites to several decisions, *ante*, at 575, n. 14, in which courts have levied punitive damages upon the principal for the "unauthorized" acts of an agent. It is not clear that *any* of these decisions holds the principal liable upon the apparent authority of an agent acting without intent to benefit the principal. None of them concerns the antitrust laws. None involves a nonprofit entity.

[5] "[A] trades-union . . . might be held liable . . . but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association." *Coronado Coal Co.*, 268 U. S., at 304. The Court refused to impose liability on the national union simply because it had the authority to discipline the local. See *Mine Workers*, 259 U. S., at 395. Moreover, the Court indicated that this was not a case in which a theory of apparent authority might be applied—despite the national union's power over the local and despite the support of the strike by the president of the national union: "Here it is not a question of contract or of holding out an appearance of authority on which some third person acts." *Ibid.* The majority quotes this language, see *ante*, at 573, n. 12, but misses its point. The *Mine Workers* Court well could have characterized the case before it as involving an exercise of apparent authority by the local

of commercial enterprises, the Courts of Appeals that have considered the matter appear to reject antitrust liability upon mere apparent authority.[6]

Moreover, the Court as much as concedes that an apparent authority rule of liability has rarely, if ever, been used to impose punitive damages upon the principal. See *ante*, at 570, n. 7.[7] Rather than contest this well-established rule of

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union or the national president; it refused to do so. See *Truck Drivers' Local No. 421* v. *United States*, 128 F. 2d 227, 235 (CA8 1942) (viewing the holding in *Mine Workers* as rejecting an apparent authority theory of antitrust liability).

[6] See *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204 (CA3 1970); *United States* v. *Cadillac Overall Supply Co.*, 568 F. 2d 1078, 1090 (CA5 1978); *United States* v. *Hilton Hotels Corp.*, 467 F. 2d 1000 (CA9 1972). Accord *Truck Drivers' Local No. 421* v. *United States*, *supra*, at 235 (union not liable for the antitrust violations of a local division: "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent authority would not be sufficient").

In *United States* v. *Hilton Hotels Corp.*, *supra*, for example, the Court of Appeals for the Ninth Circuit ruled out liability on apparent authority by requiring that the agent hold a "purpose to benefit the corporation." *Id.*, at 1006, n. 4. In light of the rule adopted by the Court today, it is ironic that the Court of Appeals in *Hilton Hotels* considered that its rule of liability was actually a broad one. Although implicitly rejecting a rule of apparent authority, the court held that a corporation could be liable for the acts of its agents "even when done against company orders." *Id.*, at 1004. The court argued that such an expansive rule of liability was justified in the case before it, involving a commercial enterprise, because the Sherman Act was "primarily concerned with the activities of business entities." *Ibid.* A rule promoting corporate liability was supported further by the consideration that antitrust violations "are usually motivated by a desire to enhance profits," "involve basic policy decisions, and must be implemented over an extended period of time," and "if a violation of the Sherman Act occurs, the corporation, and not the individual agents, will have realized the profits from the illegal activity." *Id.*, at 1006. None of these considerations in support of a broad rule of liability applies to the fraudulent, self-interested conduct of ASME members in this case. Yet the Court adopts a rule of liability far broader than that stated by the Ninth Circuit with such care.

[7] In *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 101, 107 (1893), the Court held that "[a] principal . . . cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious in-

agency law, the Court argues that treble damages are not punitive or, even if they are, the purposes of the antitrust laws override this basic rule of the law of agency. In fact the Court often has characterized treble-damages liability as punitive: "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981). See P. Areeda & D. Turner, Antitrust Law ¶311b (1978) ("whether or not compensatory damages ever punish, treble damages are indisputably punishment"). In the context of a nonprofit, tax-exempt organization it would seem even clearer that treble damages primarily punish and are intended to do so. There is no element of restitution here; ASME has derived no ill-gotten gain from the misdeeds of its disloyal agent.

In short, the Court launches on an uncharted course. I know of no antitrust decision that has imposed treble-damages liability upon a commercial enterprise, let alone a nonprofit organization, solely on an apparent authority theory of liability.[8] The antitrust laws have been effectively enforced for over 90 years without the need for such a theory of liability. Indeed, the very facts of this case belie the neces-

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tent on the part of the agent." In a generally similar context, the Court of Appeals for the Fifth Circuit held that a principal was not subject to double damages under the False Claims Act, 31 U. S. C. § 231, for the fraud of an agent acting without intent to benefit the principal. See *United States* v. *Ridglea State Bank*, 357 F. 2d 495, 500 (1966) ("[T]he present action is not primarily one for the recovery of a loss caused by an employee, but is one which, if successful, must result in a recovery wholly out of proportion to actual loss. . . . [T]he case calls for the application of the rule . . . that the knowledge or guilty intent of an agent not acting with a purpose to benefit his employer, will not be imputed to the employer").

[8] Hydrolevel argues that *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 150–151 (CA6 1960), and *United States* v. *Continental Group, Inc.*, 603 F. 2d 444, 468, n. 5 (CA3 1979), support an apparent authority theory of liability in antitrust cases. Yet in *Continental Baking* the court endorsed an instruction that included an "apparent" authority component on the theory that a corporation must "answer for [an agent's] violations of law which inure to the corporation's benefit." There was no such benefit

sity of simply *creating* a new theory of liability; the jury found ASME liable not upon a theory of apparent authority but upon the traditional basis of ratification or authorization. The apparent authority rationale was not even argued to the Second Circuit on appeal. The Second Circuit, and now this Court, reach out unnecessarily to embrace a dubious new doctrine. That the Court chooses the case of a nonprofit, tax-exempt organization to announce its new rule is particularly inappropriate. Nor can the Court's decision be squared with the intent of Congress in enacting the Sherman Act.

II

This case comes before us as an antitrust suit under the Sherman Act. Our focus should be on the intent of Congress.[9] See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, at 639. And that intent emerges clearly from the legislative history:

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in this case. Moreover, in *Continental Group* the court simply affirmed an apparent authority instruction without comment, in a footnote, in a case presenting many other issues. The agents in that case were clearly acting for the benefit of their corporations, and the court may have considered that the apparent authority instruction, if error, was harmless.

In any event, the comparative paucity of authority on the question of apparent authority liability in antitrust cases simply underscores that the Court today is making new law. It also is doing so needlessly as ASME was neither tried nor found liable on the basis of apparent authority.

[9] Relying on a novel public policy as to nonprofit associations, the Court makes little effort to ascertain the intent of Congress either through examining the legislative history or the common law then existing. Indeed, the Court implies that the agency law of the 19th century and "Victorian" common law are irrelevant. See *ante*, at 568–569, n. 6. In seeking to understand the Sherman Act, this Court frequently has found it necessary to "delve" into the history of the common law both "Victorian" and from earlier eras. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 51–62 (1911). The Civil Rights Acts of the 19th century were also the work of a "Victorian" Congress, yet we have looked both to the legislative history and to the common law when interpreting those Acts. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S. 547 (1967).

> "[The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 492–493 (1940).

Senator Sherman twice explained that his bill was directed at anticompetitive *business* activity and not at voluntary associations. In response to a request that the legislation be more clearly tailored to "these great trusts, these great corporations, these large moneyed institutions," Senator Sherman answered as follows:

> "The bill as reported contains three or four simple propositions which relate only to contracts, combinations, agreements made with a view and designed to carry out a certain purpose . . . . It does not interfere in the slightest degree with voluntary associations . . . to advance the interests of a particular trade or occupation. . . . They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them." 21 Cong. Rec. 2562 (1890).

When Senator Hoar expressed the concern that the bill would prohibit temperance organizations, and proposed an amendment to exclude them from the bill, Senator Sherman spoke reassuringly:

> "I have no objection to [this] amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of

> moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce." *Id.*, at 2658.

This legislative history does not indicate that nonprofit associations are exempt from the antitrust laws. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975). But it does counsel against adopting a new rule of agency law that extends the exposure of such organizations to potentially destructive treble-damages liability.

In addition to the legislative history, it is particularly relevant—in view of the Court's reliance on the modern law of agency—to consider the accepted law of agency as it existed at the time the Sherman Act was passed.[10] It was clear under basic principles then established that charitable organizations were not liable for the torts of their agents.[11]

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[10] In *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 644, n. 17 (1981), the Court stated that the rules of common law in effect at the time the Act was passed were relevant to an inquiry into congressional intent: "[I]t is clear that when the Sherman Act was adopted the common law did not provide a right to contribution among tortfeasors participating in proscribed conduct. One permissible, though not mandatory, inference is that Congress relied on courts' continuing to apply principles in effect at the time of enactment." The contemporary case law is relevant precisely because "Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *National Society of Professional Engineers* v. *United States*, 435 U. S., at 688.

[11] "Where a corporation or trustees are conducting a charity with funds devoted to that purpose, the charitable organization is not liable for the torts of its agents or servants, as 'it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants.'" E. Huffcut, Elements of the Law of Agency § 161, pp. 176–177 (1895).

Whether a nonprofit, tax-exempt, public service association would have been considered a "charity" is not clear, but one would think that it well might have been.[12]

Moreover, under the laws of agency as known to the Congress that passed the Sherman Act it was far from clear—even in cases involving commercial enterprises—that a principal could be held liable for the deliberate torts of his agent. According to one treatise of the time, "[w]hile . . . it is well settled that the principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases, that he is not liable for the agent's willful or malicious act." F. Mechem, Law of Agency § 740 (1889) (hereafter Mechem).[13] Indeed, the Court acknowl-

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[12] In describing the liability of the principal for the torts of the agent, the First Restatement of Agency, published in 1933, cautioned that it did not address "any limitations upon liability because of . . . rules applicable to special classes, such as charitable organizations." Restatement of Agency 458.

[13] The complete statement of the rule by Mechem is as follows:

"While . . . it is well settled that the principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases, that he is not liable for the agent's willful or malicious act. . . .

"The tendency of modern cases, however, is to attach less importance to the intention of the agent and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the wilful or malicious acts of his agent, if they are done in the course of his employment and within the scope of his authority; *but that the principal is not liable for such acts, unless previously expressly authorized, or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own*" (emphasis added, footnotes omitted).

Although the concept of within "scope of authority" is not always easy to apply, it is beyond rational doubt that in this case the fraudulent activity of Hardin and James, on behalf of McDonnell & Miller, Inc., was not within the scope of any authority of ASME. In addition, some courts have found that "[a] purpose to benefit the corporation is necessary to bring the

edges this much when it notes that in *Friedlander* v. *Texas & Pacific R. Co.*, 130 U. S. 416 (1889)—decided the year before the Sherman Act was passed—"the Court held that an employer was not liable for the fraud of his agent, when the employer could derive no benefit from the agent's fraud." *Ante*, at 567.[14]

Finally, no principle of agency law was more firmly established in 1890—or now for that matter—than that *punitive* damages are not awarded against a principal for the acts of an agent acting only with apparent authority and without any intention of benefiting the principal. Indeed, this Court

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agent's acts within the scope of his employment." See *United States* v. *Hilton Hotels Corp.*, 467 F. 2d, at 1006, n. 4. It is just such a purpose that was lacking in this case. Indeed, the "agents" in this case were not acting simply for their own malicious purposes, they were acting on behalf of another principal with interests inimical to those of ASME. It is far from clear under principles of agency law that Hardin and James are properly described as the "agents" of ASME when they act to serve a different principal and without any intention of benefiting ASME. See Mechem § 67 ("A person may act as agent of two or more principals . . . if his duties to each are not such as to require . . . incompatible things").

The Court suggests that there was a division among the state courts on the question of the principal's liability for the malicious acts of an agent. See *ante*, at 568–569, n. 6. But there was no division in the federal courts, the courts charged with enforcement of the Sherman Act. In any event, surely the point is not whether every state court recognized the rule stated by this Court in *Friedlander* v. *Texas & Pacific R. Co.*, 130 U. S. 416 (1889). Rather, if there was any uncertainty as to the liability of a commercial principal for the torts of an agent acting in the course of employment, how much clearer must it be that a nonprofit, voluntary association would not have been held liable in treble damages for the acts of an agent acting with apparent authority only.

[14] The Court notes that *Friedlander* was later overruled by *Gleason* v. *Seaboard Air Line R. Co.*, 278 U. S. 349 (1929). The relevance of this fact to *Congress'* intentions is not clear to me. There is "no federal general common law." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938). There is no federal general law of agency. Rather we are engaged here in an exercise in statutory construction. Cf. 21 Cong. Rec. 3149 (1890) (remarks of Sen. Morgan) ("It is very true that we use common-law terms

went further, holding more generally that "'punitive or vindictive damages, or smart money, [are] not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent.'" *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S., at 114, quoting *Hagan* v. *Providence & Worcester R. Co.*, 3 R. I. 88, 91 (1854).[15]

Although an inquiry into the legislative history and the law of agency is not conclusive, it does cast serious doubt on the Court's choice of this case to promulgate a new rule of antitrust liability. Whatever the merits of an apparent authority rule of liability for commercial enterprises, in the case of a treble-damages action against a nonprofit organization, such a rule is inconsistent with what appears to have been the intent of Congress in enacting the Sherman Act.

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here and common-law definitions in order to define an offense which is in itself comparatively new, but it is not a common-law jurisdiction that we are conferring upon the circuit courts of the United States," quoted in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S., at 644).

[15] The Court responds by citing to several *state* law decisions indicating that in some States a principal might have been held liable in punitive damages for the acts of an agent. See *ante*, at 575, n. 14. I believe the Court overstates the extent to which 19th-century state courts imposed punitive damages on the principal for the deliberate torts of an agent. See Mechem § 751; cf. *Mayo Hotel Co.* v. *Danciger*, 143 Okla. 196, 200, 288 P. 309, 312 (1930) ("There are . . . respectable authorities, some of them recent ones, definitely holding that a corporation cannot be subjected to exemplary damages because of the malicious . . . acts of its agents and servants where such acts are not authorized or afterwards ratified . . . . Many of the state courts, *and a majority of the federal courts*, expressly adhere to that doctrine") (emphasis added). More significantly, the Court does not make clear which, if any, of the state decisions it relies upon held the principal liable for punitive damages upon the apparent authority of an agent acting without any intention of benefiting the principal. I had thought that this was the question before us. And again the Court misses the basic point: If the rule of liabilty adopted by the Court today would have seemed questionable in 1890 even as applied to a commercial enterprise, can there be any basis for believing that Congress intended such an extreme rule of liability to be applied to voluntary, nonprofit associations?

III

The underlying theme of the Court's opinion seems to be that any rule of agency law that widens the net of antitrust enforcement and liability should be adopted. Yet the Court has never used such a single-minded approach in the past. In *United States* v. *United States Gypsum Co.*, 438 U. S. 422 (1978), for example, the Court held that intent is a necessary element of a criminal antitrust offense. The Court was unwilling to assume that Congress had intended to create a strict liability crime despite the potential increase in deterrence. Similarly, in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), the Court held that indirect purchasers could not use a "pass-on" theory to recover treble damages from an antitrust violator. The Court rejected the argument that the antitrust laws would be more effective were the class of potential plaintiffs widened. On the contrary, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue." *Id.*, at 735. Nor would the Court accept a rule that might permit both indirect and direct purchasers to sue for the same overcharge. Such a rule "would create a serious risk of multiple liability for defendants." *Id.*, at 730. Thus, the Court has adopted a more discerning approach to questions of antitrust liability in the past—an approach that considers the fairness and appropriateness of a rule in addition to its perceived potential for deterrence.

The Court argues that its expanded rule of liability furthers effective antitrust enforcement. One may question whether a rule of liability developed so late in the day and with so little support in precedent can be described as necessary to antitrust enforcement. When one considers further that the jury found ASME liable under traditional principles, the need for an expanded rule becomes even less credible. Nor does the Court explain how its rule of apparent authority serves the purpose of effective antitrust enforcement. The

primary beneficiary in this case was McDonnell & Miller, the manufacturing company that arranged for the fraudulent ruling by the ASME subcommittee chairman. The sole purpose of the fraud was to disadvantage McDonnell & Miller's competitor. The focus of Hydrolevel's attack, however, has been on ASME.[16] It is curious reasoning to argue, as the Court does, that a rule that encourages plaintiffs to seek recovery from nonprofit organizations, rather than from the commercial enterprises that benefited from the violation, will facilitate proper antitrust enforcement.[17]

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[16] Damages were awarded against ASME in an amount of $7.5 million. By contrast, McDonnell & Miller settled the suit for less than a million dollars. See n. 1, *supra*. The majority's contention that "a plaintiff will prefer to bring a corporate defendant like M&M (ITT) before a jury," *ante*, at 574, n. 13, is not borne out by this case. If the Court has some other case in mind, it does not cite to it.

[17] The Court's argument that the imposition of treble damages will advance antitrust enforcement has a hollow ring in the context of a membership, nonprofit organization. Organizations of this kind normally function through committees composed—as in this case—of volunteers who are not employees, serve only at infrequent intervals, and are virtually uncontrollable by what usually is a small headquarters staff.

The Court suggests that voluntary organizations can "take steps to reduce the likelihood that antitrust violations like the one that occurred in this case will take place in the future." *Ibid.* The Court then refers to "new procedures" adopted by ASME, and criticizes my dissent for refusing "to accept that ASME and other such organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation." *Ibid.*

It would be enlightening if the Court would explain how such an association can protect itself even from "mere tort" liability, see *ante*, at 569, n. 6, much less the treble-damages liability imposed in this case, in light of the Court's adoption of the apparent authority theory of liability. Review procedures well may be helpful to prevent mistakes made in good faith on behalf of an association. But no set of rules and regulations, and no procedures however elaborate, can protect adequately against fraud and disloyalty. In this case, for example, if ASME had required approval by a review committee or even by its governing body before the release of each of the thousands of ruling letters, a member bent on fraud could forge evidence or otherwise circumvent most safeguards. In practice, a rule of ap-

In a more fundamental sense, the Court's assignment of liability to ASME on a theory of apparent authority simply has no relevance to the furtherance of the purposes of the antitrust laws. ASME is not a competitor. The competition here was between McDonnell & Miller, Inc., and Hydrolevel. Of course, if ASME ratifies the fraudulent act of its agent, as the jury found, liability should attach. But the Court has devised what amounts to a rule of strict liability for voluntary associations in antitrust cases. Under the Court's rule ASME would be liable if an ASME building employee pilfered ASME stationery and supplied it to McDonnell & Miller. Similarly, if a private pharmaceutical school—a tax-exempt corporation like ASME—released a study condemning a particular drug, because a competing drug company had suborned the professor who wrote the report, the Court's rule would subject the school to the full brunt of treble damages.

Section 1 of the Sherman Act requires a contract, combination, or conspiracy in restraint of trade. The Court attaches liability in this case on the dubious notion that ASME somehow has "conspired" with McDonnell & Miller. Yet it stretches the concept of vicarious liability beyond its rational limits to conceive of Hardin and James as conspiring on behalf of ASME when they acted solely for the benefit of McDonnell & Miller and against the interests of ASME.[18] The Court simply opens new vistas in the law of conspiracy and vicarious liability, as well as in the imposition of the harsh penalty of treble damages.

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parent authority can be a rule of strict liability as the Court today holds in this case. In the context of a loosely structured, voluntary nonprofit association it may be wholly impractical to adopt any measures that will lessen substantially the likelihood of liability, and if there is liability the Court also would impose punitive damages.

[18] The intersection of the law of agency and vicarious liability with the law of conspiracy makes this a complex case. Yet the Court does not recognize this complexity. It so expands the concept of vicarious liability as to leave little content, in this case, to the requirement in § 1 of the Sherman

Whatever the application of agency law in its traditional setting, application of the most expansive rules of liability in the context of antitrust treble damages and nonprofit, tax-exempt associations threatens serious injustice and overdeterrence. There is no way in which an association adequately can protect itself from this sort of liability. There is no chain of delegated authority, from stockholders through directors and officers, in the typical voluntary association. The members of these associations exercise a far less structured control than the stockholders and directors of a commercial enterprise. Perhaps ASME will attempt to protect itself by ceasing to respond to inquiries concerning its codes. That hardly would contribute either to antitrust enforcement or to the public welfare. And whereas a commercial enterprise may have the resources to bear a treble-damages award, the same cannot be said of most nonprofit organizations.[19]

The Court is so zealous to impose treble-damages liability that it ignores a basic purpose of the Sherman Act: the preservation of *private* action contributing to the public welfare. See *United States* v. *United States Gypsum Co.*, 438 U. S.,

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Act that antitrust plaintiffs demonstrate a contract, combination, or conspiracy. Indeed, the Court never identifies who conspired with whom. Did James—acting for ASME—conspire with Hardin—acting for McDonnell & Miller, Inc., and Hartford Steam Boiler Inspection and Insurance Co.? Or was it the other way around? Could it be said, under the Court's theory, that James had conspired with himself—as a double agent—thereby committing both of his "principals" to an antitrust conspiracy? In my view, it makes more sense to view the matter as a conspiracy between the agents of McDonnell & Miller, Inc., and Hartford Steam Boiler Inspection and Insurance Co. The Court's theory makes possible ratification by ASME irrelevant. In this light, ASME was as much a victim of this conspiracy as Hydrolevel.

[19] It is relevant to note that a nonprofit organization cannot reduce the burden of a treble-damages award by deducting the award as a business expense. See P. Areeda & D. Turner, Antitrust Law § 311a (1978) ("treble damages are generally a deductible business expense for federal income tax purposes").

at 438–443. ASME industry standard-setting can have a significant potential for consumer benefit: for example, its boiler safety information can be expensive if consumers are forced to gain it only by their own experience or by the creation of another bureaucracy. The Court's policy discussion takes no account of this potential cost. Rather, it appears to be so concerned with imposing liability that it puts at risk much of the beneficial private activity of the voluntary associations of our country.

How far the Court's holding extends is unclear. The Court emphasizes that ASME is a standard-setting organization. Yet it does not limit its rationale to these particular organizations. One must be concerned whether the new doctrine and the sweep of the Court's language will be read as exposing the array of nonprofit associations—professional, charitable, educational, and even religious—to a new theory of strict liability in treble damages.

UNITED STATES DEPARTMENT OF STATE ET AL. *v.* WASHINGTON POST CO.

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

No. 81–535. Argued March 31, 1982—Decided May 17, 1982

Respondent filed a request with petitioner United States Department of State under the Freedom of Information Act for documents indicating whether certain Iranian nationals held valid United States passports. The State Department denied the request on the ground that the requested information was exempt from disclosure under Exemption 6 of the Act, which provides that the Act's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Pending an ultimately unsuccessful administrative appeal, respondent brought an action in Federal District Court to enjoin petitioners from withholding the requested documents, and the court granted summary judgment for respondent. The Court of Appeals affirmed, holding that because the citizenship status of the individuals in question was less intimate than information normally contained in personnel and medical files, it was not contained in "similar files" within the meaning of Exemption 6, and that therefore there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.

Held: The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and hence the State Department's denial of the request should have been sustained upon a showing that release of the information would constitute a clearly unwarranted invasion of personal privacy. Although Exemption 6's language sheds little light on what Congress meant by "similar files," the legislative history indicates that Congress did not mean to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information, but that "similar files" was to have a broad, rather than a narrow, meaning. Exemption 6's protection is not determined merely by the nature of the file containing the requested information, and its protection is not lost merely because an agency stores information about an individual in records other than "personnel" or "medical" files. Pp. 599–603.

207 U. S. App. D. C. 372, 647 F. 2d 197, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., concurred in the judgment.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Elinor Hadley Stillman, Leonard Schaitman, Bruce G. Forrest,* and *Margaret E. Clark.*

David E. Kendall argued the cause for respondent. With him on the brief were *Edward Bennett Williams* and *Lon S. Babby.**

JUSTICE REHNQUIST delivered the opinion of the Court.

In September 1979, respondent Washington Post Co. filed a request under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, requesting certain documents from petitioner United States Department of State. The subject of the request was defined as "documents indicating whether Dr. Ali Behzadnia and Dr. Ibrahim Yazdi . . . hold valid U. S. passports." App. 8. The request indicated that respondent would "accept any record held by the Passport Office indicating whether either of these persons is an American citizen." *Ibid.* At the time of the request, both Behzadnia and Yazdi were Iranian nationals living in Iran.

The State Department denied respondent's request the following month, stating that release of the requested information "would be 'a clearly unwarranted invasion of [the] personal privacy' of these persons," *id.*, at 14 (quoting 5 U. S. C. § 552(b)(6)), and therefore was exempt from disclosure under Exemption 6 of the FOIA.[1] Denial of respondent's request

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**Bruce W. Sanford, W. Terry Maguire, Erwin G. Krasnow,* and *Arthur B. Sackler* filed a brief for the American Newspaper Publishers Association et al. as *amici curiae* urging affirmance.

[1] Exemption 6 provides that the disclosure requirements of the FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U. S. C. § 552(b)(6).

was affirmed on appeal by the Department's Council on Classification Policy, which concluded that "the privacy interests to be protected are not incidental ones, but rather are such that they clearly outweigh any public interests which might be served by release of the requested information." *Id.*, at 22–23.

While pursuing the administrative appeal, respondent brought an action in the United States District Court for the District of Columbia to enjoin petitioners from withholding the requested documents. Both sides filed affidavits and motions for summary judgment. Petitioners' affidavit, from the Assistant Secretary of State for Near Eastern and South Asian Affairs, explained that both Behzadnia and Yazdi were prominent figures in Iran's Revolutionary Government and that compliance with respondent's request would "cause a real threat of physical harm" to both men.[2] The District Court nonetheless granted respondent's motion for summary judgment.

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[2] Petitioners' original affidavit stated:

"There is intense anti-American sentiment in Iran and several Iranian revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States. Any individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust. An official of the Government of Iran who is reputed to be an American citizen would, in my opinion, be in physical danger from some of the revolutionary groups that are prone to violence.

. . . . .

"It is the position of the Department of State that any statement at this time by the United States Government which could be construed or misconstrued to indicate that any Iranian public official is currently a United States citizen is likely to cause a real threat of physical harm to that person." Affidavit of Harold H. Saunders, Jan. 14, 1980, App. 17.

The affidavit reported that Yazdi, who had previously held the position of Foreign Minister, was currently a member of the Revolutionary Council and was responsible for solving problems in various regions of Iran. It also indicated that Behzadnia had been a senior official in the Ministry of National Guidance, but that the State Department had not received any report of his activities in recent weeks. *Ibid.* A supplemental affidavit, executed three months after the first affidavit, stated that Yazdi had been

Petitioners appealed, and the Court of Appeals for the District of Columbia Circuit affirmed. 207 U. S. App. D. C. 372, 647 F. 2d 197 (1981). As construed by the Court of Appeals, Exemption 6 permits the withholding of information only when two requirements have been met: first, the information must be contained in personnel, medical, or "similar" files, and second, the information must be of such a nature that its disclosure would constitute a clearly unwarranted invasion of personal privacy. *Id.*, at 373, 647 F. 2d, at 198. Petitioners argued that the first requirement was satisfied because the information sought by respondent was contained in "similar files." The Court of Appeals disagreed, holding that the phrase "similar files" applies only to those records which contain information "'"of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records."'" *Id.*, at 373–374, 647 F. 2d, at 198–199 (quoting *Simpson* v. *Vance*, 208 U. S. App. D. C. 270, 273, 648 F. 2d 10, 13 (1980), in turn quoting *Board of Trade* v. *Commodity Futures Trading Comm'n*, 200 U. S. App. D. C. 339, 345, 627 F. 2d 392, 398 (1980)). Because it found the citizenship status of Behzadnia and Yazdi to be less intimate than information normally contained in personnel and medical files, the Court of Appeals held that it was not contained in "similar files." Therefore, the Court of Appeals reasoned, there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy; having failed to meet the first requirement of Exemption 6, the information had to be disclosed under the mandate of the FOIA. We granted certiorari, 454 U. S. 1030 (1981), to review the Court of Appeals' construction of the "similar files" language, and we now reverse.

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elected to the Iranian National Assembly, but that the activities of Behzadnia were still unreported. Supplemental Affidavit of Harold H. Saunders, Apr. 22, 1980, App. 41.

The language of Exemption 6 sheds little light on what Congress meant by "similar files." Fortunately, the legislative history is somewhat more illuminating. The House and Senate Reports, although not defining the phrase "similar files," suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. After referring to the "great quantities of [Federal Government] files containing intimate details about millions of citizens," the House Report explains that the exemption is "general" in nature and seeks to protect individuals:

> "A *general exemption* for [this] category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information *by excluding those kinds of files the disclosure of which might harm the individual.*" H. R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966) (emphasis added).

Similarly, the Senate Judiciary Committee reached a "consensus that these [personal] files should not be opened to the public, and . . . decided upon a *general exemption* rather than a number of specific statutory authorizations for various agencies." S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965) (emphasis added). The Committee concluded that the balancing of private against public interests, not the nature of the files in which the information was contained, should limit the scope of the exemption: "It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" *Ibid.* Thus, "the primary concern of Congress in drafting

Exemption 6 was to provide for the confidentiality of personal matters." *Department of Air Force* v. *Rose*, 425 U. S. 352, 375, n. 14 (1976).

Respondent relies upon passing references in the legislative history to argue that the phrase "similar files" does not include all files which contain information about particular individuals, but instead is limited to files containing "intimate details" and "highly personal" information. See H. R. Rep. No. 1497, *supra*, at 11; S. Rep. No. 813, *supra*, at 9. We disagree. Passing references and isolated phrases are not controlling when analyzing a legislative history. Congress' statements that it was creating a "general exemption" for information contained in "great quantities of files," H. R. Rep. No. 1497, *supra*, at 11, suggest that the phrase "similar files" was to have a broad, rather than a narrow, meaning. This impression is confirmed by the frequent characterization of the "clearly unwarranted invasion of personal privacy" language as a "limitation" which holds Exemption 6 "within bounds." S. Rep. No. 813, *supra*, at 9. See also, H. R. Rep. No. 1497, *supra*, at 11; S. Rep. No. 1219, 88th Cong., 2d Sess., 14 (1964). Had the words "similar files" been intended to be only a narrow addition to "personnel and medical files," there would seem to be no reason for concern about the exemption's being "held within bounds," and there surely would be clear suggestions in the legislative history that such a narrow meaning was intended. We have found none.

A proper analysis of the exemption must also take into account the fact that "personnel and medical files," the two benchmarks for measuring the term "similar files," are likely to contain much information about a particular individual that is not intimate. Information such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet respondent does not disagree that such information, if contained in a "personnel" or "medical" file, would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy. The passport informa-

tion here requested, if it exists, presumably would be found in files containing much of the same kind of information. Such files would contain at least the information that normally is required from a passport applicant. See 22 U. S. C. § 213. It strains the normal meaning of the word to say that such files are not "similar" to personnel or medical files.

We agree with petitioners' argument that adoption of respondent's limited view of Exemption 6 would produce anomalous results. Under the plain language of the exemption, nonintimate information about a particular individual which happens to be contained in a personnel or medical file can be withheld if its release would constitute a clearly unwarranted invasion of personal privacy. And yet under respondent's view of the exemption, the very same information, being nonintimate and therefore not within the "similar files" language, would be subject to mandatory disclosure if it happened to be contained in records other than personnel or medical files. "[T]he protection of an individual's right of privacy" which Congress sought to achieve by preventing "the disclosure of [information] which might harm the individual," H. R. Rep. No. 1497, *supra*, at 11, surely was not intended to turn upon the label of the file which contains the damaging information. In *Department of Air Force* v. *Rose*, *supra*, at 372, we recognized that the protection of Exemption 6 is not determined merely by the nature of the file in which the requested information is contained:

> "Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files."

By the same reasoning, information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than "personnel" or "medical" files.

In sum, we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." H. R. Rep. No. 1497, *supra*, at 11.[3] When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy.[4]

The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and petitioners' denial of the request should have been sustained upon a showing by the Government that release of the information would constitute a clearly unwarranted invasion of personal privacy.[5] The Court of Appeals expressly declined to con-

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[3] This view of Exemption 6 was adopted by the Attorney General shortly after enactment of the FOIA in a memorandum explaining the meaning of the Act to various federal agencies:

"It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, *and all private or personal information contained in other files* which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 36 (June 1967) (emphasis added).

[4] This construction of Exemption 6 will not render meaningless the threshold requirement that information be contained in personnel, medical, and similar files by reducing it to a test which fails to screen out any information that will not be screened out by the balancing of private against public interests. As petitioners point out, there are undoubtedly many Government files which contain information not personal to any particular individual, the disclosure of which would nonetheless cause embarrassment to certain persons. Information unrelated to any particular person presumably would not satisfy the threshold test.

[5] In holding that "similar files" are limited to those containing intimate details about individuals such as might also be contained in personnel or medical files, the Court of Appeals relied on its decision in *Simpson* v. *Vance*, 208 U. S. App. D. C. 270, 648 F. 2d 10 (1980). In *Simpson*, the

sider the effect of disclosure upon the privacy interests of Behzadnia and Yazdi, and we think that such balancing should be left to the Court of Appeals or to the District Court on remand. 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 O'CONNOR concurs in the judgment.

Court of Appeals held that portions of the State Department's Biographical Register could not be considered a "similar file" because such information was currently available to the public. *Id.*, at 275, 648 F. 2d, at 15. At the same time, *Simpson* held that release of information pertaining to an individual's marital status and the name of the individual's spouse "would not be appropriate." *Id.*, at 277, 648 F. 2d, at 17. Respondent contends that information concerning the citizenship of Behzadnia and Yazdi likewise cannot be withheld as contained in "similar files" because United States citizenship is a matter of public record.

Even under the Court of Appeals' holding in *Simpson*, however, the fact that citizenship is a matter of public record somewhere in the Nation cannot be decisive, since it would seem almost certain that the information concerning marital status that was withheld in *Simpson* would likewise be contained in public records. In addition, "personnel" files, which expressly come within Exemption 6, are likely to contain much information that is equally a matter of public record. Place of birth, date of birth, marital status, past criminal convictions, and acquisition of citizenship are some examples. The public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a "clearly unwarranted invasion of personal privacy," but it does not militate against a conclusion that files are "similar" to personnel and medical files.

FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS *v.* MURRAY

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

No. 80-2205. Argued April 21, 1982—Decided May 17, 1982

Certiorari dismissed. Reported below: 634 F. 2d 365.

Scott A. Mayer argued the cause for petitioner. With him on the briefs was *Joan S. Cherry*.

John S. Elson, by appointment of the Court, 454 U. S. 1096, argued the cause and filed a brief for respondent.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Sybille Fritzsche* filed a brief for the Chicago Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

HOPPER, CORRECTIONS COMMISSIONER, ET AL. *v.* EVANS

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

No. 80–1714. Argued March 24, 1982—Decided May 24, 1982

Respondent was convicted in an Alabama state court of the capital offense of an intentional killing during a robbery, and was sentenced to death. At the time of respondent's trial, an Alabama statute precluded jury instructions on lesser included offenses in capital cases. The conviction and sentence were affirmed on automatic appeal. Subsequently, habeas corpus proceedings were brought in Federal District Court seeking to have the conviction set aside on the ground, *inter alia*, that respondent had been convicted and sentenced under a statute that unconstitutionally precluded consideration of lesser included offenses. The District Court denied relief. Pending an appeal, the Alabama statute precluding lesser included offense instructions in capital cases was invalidated in *Beck* v. *Alabama*, 447 U. S. 625. The Court of Appeals then reversed the District Court, concluding that *Beck* v. *Alabama* meant that the Alabama preclusion clause so "infected" respondent's trial that he must be retried so that he might have the opportunity to introduce evidence of some lesser included offense.

Held: The Alabama preclusion clause did not prejudice respondent in any way, and he is not entitled to a new trial, where his own evidence negates the possibility that a lesser included offense instruction might have been warranted. The Court of Appeals misread *Beck* v. *Alabama*, which held that due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. Here, the evidence not only supported the claim that respondent intended to kill the victim but affirmatively negated any claim that he did not intend to kill the victim. Accordingly, an instruction on the offense of unintentional killing was not warranted. Pp. 610–614.

628 F. 2d 400 and 639 F. 2d 221, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN and MARSHALL, JJ., filed an opinion concurring in part and dissenting in part, *post*, p. 614.

Edward E. Carnes, Assistant Attorney General of Alabama, argued the cause for petitioners. With him on the

briefs were *Charles Graddick*, Attorney General, and *Susan Beth Farmer*, Assistant Attorney General.

John L. Carroll argued the cause for respondent. With him on the brief was *Steven Alan Reiss*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether, after invalidation of a state law which precluded instructions on lesser included offenses in capital cases, a new trial is required in a capital case in which the defendant's own evidence negates the possibility that such an instruction might have been warranted.

I

A

Shortly after respondent was released on parole from an Indiana prison in 1976, he and Wayne Ritter, who had been a fellow inmate, embarked on what respondent himself described as a cross-country crime "spree." App. 9. According to respondent's testimony, they committed about 30 armed robberies, 9 kidnapings, and 2 extortion schemes in seven different States during a 2-month period. Respondent testified that on January 5, 1977, he and Ritter entered a pawnshop in Mobile, Ala., intending to rob it. Ritter asked the pawnshop owner, Edward Nassar, to show him a gun. When Nassar handed the gun to Ritter, respondent pulled his own gun and announced that he intended to rob him. Nassar dropped to his hands and knees and crawled toward his office. Respondent then shot him in the back, killing him. Nassar's two daughters, aged seven and nine, were in the pawnshop at the time of the murder.

Respondent and Ritter were captured by the Federal Bureau of Investigation in Little Rock, Ark., on March 7, 1977. A gun, which was identified by ballistics tests as the weapon used to kill Nassar, was found in their motel room and the

gun Nassar showed Ritter at the pawnshop was found in their car. After being fully advised of his constitutional rights, respondent signed a detailed written confession on March 8, 1977, admitting that he shot Nassar in the back. He repeated and elaborated on his confession before a grand jury in Mobile on April 4, 1977. He told the grand jury that Nassar was not the only person he had ever killed, that he felt no remorse because of that murder, that he would kill again in similar circumstances, and that he intended to return to a life of crime if he was ever freed. Since he doubted that he ever would be freed, he told the grand jury that he wanted to be executed as soon as possible. The grand jury indicted him under Ala. Code § 13–11–2(a)(2) (1975), which makes "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant" a capital offense.

B

Under Alabama law, capital punishment may be imposed only after conviction by a jury. *Prothro* v. *State*, 370 So. 2d 740, 746–747 (Ala. Crim. App. 1979). The prosecution, therefore, declined to accept respondent's guilty plea. A psychiatrist, appointed by the court, concluded that respondent was competent to stand trial. Respondent and Ritter were tried together. The evidence against respondent included his confession to the Federal Bureau of Investigation, two eyewitnesses who identified him, and ballistic evidence matching the bullet that killed Nassar with respondent's gun.

Against his attorneys' advice, respondent testified in his own behalf. He told the jury he had shot Nassar, and informed it that he had "no intention whatsoever of ever reforming in any way" and would return to a life of crime if released. App. 38. Release from prison in the near future appeared unlikely since he was wanted for a number of crimes in different States as a result of the armed robbery spree. Respondent told the jury: "I would rather die by

electrocution than spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State." *Ibid.*

The judge instructed the jury that it could not convict respondent merely on the basis of his confession, but must consider all the evidence, and could find him guilty only if the State had proved its case beyond a reasonable doubt. Prior to this Court's judgment in *Beck* v. *Alabama*, 447 U. S. 625 (1980), a jury hearing a capital case in Alabama was precluded by statute from considering lesser included offenses. Alabama required a jury to convict the defendant of the capital offense charged or return a verdict of not guilty. The jurors were instructed to impose the death sentence if they concluded that the defendant was guilty, and they were not told that the trial judge could reduce the sentence to a sentence of life imprisonment without possibility of parole. *Id.*, at 639, n. 15. The jury in this case returned its verdict of guilty in less than 15 minutes.

The trial judge sentenced respondent to death and entered written findings that the aggravating circumstances in his case far outweighed any mitigating circumstances. The conviction and sentence were subject to automatic appeal and were affirmed on review. *Evans* v. *State*, 361 So. 2d 654 (Ala. Crim. App. 1977), aff'd, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U. S. 930 (1979).

C

Respondent's mother initiated habeas corpus proceedings under 28 U. S. C. § 2254. Respondent then changed his previous attitude of desiring execution. His habeas corpus petition to the District Court for the Southern District of Alabama challenged his conviction on a number of grounds, including an allegation that he had been convicted and sentenced under a statute which unconstitutionally precluded consideration of lesser included offenses. He did not allege that he had been

prejudiced by the Alabama death penalty statute's preclusion clause, but instead argued that the statute was unconstitutional on its face and that his conviction therefore must be set aside. The District Court held a hearing, and subsequently rejected respondent's arguments, noting that respondent had confessed at least four times to shooting Nassar. *Evans* v. *Britton*, 472 F. Supp. 707, 711–712 (1979).

Subsequently, in *Beck* v. *Alabama*, *supra*, we held that the sentence of death could not be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense, provided that the evidence would have supported such a verdict. The petitioner in *Beck* was also involved in a robbery in the course of which a murder occurred. He contended, however, that he did not kill the victim or intend his death. Instead he claimed that while he was attempting to tie up the victim, an 80-year-old man, his accomplice unexpectedly struck and killed the man. The State conceded that, on the evidence in that case, Beck would have been entitled to an instruction on the lesser included, noncapital offense of felony murder except for the preclusion clause. *Id.*, at 629–630.

Our opinion in *Beck* stressed that the jury was faced with a situation in which its choices were only to convict the defendant and sentence him to death or find him not guilty. The jury could not take a third option of finding that although the defendant had committed a grave crime, it was not so grave as to warrant capital punishment. We concluded that a jury might have convicted Beck but also might have rejected capital punishment if it believed Beck's testimony. On the facts shown in *Beck*, we held that the defendant was entitled to a lesser included offense instruction as a matter of due process. *Id.*, at 637.

In the instant case, the Court of Appeals for the Fifth Circuit, purporting to rely on *Beck*, reversed the District

Court's denial of relief. *Evans* v. *Britton*, 628 F. 2d 400 (1980), modified, 639 F. 2d 221 (1981). We granted certiorari, 452 U. S. 960 (1981), and we now reverse.

II

A

The Court of Appeals misread our opinion in *Beck*. The *Beck* opinion considered the alternatives open to a jury which is constrained by a preclusion clause and therefore unable to convict a defendant of a lesser included offense when there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense. In such a situation, we concluded, a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime. 447 U. S., at 642. Or a jury might acquit because it does not think the crime warrants death, even if it concludes that the defendant is guilty of a lesser offense. *Id.*, at 642–643. While in some cases a defendant might profit from the preclusion clause, we concluded that "in every case [it] introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.*, at 643.

The Court of Appeals, quoting this statement from our *Beck* opinion, repeatedly stressed the words "in every case." 639 F. 2d, at 223–224; 628 F. 2d, at 401. It concluded that we meant that the Alabama preclusion clause was a "brooding omnipresence" which might "infect virtually every aspect of any capital defendant's trial from beginning to end." *Ibid.* It is important to note that our holding in *Beck* was limited to the question submitted on certiorari, and we expressly pointed out that we granted the writ in that case to decide whether a jury must be permitted to convict a defendant of a lesser included offense "when the evidence would have supported such a verdict." 447 U. S., at 627. Thus, our holding was that the jury must be permitted to consider a verdict of guilt of a noncapital offense "in every case" in which "the evidence would have supported such a verdict."

Our holding in *Beck*, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided. See, *e. g.*, *Roberts* v. *Louisiana*, 428 U. S. 325, 334 (1976) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (principal opinion); *Furman* v. *Georgia*, 408 U. S. 238, 313 (1972) (WHITE, J., concurring); *id.*, at 309–310 (Stewart, J., concurring); and *id.*, at 398–399 (BURGER, C. J., dissenting).

In *Roberts* v. *Louisiana*, *supra*, the Court considered a Louisiana statute which was the obverse of the Alabama preclusion clause. In Louisiana, prior to *Roberts*, every jury in a capital murder case was permitted to return a verdict of guilty of the noncapital crimes of second-degree murder and manslaughter, "even if there [was] not a scintilla of evidence to support the lesser verdicts." *Id.*, at 334 (plurality opinion). Such a practice was impermissible, a plurality of the Court concluded, because it invited the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first-degree murder, inevitably leading to arbitrary results. *Id.*, at 335. The analysis in *Roberts* thus suggests that an instruction on a lesser offense in this case would have been impermissible absent evidence supporting a conviction of a lesser offense.

Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence. Under Alabama law, the rule in noncapital cases is that a lesser included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum* v. *State*, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973).

The federal rule is that a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble* v. *United States*, 412 U. S. 205, 208 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases.

B

The uniqueness of respondent's claims has been outlined in the statement of facts, but those facts merit emphasis for they bear on the key issue of whether there was any evidentiary basis to support a conviction of a lesser included offense. From the outset, beginning with his appearance before the grand jury, respondent made it crystal clear that he had killed the victim, that he intended to kill him, and that he would do the same thing again in similar circumstances. At trial, he testified that he always tried to choose places to rob so that he could avoid killing people. However, he also testified that, if necessary, he was always prepared to kill. App. 19–21. Respondent was convicted, under Ala. Code § 13–11–2(a)(2) (1975), of robbery when the victim was intentionally killed.

In this Court, respondent contends that he could have been convicted under Ala. Code § 13–1–70 (1975), which makes a "homicide . . . committed in the perpetration of, or the attempt to perpetrate, any . . . robbery" a noncapital offense. Respondent concedes that a conviction is warranted under this section only when a defendant lacks intent to kill. Brief for Respondent 26. Respondent's current claim is a curious—even cynical—new version of the claim of self-defense. His testimony given before the grand jury was:

> "I was going to shoot him if he reached for a—a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody, *if you don't have to.* That's—

> that's stupidity, you know. But if it ever came down to a case of, you know, *of me or somebody else, well that's—that's pure instinct. That's self-preservation. I'm going to fire; I'm not going to waste any time . . . .*" App. 19 (emphasis supplied).

On the basis of this testimony, he implies that he had no malice toward the victim nor intent to kill him. Of course, it can be argued that this case is not one of a killer with affirmative, purposeful malice; his claim bears some resemblance to that of a hired killer who, bearing no ill will or malice toward his victim, simply engages in the pursuit of his chosen occupation. Respondent thus blandly—even boldly—proclaims that, although he will *try* not to kill his victims, he will do it if he finds it to be an occupational necessity.

It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon, engaged in an armed robbery, admits to shooting his victim in the back in the circumstances shown here. The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction on the offense of unintentional killing during this robbery was therefore not warranted. See *Fulghum, supra.*

Finally, the Court of Appeals stated, and respondent argues, that the mere existence of the preclusion clause so "infected" respondent's trial that he must be retried so that he may have the opportunity to introduce evidence of some lesser included offense. Respondent suggests no plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial.* The preclusion clause did not prejudice re-

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*In another case with different facts, a defendant might make a plausible claim that he would have employed different trial tactics—for example, that he would have introduced certain evidence or requested certain jury

spondent in any way, and a new trial is not warranted. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967).

Reversed.

JUSTICE BRENNAN and JUSTICE MARSHALL, concurring in part and dissenting in part.

We join the opinion of the Court to the extent that it reverses the judgment of the Court of Appeals invalidating respondent's conviction. But we adhere to our view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). Consequently, we would affirm the judgment of the Court of Appeals to the extent that it invalidates the sentence of death imposed upon respondent.

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instructions—but for the preclusion clause. However, that is not this case, since the defendant here confessed that he shot the victim and then pleaded guilty to capital murder.

FEDERAL BUREAU OF INVESTIGATION ET AL. v. ABRAMSON

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

No. 80-1735. Argued January 11, 1982—Decided May 24, 1982

Respondent journalist filed a request with the Federal Bureau of Investigation (FBI) pursuant to the Freedom of Information Act (FOIA) for documents relating to the FBI's transmittal to the White House of information concerning individuals who had criticized the Presidential administration. The FBI denied the request under, *inter alia*, Exemption 7(C) of the FOIA, which exempts from disclosure "investigatory records compiled for law enforcement purposes" when the release of such records would "constitute an unwarranted invasion of personal privacy." After unsuccessful administrative appeals, respondent filed suit in Federal District Court to enjoin the FBI from withholding the requested documents. While the suit was pending, the FBI provided respondent with certain documents, and respondent then modified his request to seek only a certain cover letter from the FBI to the White House, along with the accompanying "name check" summaries containing information culled from FBI files on the individuals in question, and certain attached documents. The District Court granted the FBI's motion for a summary judgment with respect to material withheld pursuant to Exemption 7(C). The Court of Appeals reversed, holding that except for those documents attached to the "name check" summaries that may have been duplicates of FBI files, the FBI had failed to show that the documents were compiled for law enforcement purposes, and that accordingly Exemption 7(C) was unavailable even though disclosure would constitute an unwarranted invasion of personal privacy.

Held: Information contained in records originally compiled for law enforcement purposes does not lose its Exemption 7 exemption where such information is reproduced or summarized in a new document prepared for other than law enforcement purposes, but continues to meet Exemption 7's threshold requirement of being compiled for law enforcement purposes. Pp. 621-632.

(a) Although the Court of Appeals' construction of Exemption 7's threshold requirement as turning on the purpose for which the document sought to be withheld was prepared, not on the purpose for which the material included in the document was collected, is a plausible one on the face of the statute, it is not the only reasonable construction of the statutory language. The statutory language is reasonably construable to

protect that part of an otherwise nonexempt compilation that essentially reproduces and is substantially the equivalent of all or part of an earlier record made for law enforcement uses. This construction more accurately reflects Congress' intention, is more consistent with the Act's structure, and more fully serves its purposes. Pp. 623–629.

(b) The legitimate interests in protecting information from disclosure under Exemption 7 are not satisfied by other exemptions, such as Exemption 6, which protects against unwarranted invasion of personal privacy, and Exemption 5, which protects from disclosure predecisional communications within an agency and other internal documents. The reasons for an exemption under Exemption 7 remain intact even though information in a law enforcement record is recompiled in another document for other than law enforcement purposes. Pp. 629–630.

(c) The result in this case is consistent with the principle that FOIA exemptions are to be narrowly construed, since there is no request that Exemption 7 be expanded to agencies or material not envisioned by Congress. Pp. 630–631.

(d) Congress' concern with possible misuse of governmental information for partisan political activity is not the equivalent of a mandate to release any information that might document such activity. Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such information would lead to one of the listed harms under Exemption 7, the information is exempt. Congress thus created a scheme of categorical exclusion and did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis. P. 631.

212 U. S. App. D. C. 58, 658 F. 2d 806, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 632. O'CONNOR, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 633.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Schiffer*, *Elinor Hadley Stillman*, *Leonard Schaitman*, and *Howard S. Scher*.

Sharon T. Nelson argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging affirmance were filed by *Cornish F. Hitchcock*, *Alan B. Morrison*, *David C. Vladeck*, and *Katherine A. Meyer*

JUSTICE WHITE delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1976 ed. and Supp. IV), does not require the disclosure of "investigatory records compiled for law enforcement purposes" when the release of such records would interfere with effective law enforcement, impede the administration of justice, constitute an unwarranted invasion of privacy, or produce certain other specified consequences. § 552(b)(7).[1]

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for Freedom of Information Clearinghouse; and by *Bruce W. Sanford, Richard M. Schmidt, Jr., Erwin G. Krasnow, Arthur B. Sackler*, and *J. Laurent Scharff* for the Society of Professional Journalists, Sigma Delta Chi, et al.

[1] Section 552(b) in its entirety provides:

"This section does not apply to matters that are—

"(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information fur-

The sole question presented in this case is whether information contained in records compiled for law enforcement purposes loses that exempt status when it is incorporated into records compiled for purposes other than law enforcement.

I

Respondent Howard Abramson is a professional journalist interested in the extent to which the White House may have used the Federal Bureau of Investigation (FBI) and its files to obtain derogatory information about political opponents. On June 23, 1976, Abramson filed a request pursuant to FOIA for specific documents relating to the transmittal from the FBI to the White House in 1969 of information concerning particular individuals who had criticized the administration.[2] The Bureau denied the request on grounds that the information was exempt from disclosure pursuant to § 552(b)(6) (Exemption 6) and § 552(b)(7)(C) (Exemption 7(C)), both

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nished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells.

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

[2] Abramson sought the following documents:

"—Copies of any and all information contained in [FBI] files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donahue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario.

"—Copies of any and all information so transmitted.

"—An uncensored copy of the Oct. 6, 1969 letter from J. Edgar Hoover to

of which protect against unwarranted invasions of personal privacy. Abramson, believing his first request was flawed by its specificity, filed a much broader request,[3] which was denied for failure to "reasonably describe the records sought" as required by § 552(a)(3).

In December 1977, after unsuccessfully appealing both denials within the agency, Abramson filed suit in the United States District Court for the District of Columbia to enjoin the FBI from withholding the requested records. While the suit was pending, the FBI provided Abramson with 84 pages of documents, some intact and some with deletions. The District Court rejected the Bureau's assertions that all deleted material was exempt. *Abramson* v. *U. S. Dept. of Justice*, Civ. Action No. 77–2206 (Jan. 3, 1979). In response, the FBI submitted an affidavit to the District Court explaining the justification for each deletion. In light of the released material and the Bureau's affidavit, Abramson mod-

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John D. Ehrlichman by which Mr. Hoover transmits 'memoranda' on several individuals to Mr. Ehrlichman.

"—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

"—Copies of all data so transmitted by the Oct. 6, 1969 letter from Mr. Hoover to Mr. Ehrlichman.

"—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter." 212 U. S. App. D. C. 58, 60, 658 F. 2d 806, 808 (1980).

[3] In his revised request, Abramson sought the following documents:

—"All written requests and written records of oral or telephone requests from the White House or any person employed by the White House to the FBI for information about any person who was in 1969, 1970, 1971, 1972, 1973, or 1974 the holder of a federal elective office or a candidate for federal elective office.

—"All written replies and records of oral or telephonic replies from the FBI to the White House in response to requests described in paragraph one.

—"Any index or indices to requests or replies described in paragraphs one and two." *Id.*, at 61, 658 F. 2d, at 809.

ified his request, seeking only the material withheld from a single document consisting of a one-page memorandum from J. Edgar Hoover to John D. Ehrlichman, together with approximately 63 pages of "name check" summaries and attached documents. The "name check" summaries contained information, culled from existing FBI files, on 11 public figures.

The District Court found that the FBI had failed to show that the information was compiled for law enforcement rather than political purposes, but went on to rule that Exemption 7(C) was validly invoked by the Government because disclosure of the withheld materials would constitute an unwarranted invasion of personal privacy. The District Court thus granted the Government's motion for summary judgment with respect to material withheld pursuant to Exemption 7(C). *Abramson* v. *FBI*, Civ. Action No. 77–2206 (Nov. 30, 1979).

The Court of Appeals reversed, holding that with the exception of those documents attached to the summaries that may have been duplicates of original FBI files,[4] the Government had failed to sustain its burden of demonstrating that the documents were compiled for law enforcement purposes, and that Exemption 7(C) was therefore unavailable even though disclosure would constitute an unwarranted invasion of personal privacy. 212 U. S. App. D. C. 58, 658 F. 2d

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[4] The District Court did not consider the summaries and attachments separately for Exemption 7(C) purposes. The Court of Appeals was "satisfied that the 'name check' summaries were not compiled for legitimate law enforcement purposes," but was "less sure" of the "attachments," being unable to determine their precise nature or the purposes for which they were originally created. The Court of Appeals stated that if the "attachments" documents were already in existence and a part of the FBI files prior to the White House's "name check" requests, and if these original documents were sent to the White House as initially compiled, without modification, then a determination would have to be made whether these documents meet the threshold requirements of Exemption 7. Thus, the

806 (1980). To reach this conclusion, the Court of Appeals rejected the Government's claim that Exemption 7(C) was applicable because the "name check" summaries contained information taken from documents in FBI files that had been created for law enforcement purposes. Thus, with the exception noted, the Government's invocation of Exemption 7(C) was rejected. Because this interpretation of the Exemption has important ramifications for law enforcement agencies, for persons about whom information has been compiled, and for the general public, we granted certiorari. 452 U. S. 937 (1981). We now reverse.

II

The Freedom of Information Act sets forth a policy of broad disclosure of Government documents in order "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 242 (1978); *EPA* v. *Mink*, 410 U. S. 73, 80 (1973). Yet Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused. Here we are concerned with Exemption 7, which was intended to prevent premature disclosure of investigatory materials which might be used in a law enforcement action. This provision originally exempted "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." A sweeping interpretation given the Exemption by some courts permitted the unlimited withholding of files merely by classifying them as investigatory files compiled for law enforcement purposes. As a result, the Exemption underwent

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Court of Appeals remanded to the District Court for a finding on whether the "attachments" were the original documents in FBI files and whether they were originally compiled pursuant to a legitimate law enforcement investigation.

a major revision in 1974. As amended, Exemption 7 authorizes disclosure of law enforcement records unless the agency can demonstrate one of six specific harms. The provision now protects

> "investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel." 5 U. S. C. § 552(b)(7).

The language of the Exemption indicates that judicial review of an asserted Exemption 7 privilege requires a two-part inquiry. First, a requested document must be shown to have been an investigatory record "compiled for law enforcement purposes." If so, the agency must demonstrate that release of the material would have one of the six results specified in the Act.[5]

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[5] The Attorney General's Memorandum on the 1974 Amendments to the FOIA 6 (1975) reads the amendments in this manner. Respondent places undue emphasis on this document and the direction to first determine whether a record has been compiled for law enforcement purposes and then examine whether one of the six harms are involved. This is, of course, the prescribed order in which a court should interpret the Exemption. It does not necessarily mean, however, that information admittedly compiled in a law enforcement record loses its exemption when recompiled. The Attorney General's memorandum submits that the test is whether the requested material "reflect[s] or result[s] from investigative efforts" into civil or criminal enforcement matters." *Ibid.*

As the case comes to us, it is agreed that the information withheld by the Bureau was originally compiled for law enforcement purposes. It is also settled that the name check summaries were developed pursuant to a request from the White House for information about certain public personalities and were not compiled for law enforcement purposes. Finally, it is not disputed that if the threshold requirement of Exemption 7 is met—if the documents were compiled for law enforcement purposes—the disclosure of such information would be an unwarranted invasion of privacy. The sole question for decision is whether information originally compiled for law enforcement purposes loses its Exemption 7 protection if summarized in a new document not created for law enforcement purposes.

III

No express answer is provided by the statutory language or by the legislative history. The Court of Appeals resolved the question in favor of Abramson by construing the threshold requirement of Exemption 7 in the following manner. The cover letter to the White House, along with the accompanying summaries and attachments, constituted a "record." Because that "record" was not compiled for law enforcement purposes, the material within it could not qualify for the exemption, regardless of the purpose for which that material was originally gathered and recorded and regardless of the impact that disclosure of such information would produce. The Court of Appeals supported its interpretation by distinguishing between documents and information. "[T]he statutory scheme of the FOIA very clearly indicates that exemptions from disclosure apply only to *documents*, and not to the use of the information contained in such documents." 212 U. S. App. D. C., at 65, 658 F. 2d, at 813.[6] A "record" is a

[6] The Court of Appeals supported this distinction by referring to two of its earlier FOIA decisions. *Simpson* v. *Vance*, 208 U. S. App. D. C. 270, 648 F. 2d 10 (1980), held that a State Department Biographic Register was not exempt from disclosure even though the information in the Register was extracted from personnel files which may have been exempt under

"document" and, for the Court of Appeals, the document must be treated as a unit for purposes of deciding whether it was prepared for law enforcement purposes. The threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared, not on the purpose for which the material included in the document was collected. The Court of Appeals would apply this rule even when the information for which the exemption is claimed appears in the requested document in the form essentially identical to the original memorialization.

The Court of Appeals' view is a tenable construction of Exemption 7, but there is another interpretation, equally plausible on the face of the statute, of the requirement that the record sought to be withheld must have been prepared for law enforcement purposes. If a requested document, such as the one sent to the White House in this case, contains or essentially reproduces all or part of a record that was previously compiled for law enforcement reasons, it is reasonably arguable that the law enforcement record does not lose its exemption by its subsequent inclusion in a document created for a nonexempt purpose. The Court of Appeals itself pointed the way to this alternative construction by indicating that Exemption 7 protected attachments to the name check summaries that were duplicates of original records compiled for law enforcement purposes. Those records would not lose their exemption by being included in a later compilation made for political purposes. Although in this case the duplicate law enforcement records were attached to the name check summaries, the result hardly should be different if all or part

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Exemption 6 of FOIA. *Lesar* v. *United States Department of Justice*, 204 U. S. App. D. C. 200, 636 F. 2d 472 (1980), held that summaries of FBI surveillance records did not lose their exempt status because the underlying original surveillance records from which the summaries were compiled may not have been gathered for legitimate law enforcement purposes. As we understand those cases, however, neither of them is inconsistent with the result we reach today.

of the prior record were quoted verbatim in the new document. That document, even though it may be delivered to another agency for a nonexempt purpose, contains a "record" qualifying for consideration under Exemption 7.

The question is whether FOIA permits the same result where the exempt record is not reproduced verbatim but is accurately reflected in summary form. The Court of Appeals would have it that because the FBI summarized the relevant records rather than reproducing them verbatim, the identical information no longer qualifies for the exemption. The originally compiled record and the derivative summary would be treated completely differently although the content of the information is the same and although the reasons for maintaining its confidentiality remain equally strong. We are of the view, however, that the statutory language is reasonably construable to protect that part of an otherwise nonexempt compilation which essentially reproduces and is substantially the equivalent of all or part of an earlier record made for law enforcement uses. Moreover, that construction of the statute rather than the interpretation embraced by the Court of Appeals, more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute.[7]

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[7] We would agree with much of JUSTICE O'CONNOR's dissenting opinion if we accepted its premise that the language of the statute is "plain" in the sense that it can reasonably be read only as the dissent would read it. But we do not agree with that premise: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States* v. *Monia*, 317 U. S. 424, 431 (1943) (Frankfurter, J., dissenting). Given our view that there is a reasonable alternative construction of Exemption 7, much of JUSTICE O'CONNOR's dissent is rhetorical and beside the point. For our duty then is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *NLRB* v. *Lion Oil Co.*, 352 U. S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part).

FOIA contains no definition of the term "record."[8] Throughout the legislative history of the 1974 amendments, Representatives and Senators used interchangeably such terms as "documents," "records," "matters," and "information."[9] Furthermore, in determining whether information in a requested record should be released, the Act consistently focuses on the nature of the information and the effects of disclosure. After enumerating the nine exemptions from FOIA, Congress expressly directed that "[a]ny reasonably segregable portion of a record" be "provided to any person requesting such record after deletion of the portions which are exempt . . . ." § 552(b). This provision requires agencies and courts to differentiate among the contents of a document rather than to treat it as an indivisible "record" for FOIA purposes. When a record is requested, it is permissible for an agency to divide the record into parts that are exempt and parts that are not exempt, based on the kind of information contained in the respective parts.

The 1974 amendments modified Exemption 7 in two ways. First, by substituting the word "records" for "files," Congress intended for courts to "consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible 'commingling' by an

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[8] While Congress' definition of "records" in the Records Disposal Act and the Presidential Records Act of 1978 was helpful to us in determining that an agency must create or obtain a record before information to which the Government has access can be considered an "agency record," *Forsham* v. *Harris*, 445 U. S. 169, 183–184 (1980), the definition of terms in these Acts does not aid in resolving the issue presented in this case.

[9] See, *e. g.*, 120 Cong. Rec. 17033 (1974), House Committee on Government Operations and Senate Committee on the Judiciary, Freedom of Information Act and Amendments of 1974 (Pub. L. 93–502), Source Book, 94th Cong., 1st Sess., 333 (Joint Comm. Print 1975) (hereafter 1975 Source Book) (remarks of Sen. Hart); 120 Cong. Rec. 17034 (1974), 1975 Source Book 335 (remarks of Sen. Kennedy); 120 Cong. Rec. 36626 (1974), 1975 Source Book 413 (remarks of Rep. Reid); 120 Cong. Rec. 36877–36878 (1974), 1975 Source Book 468 (remarks of Sen. R. Byrd); H. R. Conf. Rep. No. 93–1380, p. 13 (1974), 1975 Source Book 230.

agency's placing in an investigatory file material that did not legitimately have to be kept confidential." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S., at 229–230.[10] Second, by enumerating six particular objectives of the Exemption, the amendments required reviewing courts to "loo[k] to the reasons" for allowing withholding of information. *Id.*, at 230. The requirement that one of six types of harm must be demonstrated to prevent production of a record compiled for law enforcement purposes was a reaction to a line of cases decided by the Court of Appeals for the District of Columbia Circuit which read the original Exemption 7 as protecting all law enforcement files.[11] The amendment requires that the Government "specify some harm in order to claim the exemption" rather than "affording all law enforcement matters a blanket exemption." 120 Cong. Rec. 36626 (1974), 1975 Source Book 413 (statement of Rep. Reid). The enumera-

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[10] There is no claim that the "name check" summaries are protected against disclosure *in toto* because of the presence of some material falling squarely within Exemption 7.

[11] Senator Hart, the sponsor of the 1974 amendment, stated specifically that the amendment's purpose was to respond to four decisions of the Court of Appeals for the District of Columbia Circuit which cumulatively held that all material found in an investigatory file compiled for law enforcement purposes was exempt, even if an enforcement proceeding were neither imminent nor likely. *Weisberg* v. *United States Dept. of Justice*, 160 U. S. App. D. C. 71, 74, 489 F. 2d 1195, 1198 (1973), cert. denied, 416 U. S. 993 (1974); *Aspin* v. *Department of Defense*, 160 U. S. App. D. C. 231, 237, 491 F. 2d 24, 30 (1973); *Ditlow* v. *Brinegar*, 161 U. S. App. D. C. 154, 494 F. 2d 1073 (1974); *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 163 U. S. App. D. C. 368, 502 F. 2d 370 (1974). These four cases, in Senator Hart's view, erected a "stone wall" preventing public access to any material in an investigatory file. 120 Cong. Rec. 17033 (1974), 1975 Source Book 332. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 227–229 (1978). The Conference Report on the 1974 amendment similarly states that the amendment was designed to communicate Congress' disapproval of these court decisions. H. R. Conf. Rep. No. 93–1380, at 12, 1975 Source Book 229. Because the disapproved decisions cut far more broadly into the Act than the present issue, we cannot infer that Congress intended all subsidiary questions concerning Exemption 7's scope to be resolved against the Government.

tion of these categories of undesirable consequences indicates Congress believed the harm of disclosing this type of information would outweigh its benefits. There is nothing to suggest, and no reason for believing, that Congress would have preferred a different outcome simply because the information is now reproduced in a non-law-enforcement record.

The Court of Appeals would protect information compiled in a law enforcement record when transferred in original form to another agency for nonexempt purposes but would withdraw that protection if the same information or record is transmitted in slightly different form. In terms of the statutory objectives, this distinction makes little sense.[12] If the Court of Appeals is correct that this kind of information should be disclosed, its position leaves an obvious means of qualifying for the exemption—transmittal of the law enforcement records intact. Conversely, to the extent that Congress intended information initially gathered in the course of a law enforcement investigation to remain private, the Court

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[12] Information transmitted for a non-law-enforcement purpose may well still be used in an ongoing investigation. Moreover, by compromising the confidentiality of information gathered for law enforcement purposes, the Court of Appeals' decision could result in restricting the flow of essential information to the Government. Deputy Attorney General Schmults stated before the Second Circuit Judicial Conference (May 9, 1981): "The risk of disclosure of FBI records has made private persons, nonfederal law enforcement officials, and informants reticent about providing vital information. Many informants have actually stopped cooperating with the FBI, for example, because they feared that their identities would be disclosed under the Act." As quoted in Kennedy, Foreword: Is The Pendulum Swinging Away From Freedom of Information?, 16 Harv. Civ. Rights-Civ. Lib. L. Rev. 311, 315 (1981). See FOIA Update 1 (Dept. of Justice, Sept. 1981) ("[E]xperiences of the FBI and DEA indicate that there is a widespread perception among confidential information sources that federal investigators cannot fully guarantee the confidentiality of information because of FOIA"). The Drug Enforcement Administration claims that 40% of FOIA requests come from convicted felons, many of whom are seeking information with which to identify the informants who helped to convict them. Freedom of Information Act Oversight, Hearings before a Sub-

of Appeals' decision creates a substantial prospect that this purpose, the very reason for Exemption 7's existence, will no longer be served.

IV

Neither are we persuaded by the several other arguments Abramson submits in support of the decision below.

First, we reject the argument that the legitimate interests in protecting information from disclosure under Exemption 7 are satisfied by other exemptions when a record has been recompiled for a non-law-enforcement purpose. In particular, Abramson submits that Exemption 6 suffices to protect the privacy interest of individuals. Even if this were so with respect to the particular information requested in this case, the threshold inquiry of what constitutes compilation for law enforcement purposes must be considered with regard for all six of the types of harm stemming from disclosure that Congress sought to prevent. Assuming that Exemption 6 provided fully comparable protection against disclosures which would constitute unwarranted invasions of privacy, a questionable proposition itself,[13] no such companion provision in FOIA would halt the disclosure of information that might deprive an individual of a fair trial, interrupt a law enforcement investigation, safeguard confidential law enforcement techniques, or even protect the physical well-being of law en-

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committee of the House Committee on Government Operations, 97th Cong., 1st Sess., 165 (1981) (statement of Jonathan Rose, Dept. of Justice); see also U. S. Dept. of Justice, Attorney General's Task Force on Violent Crime, Final Report 32 (1981).

The Court has previously recognized that the purposes of the exemptions do not disappear when information is incorporated in a new document or otherwise put to a different use. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 166 (1975) (Document protected by Exemption 7 does not become discloseable solely because it is referred to in a final agency opinion; "reasons underlying Congress' decision to protect investigatory files [remain] applicable").

[13] Exemption 6 protects against disclosure of information which would constitute a "clearly unwarranted" invasion of privacy. Exemption 7 does not require that the harm to privacy be "clearly" unwarranted. The dis-

forcement personnel. No other provision of FOIA could compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure. It is therefore critical that the compiled-for-law-enforcement requirement be construed to avoid the release of information that would produce the undesirable results specified.

For much the same reason, the result we reach today is fully consistent with our holding in *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 148–154 (1975), that Exemption 5, § 552(b)(5), an exemption protecting from mandatory disclosure predecisional communications within an agency and other internal documents, does not protect internal advisory communications when incorporated in a final agency decision. The purposes behind Exemption 5, protecting the give-and-take of the decisional process, were not violated by disclosure once an agency chooses expressly to adopt a particular text as its official view. As we have explained above, this cannot be said here. The reasons for an Exemption 7 exemption may well remain intact even though information in a law enforcement record is recompiled in another document for a non-law-enforcement function.

The result is also consistent with the oft-repeated caveat that FOIA exemptions are to be narrowly construed, *Department of Air Force* v. *Rose*, 425 U. S. 352, 361 (1976). While Congress established that the basic policy of the Act is in favor of disclosure, it recognized the important interests

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tinction is meaningful. As we noted in *Department of Air Force* v. *Rose*, 425 U. S. 352, 379, n. 16 (1976), the Conference Committee dropped the "clearly" in response to a Presidential request, 120 Cong. Rec. 33158–33159 (1974), 1975 Source Book 368–372 (letters between President Ford and Sen. Kennedy); 120 Cong. Rec. 34162–34163 (1974), 1975 Source Book 377–380 (letters between President Ford and Cong. Moorhead), and the bill was enacted as reported by the Conference Committee, 88 Stat. 1563. Thus, even with respect to Exemption 7(C), it should not be assumed that Exemption 6 would provide overlapping protection.

served by the exemptions. We are not asked in this case to expand Exemption 7 to agencies or material not envisioned by Congress: "It is . . . necessary for the very operation of our Government to allow it to keep confidential certain material such as the investigatory files of the Federal Bureau of Investigation." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Reliance on this principle of narrow construction is particularly unpersuasive in this case where it is conceded that the information as originally compiled is exempt under Exemption 7 and where it is the respondent, not the Government, who urges a formalistic reading of the Act.

We are not persuaded that Congress' undeniable concern with possible misuse of governmental information for partisan political activity is the equivalent of a mandate to release any information which might document such activity. Congress did not differentiate between the purposes for which information was requested. *NLRB* v. *Sears, Roebuck & Co.*, *supra*, at 149. Rather, the Act required assessment of the harm produced by disclosure of certain types of information. Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such information would lead to one of the listed harms, the information is exempt. Congress thus created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.[14]

V

We therefore find that the construction adopted by the Court of Appeals, while plausible on the face of the statute, lacks support in the legislative history and would frustrate the purposes of Exemption 7. We hold that information ini-

[14] To be sure, the rule crafted by the Court of Appeals might deter the interagency transfer of information initially gathered for law enforcement purposes, but it should be remembered that FOIA is legislation directed at securing public access to information, not an Act intended to interdict the flow of information among Government agencies.

tially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document prepared for a non-law-enforcement purpose. Of course, it is the agency's burden to establish that the requested information originated in a record protected by Exemption 7. The Court of Appeals refused to consider such a showing as a sufficient reason for withholding certain information. The judgment of the Court of Appeals is therefore reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

Exemption 7 of the Freedom of Information Act, 5 U. S. C. § 552(b)(7), permits agencies to withhold "investigatory *records* compiled for law enforcement purposes, but only to the extent that the production of such *records* would . . . (C) constitute an unwarranted invasion of personal privacy." (Emphasis added.) The Court today holds that this language authorizes petitioner FBI to withhold investigatory records *not* compiled for law enforcement purposes simply because some information contained in those records was compiled for such purposes. The Court declares that "[o]nce it is established that *information* was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such *information* would lead to one of the listed harms [in Exemption 7], the *information* is exempt." *Ante*, at 631 (emphasis added).

I cannot escape the conclusion that the Court has simply substituted the word "information" for the word "records" in Exemption 7(C). Yet we have earlier recognized that "[t]he Freedom of Information Act deals with 'agency records,' not information in the abstract." *Forsham* v. *Harris*, 445 U. S. 169, 185 (1980). I agree with JUSTICE O'CONNOR's assess-

ment that the legislative history reveals that Congress chose the term "records," rather than the word "information," advisedly. The Court's unwillingness to give the statutory language its plain meaning requires judges who are evaluating Exemption 7(C) claims to parse agency records and determine whether any piece of information contained in those records was originally compiled for a law enforcement purpose. Because the Court presents no reason, convincing to me, why its deviation from the statutory language is necessary or desirable, I respectfully dissent.

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joins, dissenting.

Justice Frankfurter once explained the limits of statutory construction as follows:

> "[T]he courts are not at large. . . . They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. . . . A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. . . .
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> . . . . .
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> [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533, 535 (1947).

The Court does not approach this case in that spirit. Instead, it redrafts the statutory phrase "investigatory records compiled for law enforcement purposes" to exempt investigatory records that "were *not* compiled for law enforcement purposes," *ante*, at 623 (emphasis added).[1] Unfortunately, none of the usual grounds of statutory construction supports the Court's result. First, there is no doubt that if Exemption 7 is given the straightforward interpretation based on its plain language that the Court concedes is both "tenable," *ante*, at 624, and "plausible," *ante*, at 631, the name check summaries do not qualify for exemption. Second, the rather sparse legislative history of the Exemption provides, as the Court admits, *ante*, at 623, "[n]o express answer" regarding the meaning of the Exemption, leaving the Court no reason for overriding the usual presumption that the plain language of a statute controls its construction. Finally, the straightforward interpretation of Exemption 7, rejected by the Court, does not lead to consequences so absurd that one is forced to conclude that Congress could not have meant what it said in the Exemption.

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[1] Because the Government did not challenge in this Court or in the Court of Appeals the finding of the District Court that the name check summaries at issue had not been compiled for law enforcement purposes, the Court properly assumes the validity of that finding. The District Court explained its ruling as follows:

"The document at issue concerns information requested by and transmitted to the Nixon White House concerning eleven individuals. Each of these eleven individuals has been prominently associated with liberal causes and/or has been outspoken in their opposition to the war in Indochina that was being waged by this nation at that time. . . .

"The defendants contend that the White House 'name check' requests qualify as records compiled for law enforcement purposes because the White House has special security and appointment functions. At no point in their pleadings do the defendants relate these broad and general duties to the individuals about whom information was requested from the FBI. Thus, there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants have failed to meet their burden, and summary judgment will be granted in favor of the plaintiff on this point." App. to Pet. for Cert. 27a.

Under these circumstances, the Court's rejection of the plain language of the Exemption must be viewed as an effort to perfect the FOIA by judicial alteration. Since reform of legislation is a task constitutionally allocated to Congress, not this Court, I believe the Court today errs. I respectfully dissent.

I

A

"[S]tatutory construction 'must begin with the language of the statute itself,' and '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Bread Political Action Committee* v. *FEC*, 455 U. S. 577, 580 (1982) (citations omitted). In approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation. I begin, therefore, by focusing attention on the pertinent language of Exemption 7.

At issue in this case[2] is the meaning of the seven-word phrase Congress used to describe the documents it intended to exempt: "investigatory records compiled for law enforcement purposes." The Exemption's syntax is plain and unambiguous: "records" is twice modified, first, by "investigatory," and then, by "compiled for law enforcement purposes." Congress evidently meant to exempt "records" that are both "investigatory" and "compiled for law enforcement purposes."[3]

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[2] The Court rephrases the "sole question for decision" as "whether information originally compiled for law enforcement purposes loses its Exemption 7 protection if summarized in a new document not created for law enforcement purposes." *Ante*, at 623. The question presented by this case, however, is simply whether the contested documents are "investigatory records compiled for law enforcement purposes" within the meaning of Exemption 7.

[3] Strictly speaking, the Exemption is narrower than stated in text, since the Act also provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the

Since neither of the parties before this Court contends that the District Court erred in finding that the records at issue, though perhaps "investigatory," were "not compiled for law enforcement purposes," *ante*, at 623, the case would, at first blush, seem to be over: the documents withheld by the FBI do not fit within the language of the Exemption and, therefore, must be released to the respondent.[4]

The logic of this straightforward result is all the more compelling in light of the canons of construction peculiar to FOIA cases. As we have emphasized before, the enumerated exemptions to the FOIA "[were] explicitly made exclusive," *EPA* v. *Mink*, 410 U. S. 73, 79 (1973), and "must be narrowly construed." *Department of Air Force* v. *Rose*, 425 U. S. 352, 361 (1976) (citations omitted).[5] The reason for preferring a narrow construction is simply that "'the recognized principal purpose of the FOIA requires us to choose that in-

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portions which are exempt," 5 U. S. C. § 552(b). In effect, then, Exemption 7 shields only those "reasonably segregable portion[s]" of "records" that are both "investigatory" and "compiled for law enforcement purposes."

[4] The Court claims "[n]o express answer" to the question presented by the case "is provided by the statutory language," *ante*, at 623. Apparently, the Court's assertion is intended to state the Court's conclusions that the language of the statute does not mean what it says and that, therefore, a straightforward reading of the statute is "formalistic," *ante*, at 631. The statutory language does provide an "express answer," though not one to the Court's liking.

[5] Courts frequently refer to "the oft-repeated caveat that FOIA exemptions are to be narrowly construed," *ante*, at 630. *E. g.*, *Founding Church of Scientology of Washington, D.C., Inc.* v. *Bell*, 195 U. S. App. D. C. 363, 367–368, 603 F. 2d 945, 949–950 (1979) ("[t]he legislative history of the Act and the 1974 amendments to it support a narrow construction of the exemptions"); *New England Medical Center Hospital* v. *NLRB*, 548 F. 2d 377, 384 (CA1 1976) ("'disclosure, not secrecy, is the dominant objective of the Act,' and . . . exemptions are to be 'narrowly construed'" (citations omitted); *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 571 F. 2d 195, 200, n. 15 (CA4 1978) ("Exemptions in the FOIA are to be 'narrowly construed,' with all doubts resolved in 'favoring disclosure'" (citations

terpretation most favoring disclosure.'" *Id.*, at 366, quoting *Vaughn* v. *Rosen*, 173 U. S. App. D. C. 187, 193, 523 F. 2d 1136, 1142 (1975). Even if it were possible to concoct genuine doubts about the plain meaning of Exemption 7's language, therefore, those doubts would have to be resolved in favor of disclosure.

Under the conceded facts of the present case, however, no doubts arise.[6] The records at issue were not "compiled for

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omitted); *Cox* v. *United States Dept. of Justice*, 576 F. 2d 1302, 1305 (CA8 1978) ("The exemptions provided by subsection (b) 'must be narrowly construed'" (citation omitted)).

The Act itself emphasizes that it "does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated* . . . ." 5 U. S. C. § 552(c) (1976 ed., Supp. IV) (emphasis added). Moreover, the legislative histories of the Act and of the 1974 amendments dictate a narrow construction of the exemptions to the FOIA. See, *e. g.*, S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) (the FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated* statutory language" (emphasis added)); S. Rep. No. 93–854, p. 6 (1974), reprinted in House Committee on Government Operations and Senate Committee on the Judiciary, Freedom of Information Act and Amendments of 1974 (Pub. L. 93–502), Source Book, 94th Cong., 1st Sess., 158 (Joint Comm. Print 1975) (hereafter cited as Source Book).

[6] According to the Court, the phrase "investigatory records compiled" might have been intended to mean something like "investigatory information gathered." The Court, of course, cannot claim that the ordinary, everyday meanings of the words "records" and "compiled" are ambiguous. Instead, as JUSTICE BLACKMUN suggests, *ante*, at 632, "the Court has simply substituted the word 'information' for the word 'records' in Exemption 7(C)."

Notably, the Court does not attempt to cite cases interpreting the word "record" as used in the FOIA to refer to information apart from the particular tangible forms in which that information is recorded. In fact, this Court itself has said that the "[FOIA] deals with 'agency records,' not information in the abstract." *Forsham* v. *Harris*, 445 U. S. 169, 185 (1980). Surely, for example, a complete summary in different words, no matter how accurate, of all the information contained in an agency record would not satisfy an FOIA request for that record.

law enforcement purposes." The statutory language thus clearly proclaims that the documents are not exempt from disclosure. As Chief Justice Marshall wrote more than a century and a half ago: "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96 (1820).

B

Of course, while it is elementary that the plain language interpretation of a statute enjoys a robust presumption in its favor,[7] it is also true that Congress cannot, in every instance, be counted on to have said what it meant or to have meant what it said. Statutes, therefore, "are not to be construed so strictly as to defeat the obvious intention of the legislature." *Id.*, at 95. Thus, a "clearly expressed legislative intention" to the contrary could dislodge the meaning apparent from the plain language of Exemption 7, even though that meaning "must ordinarily be regarded as conclusive," *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980).[8]

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[7] See, *e. g.*, *TVA* v. *Hill*, 437 U. S. 153, 184, n. 29 (1978) ("[w]hen confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning") (BURGER, C. J.).

[8] The English practice, by contrast, excludes external evidence from the process of statutory construction. Under the classical English approach, "[i]t was permissible to consider what the law was before the statute, what 'mischief' the statute was meant to remedy, and what the statute actually said," but "it was not permissible to refer to the debates in Parliament for light on what the statute meant, nor to the changes which were made in the original bill before it became an act." T. Plucknett, A Concise History of the Common Law 335 (5th ed. 1956). This "wooden English doctrine" of excluding consideration of legislative history has been rejected by this Court "since the days of Marshall," as a "pernicious oversimplification," *United States* v. *Monia*, 317 U. S. 424, 431–432 (1943) (Frankfurter, J., dissenting).

The Court, however, rejects the plain language of Exemption 7 without identifying any "obvious" evidence of a "clearly expressed" congressional intention to have Exemption 7 mean something other than what it says.[9] In fact, the Court candidly admits that "[n]o express answer is provided . . . by the legislative history," *ante*, at 623, which explains, perhaps, why the Court's opinion is nearly devoid of references to it.

The Court cites the legislative history of the 1974 amendment to Exemption 7 no more than four times during the course of its opinion. None of those citations provides anything like sufficient grounds for displacing the plain meaning of the Exemption.[10] In fact, none of the Court's four citations directly addresses the question. In sum, the Exemp-

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[9] The Court does suggest, in effect, that Congress loosely drafted the statute, and intended to refer to "information" when it wrote "records." In support of its position, the Court cites instances in which a few Members of Congress, in the heat of floor discussions and debates, seemed to use the terms "documents," "records," "matters," and "information" rather freely. *Ante*, at 625–626, and n. 9. Because these discussions did not focus on the distinction created by the Court's construction of Exemption 7, they hardly can be considered to be the "clearly expressed legislative intention to the contrary," *Bread Political Action Committee* v. *FEC*, 455 U. S. 577, 580 (1982), required to overcome the presumption in favor of the plain language of a statute.

[10] To see how little support those citations provide for the Court's position, it is only necessary to examine them. First, as noted in n. 9, *supra*, the Court cites the legislative history to show that some Members of Congress, in the heat of debate over the wisdom of the Exemption, used terms such as "documents," "records," "matters," and "information" interchangeably. *Ante*, at 625–626, and n. 9. Second, the Court quotes a Congressman's statement that the Exemption requires the Government to specify some harm before the Government can successfully resist disclosure. *Ante*, at 627. Third, the Court cites the legislative history to show that Exemption 7 was enacted to override decisions of the Court of Appeals for the District of Columbia Circuit, which had expansively interpreted the Exemption's predecessor. *Ante*, at 627, and n. 11. And finally, the Court cites correspondence between President Ford and Members of Con-

tion's legislative history provides no basis whatever for ignoring the words of the Act.[11]

C

Even without the legislative history on its side, to be sure, the Court might be entitled to reject the plain language of Exemption 7 in order to avoid "patently absurd consequences," *United States* v. *Brown*, 333 U. S. 18, 27 (1948), that Congress could not possibly have intended. The Court, however, cannot, and does not, claim that the plain language of Exemption 7 leads to such results, though the Court does level a lesser charge. In the Court's words:

> "The Court of Appeals would protect information compiled in a law enforcement record when transferred in original form to another agency for nonexempt purposes but would withdraw that protection if the same information or record is transmitted in slightly different form. In terms of the statutory objectives, this distinction makes little sense." *Ante*, at 628 (footnote omitted).

In short, the Court accuses Congress of having arbitrarily drawn the line between exempt and nonexempt materials.

Congress, however, ordinarily is free to draw lines without cavil from this Court, so long as it respects the constitutional proprieties. We do not, and should not, make it our business

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gress supporting the view that the protection of Exemption 6 does not fully overlap the protection of Exemption 7. *Ante*, at 629–630, n. 13. In short, none of these citations directly supports the Court's result.

The legislative history of the 1974 amendment to Exemption 7 is summarized in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 226–234 (1978).

[11] Significantly, however, the legislative history of the 1974 amendment shows that Congress was aware of specific instances of alleged misconduct by the FBI and hoped the more liberal disclosure mandated by the amendment would discourage such incidents. See, *e. g.*, 120 Cong. Rec. 17039 (1974), Source Book 348 (remarks of Sen. Weicker); 120 Cong. Rec. 36866–36867 (1974), Source Book 440–441 (remarks of Sen. Kennedy); 120 Cong. Rec. 36872 (1974), Source Book 453 (remarks of Sen. Hart).

to second-guess the Legislature's judgment when it comes to such matters. Line-drawing, after all, frequently requires arbitrary decisions that cannot sensibly be subjected to judicial review.[12]

"In terms of the statutory objectives," moreover, it is plain that the principal purpose of the FOIA was "to establish a general philosophy of full agency disclosure," S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), in order "to permit access to official information long shielded unnecessarily from public view," even if it must come from "unwilling official

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[12] Moreover, the Court is too quick to find Congress' distinction to "mak[e] little sense." In fact, whatever the merits of the line Congress adopted, it is comprehensible.

To understand why, one need realize only that a summary often provides as much information about the individual who summarizes as it does about the material summarized. The summaries of the opinions of this Court carried in the media, for example, frequently provide a perspective, not only on the work of the Court, but also on the perceptions and judgment of the reporters and their editors.

Photocopies, on the other hand, indicate nothing about the purposes and perceptions of the persons responsible for their creation. Any significance a photocopy may have derives exclusively from its content and not from the process of its creation. Indeed, the Government usually satisfies an FOIA request by releasing a photocopy while retaining the original. A photocopy, moreover, inevitably discloses the entire original that it duplicates, while a summary discloses its sources only in part.

Thus, it is not true that the distinction Congress drew "makes little sense." A rational Congress could have thought that a summary is likely to provide sufficient insight into the purposes of its creators and requesters to justify its disclosure under the FOIA, if it was "compiled" for other than "law enforcement purposes." The same Congress, furthermore, could have concluded that a photocopy, which can never convey anything other than the entire contents of the original document, should not be disclosed if the original is exempt from disclosure.

Of course, there is no evidence that Congress thought about this distinction, and Congress plainly could not have considered the distinction as applied to the facts of the present case. The point, however, is only that the line drawn by the language of the statute does not lead to patently absurd consequences. Whether that distinction is well advised as a matter of sound policy is, of course, entirely another matter—and not for this Court.

hands." *EPA* v. *Mink*, 410 U. S., at 80. It scarcely needs to be repeated that Congress' ultimate objective in requiring such disclosure was "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 242 (1978) (citations omitted). Clearly, the disclosure of the name check summaries required by the plain language of Exemption 7 comports with this statutory objective, since it mandates the release of documents that the District Court found to have been compiled for political, not "law enforcement," purposes.

Unquestionably, of course, Congress' intent in enacting the FOIA was not singlemindedly to require disclosure whatever the costs. Congress realized that, under certain circumstances, the costs of disclosure exceed the benefits. Congress weighed those costs and benefits, and recorded the results of its deliberations in the "clearly delineated statutory language," S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), of the FOIA's nine exclusive exemptions. The Senate Committee described the legislative balancing process: "It is not an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." *Ibid.*

Once having completed the arduous and demanding task of balancing interests, and having recorded the results in the nine enumerated exemptions from the FOIA, Congress then attempted to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the "availability of records to the public" is not limited, "except as *specifically* stated." 5 U. S. C. § 552(c) (1976 ed., Supp. IV) (emphasis added). The Court now presumes to suggest that the balance as struck in Exemption 7 "makes little sense" "[i]n terms of the statutory objectives." *Ante*, at

628 (footnote omitted). The statutory objectives, however, point in different directions, demanding a balance between the Act's primary focus on disclosure and other, sometimes equally compelling, interests. The particular balance struck by Congress and enshrined in Exemption 7 may be open to attack as ill-advised, but, exactly because it represents a compromise between competing policies, it cannot be said to lead to results so "patently absurd" that a court can only conclude that Congress did not mean what it said.

In short, if the Court hopes to support its result on the basis that a straightforward interpretation of the statute "makes little sense," the Court errs, unless, of course, the "sense" to which the Court refers is to be found, not in logic, but in the Court's view of what makes "sense" as a matter of public policy.

II

To reach its result, the Court assumes that, through inadvertence or inattention, Congress' pen slipped while amending Exemption 7 in 1974. Proceeding on this basis, the Court helpfully undertakes to rewrite the Exemption, substituting for the statutory phrase "investigatory records compiled for law enforcement purposes" something like "records containing investigatory information originally gathered for law enforcement purposes."

As the Court is quick to point out, its new creation has advantages. The Court notes that "[t]he reasons for an Exemption 7 exemption" might apply to "information in a law enforcement record [that has been] recompiled in another document for a non-law-enforcement function." *Ante*, at 630. The Court then suggests that, without its redaction of Exemption 7, no guarantee would exist that some other provision of the FOIA would halt disclosure. For this reason, the Court candidly concludes that "[i]t is therefore critical that the compiled-for-law-enforcement requirement be construed to avoid the release of information that would produce . . . undesirable results." *Ibid.* Evidently, the Court arrives at

this conclusion, not because the language of Exemption 7 requires it, not because the legislative history supports it, not because the statute would have "absurd consequences" otherwise, but rather because "the statesmanship of policy-making . . . wisely suggest[s]" it. Frankfurter, 47 Colum. L. Rev., at 533.

It is not the function of this Court, however, to apply the finishing touches needed to perfect legislation. Our job does not extend beyond attempting to fathom what it is that Congress produced, blemished as the Court may perceive that creation to be. Our task is solely to give effect to the intentions, as best they can be determined, of the Congress that enacted the legislation. Absent compelling evidence requiring a contrary conclusion, the best indication of Congress' intent is Congress' own language. Therefore, I dissent.

WOELKE & ROMERO FRAMING, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 80–1798. Argued March 3, 1982—Decided May 24, 1982*

Section 8(e) of the National Labor Relations Act (Act) proscribes secondary agreements between unions and employers—that is, agreements that require an employer to cease doing business with another party. However, § 8(e) contains a proviso which exempts from the proscription of § 8(e) agreements between a union and an employer in the construction industry concerning the contracting or subcontracting of work to be performed at a construction jobsite. In No. 80–1798, petitioner Woelke & Romero Framing, Inc. (Woelke), and respondent union, in negotiating a new collective-bargaining agreement, reached an impasse over the union's demand for a clause that would prohibit Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." When Woelke's construction sites were picketed in support of the union's demand for the subcontracting clause, Woelke filed unfair labor practice charges with the National Labor Relations Board, asserting that subcontracting clauses are sheltered by § 8(e)'s construction industry proviso only if they are limited in application to particular jobsites at which both union and nonunion workers are employed. Woelke argued that because the clause sought by the union violated § 8(e), the picketing violated § 8(b)(4)(A) of the Act, which prohibits coercing an employer "to enter into any agreement which is prohibited by" § 8(e). The Board held that subcontracting clauses are lawful whenever they are sought or negotiated in the context of collective-bargaining relationships, and that therefore picketing to obtain such a clause was permitted under § 8(b)(4)(A). In Nos. 80–1808 and 81–91, a labor dispute resulted in unfair labor practice charges being filed against respondent union by a member (petitioner in No. 80–1808) of an association of construction in-

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*Together with No. 80–1808, *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.* v. *National Labor Relations Board et al.;* and No. 81–91, *Oregon-Columbia Chapter, Associated General Contractors of America, Inc.* v. *National Labor Relations Board et al.*, also on certiorari to the same court.

dustry employers (petitioner in No. 81–91), challenging the validity under § 8(e) of a subcontracting clause which was substantially similar to the clause involved in No. 80–1798, and which was included in a collective-bargaining agreement between the union and the association. The Board held that such clause was protected by the construction industry proviso. The Court of Appeals consolidated the petitioners' requests for review of the Board's orders and ultimately decided to enforce the orders, holding that union signatory subcontracting clauses are protected so long as they are negotiated in the context of a collective-bargaining relationship and that picketing may be used to obtain such a clause.

Held:

1. The construction industry proviso to § 8(e) ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, even when not limited in application to particular jobsites at which both union and nonunion workers are employed. The subcontracting clauses at issue here are protected by the proviso. Pp. 652–665.

(a) The plain language and the legislative history of § 8(e) and the construction industry proviso clearly indicate that Congress intended to protect subcontracting clauses like those at issue here. Pp. 652–660.

(b) The legislative history does not support petitioners' argument that the proviso was intended primarily as a response to the decision in *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675—which held that picketing a general contractor's entire project in order to protest the presence of a nonunion subcontractor is an illegal secondary boycott—and thus should be interpreted as permitting only those subcontracting agreements that are designed to reduce friction at jobsites where union workers are forced to work alongside nonunion workers. The proviso serves a variety of purposes unrelated to that case's holding, and even as a response to that case is only partly concerned with jobsite friction. Pp. 661–662.

(c) While subcontracting clauses like those at issue here create "top-down" pressure for unionization—requiring subcontractors, in order to obtain work, to force their employees to become union members—such pressure is implicit in the construction industry proviso and Congress thus decided to accept whatever top-down pressure such clauses might entail. Moreover, the top-down organizing effect of such clauses is limited by other provisions of the Act. Pp. 662–665.

2. The Court of Appeals was without jurisdiction to decide that unions do not violate § 8(b)(4)(A) when they picket to obtain a subcontracting clause sheltered by the construction industry proviso. Neither Woelke nor the Board's General Counsel raised that issue during the proceedings before the Board in No. 80–1798, and thus judicial review is barred by § 10(e) of the Act, which provides that "[n]o objection that has not been

urged before the Board . . . shall be considered by the court." The § 10(e) bar applies even though the Board held that the picketing was not banned by § 8(b)(4)(A). Woelke's failure to object to the Board's decision in a petition for reconsideration or rehearing prevents consideration of the question by the courts. Pp. 665–666.

654 F. 2d 1301, affirmed in part, vacated in part, and remanded.

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

John W. Prager, Jr., argued the cause for petitioner in No. 80–1798. With him on the briefs was *Dwight L. Armstrong.*

Lewis K. Scott argued the cause for petitioners in Nos. 80–1808 and 81–91. With him on the briefs for petitioner in No. 81–91 was *David H. Wilson, Jr.* *Thomas M. Triplett* filed briefs for petitioner in No. 80–1808.

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Lee, Elinor Hadley Stillman, Linda Sher,* and *John H. Ferguson.*

Laurence Gold argued the cause for respondent unions. With him on the brief were *Abe F. Levy, Gordon K. Hubel, Richard R. Carney, Laurence J. Cohen,* and *George Kaufmann.*†

JUSTICE MARSHALL delivered the opinion of the Court.

In these consolidated cases, petitioners ask us to decide whether union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining

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†Briefs of *amici curiae* urging reversal were filed by *Kenneth C. McGuiness, Robert E. Williams,* and *Daniel R. Levinson* for the Air Conditioning and Refrigeration Institute et al.; by *Richard P. Markey* for Associated Builders and Contractors; by *Peter G. Nash* for Associated General Contractors of America, Inc.; and by *Vincent J. Apruzzese, Francis A. Mastro, Lawrence B. Kraus,* and *Stephen A. Bokat* for the Chamber of Commerce of the United States of America.

Briefs of *amici curiae* were filed by *Gerard C. Smetana* for Donald Schriver, Inc., et al.; by *Michael C. Murphy* and *Hugh M. Davenport* for Georgia Power Co.; by *Peter R. Spanos* for the National Association of Home Builders; and by *Rex H. Reed* and *Joseph J. Hahn* for the National Right to Work Legal Defense Foundation.

relationship are protected by the construction industry proviso to § 8(e) of the National Labor Relations Act (Act), 29 U. S. C. § 158(e). Such clauses bar subcontracting except to subcontractors who are signatories to agreements with particular unions. Petitioners also ask us to decide whether a union violates § 8(b)(4)(A) of the Act, 29 U. S. C. § 158 (b)(4)(A), when it pickets to obtain a lawful subcontracting clause.

The United States Court of Appeals for the Ninth Circuit held that subcontracting clauses sought or negotiated in the context of a collective-bargaining relationship are protected by the construction industry proviso even when not limited in application to particular jobsites at which both union and nonunion workers are employed. It further held that picketing to obtain such clauses does not violate § 8(b)(4)(A). See 654 F. 2d 1301 (1981) (en banc). We affirm the holding that the subcontracting clauses at issue here are protected by the construction industry proviso. Because we conclude that the Court of Appeals did not have jurisdiction to consider the picketing question, we do not review that portion of its decision.

I

A

These cases arise out of two separate labor disputes. The first involves petitioner Woelke & Romero Framing, Inc. (Woelke), a framing subcontractor in the construction industry in southern California. From July 1974 to June 1977, Woelke was party to a collective-bargaining agreement with respondent United Brotherhood of Carpenters and Joiners of America (Carpenters). Shortly before this agreement was to expire, Woelke and Carpenters commenced bargaining for the purpose of negotiating a successor agreement. In August 1977, however, the parties reached an impasse over Carpenters' demand for a union signatory subcontracting clause. This clause would have prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current

labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." 1 App. 86.[1]

In support of Carpenters' demand for a subcontracting clause, two Carpenters locals picketed Woelke's construction sites, causing some work stoppages. Woelke filed unfair labor practice charges with the National Labor Relations Board, asserting that the subcontracting clause violated § 8(e) of the Act, which proscribes secondary agreements between unions and employers—that is, agreements that require an employer to cease doing business with another party, in order to influence the labor relations of that party. Woelke argued that because the clause violated § 8(e), Carpenters' picketing in support of that restriction violated § 8(b)(4)(A), 29 U. S. C. § 158(b)(4)(A).[2]

The Board agreed that the union signatory subcontracting clauses at issue were secondary in thrust. It ruled, however, that they were saved by the construction industry proviso to § 8(e), which exempts agreements between a union and employer concerning work to be performed at a construction jobsite. The Board rejected Woelke's contention that subcontracting clauses are sheltered by the proviso only if they are limited in application to particular jobsites at which both union and nonunion workers are employed. According

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[1] The proposed clause provides in full:

"The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, san[d] and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." 1 App. 86.

The expiring contract contained a union signatory subcontracting clause that was similar in effect. *Id.*, at 28.

[2] Section 8(b)(4)(A) prohibits coercing "any employer or selfemployed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e)."

to the Board, such clauses are lawful whenever they are sought or negotiated "in the context of a collective bargaining relationship." *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)*, 239 N. L. R. B. 241, 250 (1978), citing *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975). The Board further indicated that since the subcontracting clauses were lawful, picketing to obtain a subcontracting proposal was permitted under § 8(b)(4)(A). *Carpenters Local No. 944, supra*, at 251.

B

The second dispute concerns a collective-bargaining agreement between petitioner Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (Oregon AGC), and respondent Local 701 of the International Union of Operating Engineers, AFL–CIO (Engineers). Oregon AGC is an association of approximately 200 construction industry employers in Oregon and southwest Washington. Since 1960, the contract between Oregon AGC and the Engineers has contained a subcontracting clause prohibiting Oregon AGC from subcontracting construction jobsite work to "any person, firm or company who does not have an existing labor agreement with the [Engineers] Union covering such work." 2 App. 9–10; see *id.*, at 12.[3] In addition, the agreement authorized Engineers to take "such action as they deem necessary," including strikes and other economic self-help, to enforce awards obtained through the grievance and arbitration process on matters covered by the agreement. *Id.*, at 10.

In April 1977, petitioner Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. (Pacific North-

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[3] The clause provides in full:

"Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work." 2 App. 9–10.

west), a member of Oregon AGC, filed unfair labor practice charges, asserting that the contract between the Oregon AGC and the Engineers violated § 8(e). Relying on the same reasoning employed in *Carpenters Local No. 944*, the Board held that the union signatory subcontracting clauses, standing alone, would be protected by the construction industry proviso. *International Union of Operating Engineers, Local No. 701 (Pacific Northwest Chapter of Associated Builders & Contractors, Inc.)*, 239 N. L. R. B. 274, 277 (1978). With one member dissenting, however, it decided that the provision of the contract permitting the union to *enforce* the subcontracting clause was not protected by the proviso. *Id.*, at 276.[4]

C

Woelke, Oregon AGC, and Pacific Northwest all sought review of the Board's orders in the Court of Appeals.[5] The Ninth Circuit panel consolidated the cases and reversed the Board's decisions. It reasoned that the proviso was designed solely to minimize friction between union and nonunion workers employed at the same jobsite. Thus, the proviso shelters subcontracting clauses "only where a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." 609 F. 2d 1341, 1347 (1979) (three-judge panel). Because it found that the clauses were unlawful, it did not reach the questions whether picketing or striking either to obtain or enforce a valid subcontracting clause was lawful. *Id.*, at 1351.

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[4] The Board reasoned that the use of self-help measures would violate § 8(b)(4)(B) of the Act, 29 U. S. C. § 158(b)(4)(B). That section makes it an unfair labor practice for a union to force any person to "cease doing business with any other person."

[5] Petitioner Oregon AGC was technically a respondent in the Board proceeding. However, it supported the position taken by Pacific Northwest.

At respondents' request, the cases were reheard en banc. The en banc panel decided to enforce the Board's orders in their entirety. 654 F. 2d 1301 (1981). The majority held that union signatory subcontracting clauses are protected so long as they are sought or negotiated in the context of a collective-bargaining relationship.[6] *Id.*, at 1322. It further held that economic pressure may be used to obtain a subcontracting agreement, but that it may not be employed to enforce a subcontracting agreement. *Id.*, at 1323–1324.

Woelke, Oregon AGC, and Pacific Northwest asked this Court to review the conclusion that the subcontracting agreements sought by respondents are protected by the construction industry proviso. Woelke also asked this Court to decide whether unions violate § 8(b)(4)(A) when they picket to obtain lawful subcontracting clauses.[7] We granted certiorari. 454 U. S. 814 (1981).

II

A

Section 8(e), which was added to the Act by the 1959 Landrum-Griffin Act, Pub. L. 86–257, 73 Stat. 543–544, 29 U. S. C. § 158(e), states:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract

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[6] The only other Court of Appeals to confront this question reached the same conclusion. See *Donald Schriver, Inc.* v. *NLRB*, 204 U. S. App. D. C. 4, 25, 635 F. 2d 859, 880 (1980), cert. denied, 451 U. S. 976 (1981), petition for rehearing pending, No. 80–1257.

[7] None of the petitioners sought review of the Court of Appeals' decision that economic pressure may not be used to enforce subcontracting agreements.

> or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

The union subcontracting clauses at issue here fall within the general prohibition of § 8(e); they require the general contractor to boycott the services of nonunion subcontractors in order to influence the labor relations policies of the subcontractor. The construction industry proviso to § 8(e) states, however, that

> "nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work."

Thus, the question we must answer here is whether the union signatory subcontracting clauses sought or obtained by respondent unions are protected by this proviso.

Read literally, the proviso would seem to shelter the subcontracting agreements—it expressly states that § 8(e) does not apply to agreements that limit the contracting of construction site work. In *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S., at 628, however, this Court warned that § 8(e) "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." In that case, the Court decided that the proviso did not exempt subcontracting agreements that were not sought or obtained in the context of a collective-bargaining relationship, even though they were covered by the plain language of the statute. The Court reasoned that Congress did not intend to authorize such agreements.[8]

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[8] In *Connell*, the Court was confronted with a novel and apparently foolproof organizational tactic: "stranger" picketing aimed at pressuring employers with whom the union had no collective-bargaining relationship, and whose

The subcontracting clauses at issue here were sought or negotiated in the context of collective-bargaining relationships. Petitioners argue, however, that we should further confine the scope of the proviso. They contend that Congress designed the proviso to solve the problems that arise when union and nonunion workers are employed at the same jobsite. Thus, it should be interpreted to protect only those agreements that are limited in application to construction projects where both union and nonunion workers are employed.

After examining the construction industry proviso "in light of the statutory setting and the circumstances surrounding its enactment," *Connell Construction Co., supra,* at 628, we conclude that it should not be confined as petitioners suggest. The legislative history of § 8(e) and the construction industry proviso clearly indicates that Congress intended to protect subcontracting clauses like those at issue here.

B

Prior to 1959, there were gaps in the existing protections against secondary boycotts. In *Carpenters* v. *NLRB,* 357 U. S. 93 (1958) *(Sand Door),* this Court held that a union could not engage in strikes or other concerted activity to enforce "hot cargo" agreements—agreements that required employers to boycott the goods or services of another party with

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employees it had no interest in representing, into signing union signatory subcontracting agreements. Because there was no recognitional objective to the picketing, it did not violate § 8(b)(7), 29 U. S. C. § 158(b)(7). And because the subcontracting clause appeared to be protected by the construction industry proviso, the picketing was arguably not prohibited by § 8(b)(4)(A), 29 U. S. C. § 158(b)(4)(A), which bans picketing to secure agreements made unlawful by § 8(e). The Court concluded, however, that the protection of the proviso "extends only to agreements in the context of collective-bargaining relationships." *Connell Construction Co.* v. *Plumbers & Steamfitters,* 421 U. S., at 633. In these cases, we decide a question left unresolved in *Connell:* the extent to which the proviso shelters agreements sought or obtained within the context of a collective-bargaining relationship.

whom the union had a dispute. However, *Sand Door* indicated that employers and unions were free to enter into hot cargo agreements, and that compliance was lawful so long as it was voluntary. *Id.*, at 108.

Section 8(e), which prohibits hot cargo agreements, was designed to eliminate the loophole created by the *Sand Door* decision. See *Connell Construction Co.*, *supra*, at 628. See also *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 634 (1967). The provision represents a compromise between bills reported out by the Senate and House. The Senate bill would have outlawed hot cargo agreements only in the trucking industry. 105 Cong. Rec. 6556 (1959), 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 1161–1162 (1959) (Leg. Hist.). The legislation proposed by the House—the Landrum-Griffin bill—was much broader. It made it an unfair labor practice for *any* labor organization and *any* employer to enter into an agreement whereby the employer agrees to "cease doing business with any other person." H. R. 8400, 86th Cong., 1st Sess., § 705(b)(1) (1959), 1 Leg. Hist. 683. The Conference Committee decided to adopt the House bill. However, the Senate conferees insisted on a proviso that exempted hot cargo agreements in the garment industry, and also agreements relating to work to be done at the site of a construction project. 105 Cong. Rec. 17899 (1959), 2 Leg. Hist. 1432.

The legislative history contains several references to the construction industry proviso. After noting that the proviso extends only to work to be performed at the site of the construction, the Conference Report states:

> "The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would

be illegal under the *Sand Door* case (*Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U. S. 93 (1958)). *To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e).*" H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 39 (1959), 1 Leg. Hist. 943 (emphasis added).

Senator John F. Kennedy, who was chairman of the Conference Committee, provided a similar explanation during subsequent congressional debate.[9]

> "The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of the construction project." 105 Cong. Rec. 17900 (1959), 2 Leg. Hist. 1433.

Senator Kennedy also said:

> "The Landrum-Griffin bill extended the 'hot cargo' provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. *Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries.*" 105 Cong. Rec. 17899 (1959), 2 Leg. Hist. 1432.

Other legislators expressed similar views. They emphasized that the final bill would not change the law with respect

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[9] Since the proviso was added to § 8(e) at the Senate conferees' insistence, and since Senator Kennedy was chairman of the Senate conferees, his explanation of the clause is entitled to substantial weight.

to construction site subcontracting agreements. See 105 Cong. Rec. 18128 (1959), 2 Leg. Hist. 1715 (remarks of Rep. Barden); 105 Cong. Rec. 18135 (1959), 2 Leg. Hist. 1721 (remarks of Rep. Thompson); 105 Cong. Rec. 19849 (1959), 2 Leg. Hist. 1823 (postenactment memorandum by Sen. Dirksen); 105 Cong. Rec. 19772 (1959), 2 Leg. Hist. 1858 (postenactment memorandum by Sen. Goldwater).

These statements reveal that Congress wished "to preserve the *status quo*" regarding agreements between unions and contractors in the construction industry. *National Woodwork Manufacturers Assn.*, *supra*, at 637. To the extent that subcontracting agreements were part of the pattern of collective bargaining in the construction industry, and lawful, Congress wanted to ensure that they remained lawful. Given this expression of legislative intent, we can determine whether the clauses challenged in these cases are within the scope of the proviso—or whether petitioners' narrow interpretation of the proviso is appropriate—by examining Congress' perceptions regarding the status quo in the construction industry.

There is ample evidence that Congress believed that union signatory contract clauses of the type at issue here were part of the pattern of collective bargaining in the construction industry. Comments made by Senator Kennedy clearly indicate that he believed broad subcontracting agreements were legal in 1959:

> "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them." 105 Cong. Rec. 17900 (1959), 2 Leg. Hist. 1433.

Senator Kennedy's views were shared by other legislators. Senator Curtis, testifying before the Senate Labor Commit-

tee, stated that broad subcontracting agreements were not illegal, and were used "extensively" by the building trades unions. Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess., 752 (1959) (Senate Hearings). The House Labor Committee heard similar testimony. Representatives of an employer and an independent union complained that employers and unions could lawfully enter into subcontracting clauses, and that, as a result, employers whose employees had selected another union were denied any opportunity to compete for construction jobs. They described agreements very similar to those at issue here. Labor-Management Reform Legislation: Hearings on H. R. 3540, H. R. 3302, H. R. 4473, and H. R. 4474 before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., 2363 (1959) (statement of Howard Lane) (House Hearings); *id.*, at 2365–2366 (statement of Edward M. Carlton).[10]

Petitioners argue that Congress' perception of the status quo was inaccurate. According to petitioners, subcontracting clauses were not extensively used in the construction industry prior to 1959, and neither the Board nor the courts had ruled that such clauses were lawful. However, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U. S. 820, 828 (1976). In any event, Congress' belief that subcontracting agreements were common and lawful was accurate.

The Board and the United States Court of Appeals for the District of Columbia Circuit had upheld broad subcontracting

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[10] The employer and union representatives who testified before the House Labor Committee, as well as Senator Curtis, opposed the use of subcontracting clauses, arguing that they forced nonunion contractors out of business. House Hearings 2366; Senate Hearings 752. Significantly, despite this testimony, Congress decided to exclude the construction industry from the scope of § 8(e).

clauses. See *Associated General Contractors of America, Inc. (St. Maurice, Helmkamp & Musser)*, 119 N. L. R. B. 1026 (1957), review denied and enf'd *sub nom. Operating Engineers Local Union No. 3* v. *NLRB*, 105 U. S. App. D. C. 307, 266 F. 2d 905, cert. denied *sub nom. St. Maurice, Helmkamp & Musser* v. *NLRB*, 361 U. S. 834 (1959).[11] Significantly, petitioners are unable to point to any pre-1959 cases in which a subcontracting agreement was found to be unlawful because it was not limited to particular jobsites at which the signatory union workers were employed.

A report published in 1961, which examined "the prevalence and characteristics of subcontracting provisions in effect in 1959 in the construction industry," indicates that broad subcontracting agreements were quite common. Lunden, Subcontracting Clauses in Major Contracts, 84 Monthly Lab. Rev. 579 (1961). The study examined 155 construction contracts, covering 700,000 construction workers, and found that 444,000 of those workers were employed under contracts with subcontracting provisions. *Id.*, at 582. The most frequent requirement, found in more than 50 major contracts, obligated contractors to subcontract work only to subcontractors who would apply all the "terms and conditions" of the master agreement. *Id.*, at 715–716. The Lunden report does not describe a single agreement that limited the applicability of a subcontracting restriction to jobsites at which both union and nonunion workers were employed.[12]

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[11] In *Operating Engineers Local Union No. 3* v. *NLRB*, the Court of Appeals approved the Board's conclusion that a contractor did not violate the Act by complying with a subcontracting clause under which it was not permitted to subcontract engineering work to a firm that did not observe the terms of the union's contract. The employer and union representatives who testified before the House Labor Committee referred to the case. House Hearings 2364, 2367. The text of the Court of Appeals decision was introduced into the record of the House Hearings. *Id.*, at 801, 803–807.

[12] Petitioners suggest that the Lunden study did not adequately distinguish between broad union signatory clauses like those at issue here and union standards clauses—clauses that permit general contractors to subcontract to nonunion subcontractors, so long as the subcontractors are will-

In short, Congress believed that broad subcontracting clauses similar to those at issue here were part of the pattern of collective bargaining prior to 1959, and that the Board and the courts had found them to be lawful. This perception was apparently accurate. Thus, endorsing the clauses at issue here is fully consistent with the legislative history of § 8(e) and the construction industry proviso.

III

Petitioners attach little significance to the legislative history we have just described. Instead, they focus on congressional references to this Court's decision in *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951) *(Denver Building Trades)*, which they believe support their narrow interpretation of the proviso. They also contend that if the clause is interpreted to protect any subcontracting agreements sought or obtained in the context of a collective-bargaining agreement, unions will have a potent organizational weapon. However, neither of these arguments compels the adoption of a restricted interpretation of the proviso.

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ing to comply with the standards set forth in the union's contract. However, the Board's General Counsel, who conducted his own study of subcontracting restrictions in the construction industry, and who did distinguish between various types of restrictions, found union signatory clauses very similar to those at issue here in roughly 12% of the contracts studied. NLRB General Counsel's Memorandum, Dec. 15, 1976, 93 Lab. Rel. Rep. 390, 404, reprinted in 1976 Lab. Rel. Yearbook 295, 309.

Broad subcontracting clauses have been part of the pattern of collective bargaining in southern California, where the *Woelke & Romero* case arose, since 1941. See Pierson, Building–Trades Bargaining Plan in Southern California, 70 Monthly Lab. Rev. 14, 17 (1950); see also 1 App. 20–22. The Pierson study also noted that similar bargaining arrangements existed in other localities, including the Portland, Ore., area, where the *Pacific Northwest* case arose. Pierson, *supra*, at 15. See also Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086, 1119 (1960) (construction industry proviso "approves the general practice of the building trades to secure from a contractor a promise that he will not subcontract work on the job site to a nonunion subcontractor").

A

Petitioners contend that Congress adopted the construction industry proviso primarily because it wanted to overrule this Court's decision in *Denver Building Trades*, *supra*. That case held that picketing a general contractor's entire project in order to protest the presence of a nonunion subcontractor is an illegal secondary boycott. According to petitioners, Congress disliked the *Denver Building Trades* rule because it might lead to uneasy employee relationships on the jobsite: if union workers were forced to work alongside nonunion workers, friction might result. Given this congressional purpose, the proviso should be interpreted as permitting only those subcontracting agreements that are designed to reduce friction at particular jobsites.

Petitioners are correct in suggesting that the decision in *Denver Building Trades* contributed to Congress' decision to adopt the construction industry proviso. See *Connell Construction Co.*, 421 U. S., at 629. At the time Congress was considering the proper scope of § 8(e), it had before it several proposals that would have effectively overruled the *Denver Building Trades* decision. See, *e. g.*, § 702(d) of H. R. 8342, 86th Cong., 1st Sess. (1959), 1 Leg. Hist. 752–753 (Elliot bill). "It was partly in this frame of reference that the [construction industry] proviso to Section 8(e) was written." 105 Cong. Rec. 20005 (1959), 2 Leg. Hist. 1861 (remarks of Rep. Kearns).

It is clear, however, that those who wished to overrule *Denver Building Trades* were concerned about more than the possibility of jobsite friction. Critics of *Denver Building Trades* complained that contractors and subcontractors working together on a single construction project are not the sort of neutral parties that the secondary boycott provisions were designed to protect. They pointed out that the *Denver Building Trades* rule denied construction workers the right to engage in economic picketing at their place of employment. And they emphasized that the employees of various subcontractors have a close community of interest, and that the

wages and working conditions of one set of employees may affect others.[13] In fact, as the Court of Appeals noted, the problem of jobsite friction between union and nonunion workers received relatively little emphasis. See 654 F. 2d, at 1319.

The proviso helps mitigate the impact of the *Denver Building Trades* decision: although it does not overrule the ban on picketing, it confirms that construction industry unions may enter into agreements that would prohibit the subcontracting of jobsite work to nonunion firms. However, petitioners' argument—that the proviso was intended primarily as a response to *Denver Building Trades*, and that it should therefore be interpreted as protecting only those clauses designed to prevent jobsite friction—rests on faulty premises. As we have already shown, see *supra*, at 654–661, the proviso was not designed solely as a response to the *Denver Building Trades* problem. And even as a response to *Denver Building Trades*, the proviso is only partly concerned with jobsite friction.[14]

B

Petitioners further contend that if the subcontracting clauses at issue here are approved, the unions will have a powerful organizing tool. Subcontractors will not be able to obtain work unless their employees are represented by the union. Thus, they will force their employees to become members of the union. In effect, the subcontracting clauses

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[13] 105 Cong. Rec. 17881, 2 Leg. Hist. 1425 (remarks of Sen. Morse); 105 Cong. Rec. 15541 (1959), 2 Leg. Hist. 1577 (memorandum by Reps. Thompson and Udall); 105 Cong. Rec. 15551–15552 (1959), 2 Leg. Hist. 1588 (memorandum by Rep. Elliott); 105 Cong. Rec. 15852 (1959), 2 Leg. Hist. 1684 (remarks by Rep. Goodell).

[14] It is important to recognize, however, that reducing jobsite friction is a legitimate purpose. The clauses at issue here serve this goal by ensuring that members of the respondent unions need not work alongside nonunion employees.

will create a "top-down" pressure for unionization; they will take the representation decision out of the hands of the employees and place it in the hands of the employers.

It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns. See *Connell Construction Co., supra,* at 632 (discussing legislative history). It is also true that secondary subcontracting agreements like those at issue here create top-down organizing pressure. However, even if the agreements were limited in application to jobsites at which both union and nonunion workers were employed, there would be some topdown organizing effect. Such pressure is implicit in the construction industry proviso. The bare assertion that a particular subcontracting agreement encourages top-down organizing pressure does not resolve the issue we confront in these cases: how much top-down pressure did Congress intend to tolerate when it decided to exempt construction site projects from § 8(e)? As we have already explained, we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship—and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives.[15]

The top-down organizing effect of subcontracting clauses sought or obtained in the context of a collective-bargaining

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[15] It may be true, as petitioners emphasize, that the use of union signatory subcontracting clauses will give a particular union a monopoly position in a labor market. However, the Board has previously suggested that in most labor markets, apart from some minor overlaps, there is only one union representing a particular craft. See *Carpenters Local 15,* 240 N. L. R. B. 252, 261 (1979). In addition, as Congress recognized, see S. Rep. No. 187, 86th Cong., 1st Sess., 28 (1959), a majority of the workers skilled in a particular craft will belong to that union.

relationship is limited in a number of ways by other provisions of the National Labor Relations Act.[16] A subcontractor cannot be subjected to unlimited picketing to force it into a union agreement without regard to the wishes of its employees. See 29 U. S. C. § 158(b)(7)(C).[17] An additional safeguard is provided by § 8(f), 29 U. S. C. § 158(f), which authorizes unions and employers in the construction industry to enter into collective-bargaining agreements, even though the employees of that employer have not designated the union as their lawful bargaining representative. When a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a § 8(f) agreement—known as a prehire agreement—with the union. If they do so, however, § 8(f) expressly states that their employees may challenge the union's representative status by filing an election petition with the Board. And the subcontractors themselves, if they do not have a stable work force among whom the union has secured a majority, may be free to repudiate the agreement at any project on which the union has not demonstrated that it represents a majority of their employees. See *NLRB* v. *Iron Workers*, 434 U. S. 335 (1978); *Giordano Construction Co.*, 256 N. L. R. B. 47, 47–48, 107 LRRM 1164, 1165–1166 (1981).

Despite petitioners' assertions to the contrary, nonunion employees are not frozen out of the job market by subcontracting agreements. Even where construction unions successfully negotiate collective-bargaining agreements that require both general contractors and subcontractors to obtain

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[16] Many of these protections would not have been available to limit the top-down organizing effect of the clauses at issue in *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616 (1975).

[17] As we note below, see *infra*, at 665–666, we do not reach the question whether a union may use economic pressure to obtain a subcontracting agreement. We also do not reach the question whether a union may picket to obtain a prehire agreement.

their labor from union hiring halls, the union must refer both members and nonmembers to available jobs. 29 U. S. C. §§ 158(a)(3), 158(b)(2).[18] In addition, Courts of Appeals have suggested that the obligations of union membership that may be required under union security clauses after seven days are limited to the normal financial obligations of membership.[19]

Finally, since the *Denver Building Trades* rule remains in effect, employees working for firms with whom a construction union has a primary dispute are protected against secondary picketing designed to force them off their current job. And as the Court of Appeals held in these cases, even where construction unions have negotiated secondary clauses that are sheltered by the proviso, they may not enforce them by picketing or other forms of concerted activity. See H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 39 (1959), 1 Leg. Hist. 943; 105 Cong. Rec. 19772 (1959), 2 Leg. Hist. 1858 (postenactment memorandum of Sen. Goldwater).

IV

Petitioner Woelke asks us to reverse the Court of Appeals' holding that unions do not violate § 8(b)(4)(A) when they picket to obtain a subcontracting clause sheltered by the construction industry proviso. However, the Court of Appeals was without jurisdiction to consider that question. The issue was not raised during the proceedings before the Board, either by the General Counsel or by Woelke. Thus, judicial review is barred by § 10(e) of the Act, 29 U. S. C. § 160(e), which provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *De-*

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[18] See *Radio Officers* v. *NLRB*, 347 U. S. 17, 40–42 (1954); *Teamsters* v. *NLRB*, 365 U. S. 667, 673–677 (1961).

[19] See *NLRB* v. *Hershey Foods Corp.*, 513 F. 2d 1083, 1085–1087 (CA9 1975); *Local 1104, Communications Workers of America* v. *NLRB*, 520 F. 2d 411, 417–420 (CA2 1975), cert. denied, 423 U. S. 1051 (1976).

troit Edison Co. v. *NLRB*, 440 U. S. 301, 311–312, n. 10 (1979); *Garment Workers* v. *Quality Mfg. Co.*, 420 U. S. 276, 281, n. 3 (1975); *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U. S. 318, 322 (1961).

The § 10(e) bar applies even though the Board held that the picketing was not banned by § 8(b)(4)(A). See *Carpenters Local No. 944*, 239 N. L. R. B., at 251. Woelke could have objected to the Board's decision in a petition for reconsideration or rehearing. The failure to do so prevents consideration of the question by the courts. See *Garment Workers* v. *Quality Mfg. Co.*, *supra*, at 281, n. 3.

Because the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board, we do not reach the question whether the picketing was lawful. Instead, we vacate that portion of the Court of Appeals' judgment that relates to this issue, and remand with instructions to dismiss.

V

We hold that the construction industry proviso to § 8(e) of the National Labor Relations Act ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective-bargaining relationship, even when not limited in application to particular jobsites at which both union and nonunion workers are employed. This interpretation of the proviso is supported by its plain language, as well as the legislative history. Thus, we affirm the decision below, insofar as it holds that the clauses at issue here were sheltered by the proviso. We further hold that the Court of Appeals was without jurisdiction to decide whether a union violates § 8(b)(4)(A) when it pickets to obtain a lawful subcontracting clause. We vacate that portion of the judgment below, and remand for further proceedings consistent with this opinion.

It is so ordered.

OREGON v. KENNEDY

CERTIORARI TO THE COURT OF APPEALS OF OREGON

No. 80–1991. Argued March 29, 1982—Decided May 24, 1982

During respondent's trial for theft in an Oregon state court, the State's expert witness testified as to the value and identity of the property involved. On cross-examination, he acknowledged that he had once filed an unrelated criminal complaint against respondent, but explained that no action had been taken on his complaint. On redirect examination, the court sustained a series of objections to the prosecutor's questions seeking to establish the reasons why the witness had filed a complaint against respondent. After eliciting from the witness that he had never done business with respondent, the prosecutor asked: "Is that because he is a crook?" The trial court then granted respondent's motion for a mistrial. On retrial, the court rejected respondent's contention that the Double Jeopardy Clause of the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment, barred further prosecution, finding that "it was not the intention of the prosecutor in this case to cause a mistrial." Respondent was convicted, but the Oregon Court of Appeals reversed, sustaining the double jeopardy claim because the prosecutorial misconduct that had occasioned the mistrial, even if not intended to cause a mistrial, amounted to "overreaching."

Held:

1. There is no merit to respondent's contentions that the Court of Appeals' decision was based upon an adequate and independent state ground, or that in the alternative the case should be remanded in order that the court may clarify the grounds upon which its judgment rested. A fair reading of the opinion below shows that the court rested its decision solely on federal law. Pp. 670–671.

2. Where a defendant in a criminal trial successfully moves for a mistrial, he may invoke the bar of double jeopardy in a second effort to try him only if the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct *intended* to provoke the defendant into moving for a mistrial. A more general test of "overreaching" is rejected because it offers virtually no standards for its application and because such a rule may not aid defendants as a class. By contrast, a standard that examines the prosecutor's intent is a manageable standard to apply. Since the courts below both agreed that the prosecutor did not intend her conduct to provoke respondent into moving for a mistrial,

that is the end of the matter for purposes of the Double Jeopardy Clause. Pp. 671–679.

49 Ore. App. 415, 619 P. 2d 948, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 679. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 680. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 681.

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioner. With him on the brief were *William F. Gary*, Solicitor General, and *Robert E. Barton*, *John C. Bradley*, *Thomas H. Denney*, and *Stephen F. Peifer*, Assistant Attorneys General.

Donald C. Walker argued the cause and filed a brief for respondent.

Samuel A. Alito, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, and *David B. Smith*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The Oregon Court of Appeals decided that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution barred respondent's retrial after his first trial ended in a mistrial granted on his own motion. 49 Ore. App. 415, 619 P. 2d 948 (1980), cert. granted, 454 U. S. 891 (1981). The Court of Appeals concluded that retrial was barred because the prosecutorial misconduct that occasioned the mistrial in the first instance amounted to "overreaching." Because that court took an

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**Jennifer Friesen* filed a brief for the American Civil Liberties Union Foundation of Oregon, Inc., as *amicus curiae*.

overly expansive view of the application of the Double Jeopardy Clause following a mistrial resulting from the defendant's own motion, we reverse its judgment.

I

Respondent was charged with the theft of an oriental rug. During his first trial, the State called an expert witness on the subject of Middle Eastern rugs to testify as to the value and the identity of the rug in question. On cross-examination, respondent's attorney apparently attempted to establish bias on the part of the expert witness by asking him whether he had filed a criminal complaint against respondent. The witness eventually acknowledged this fact, but explained that no action had been taken on his complaint. On redirect examination, the prosecutor sought to elicit the reasons why the witness had filed a complaint against respondent, but the trial court sustained a series of objections to this line of inquiry.[1] The following colloquy then ensued:

> "Prosecutor: Have you ever done business with the Kennedys?
>
> "Witness: No, I have not.
>
> "Prosecutor: Is that because he is a crook?"

The trial court then granted respondent's motion for a mistrial.

When the State later sought to retry respondent, he moved to dismiss the charges because of double jeopardy. After a hearing at which the prosecutor testified, the trial court[2] found as a fact that "it was not the intention of the prosecutor in this case to cause a mistrial." 49 Ore. App., at

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[1] The Court of Appeals later explained that respondent's "objections were not well taken, and the judge's rulings were probably wrong." 49 Ore. App. 415, 417, 619 P. 2d 948, 949 (1980).

[2] These proceedings were not conducted by the same trial judge who presided over respondent's initial trial.

418, 619 P. 2d, at 949. On the basis of this finding, the trial court held that double jeopardy principles did not bar retrial, and respondent was then tried and convicted.

Respondent then successfully appealed to the Oregon Court of Appeals, which sustained his double jeopardy claim. That court set out what it considered to be the governing principles in this kind of case:

> "The general rule is said to be that the double jeopardy clause does not bar reprosecution, '. . . where circumstances develop not attributable to prosecutorial or judicial overreaching, . . . even if defendant's motion is necessitated by a prosecutorial error.' *United States* v. *Jorn*, 400 U. S. 470, 485 . . . (197[1]). However, retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is 'motivated by bad faith or undertaken to harass or prejudice' the defendant. *United States* v. *Dinitz*, 424 U. S. 600, 611 . . . (1976). Accord, *State* v. *Rathbun*, 37 Or. App. 259, 586 P. 2d 1136 (1978), *reversed on other grounds*, 287 Or. 421, [600] P. 2d [329] (1979)." *Id.*, at 417–418, 619 P. 2d, at 949.

The Court of Appeals accepted the trial court's finding that it was not the intent of the prosecutor to cause a mistrial. Nevertheless, the court held that retrial was barred because the prosecutor's conduct in this case constituted what it viewed as "overreaching." Although the prosecutor intended to rehabilitate the witness, the Court of Appeals expressed the view that the question was in fact "a direct personal attack on the general character of the defendant." *Id.*, at 418, 619 P. 2d, at 949. This personal attack left respondent with a "Hobson's choice—either to accept a necessarily prejudiced jury, or to move for a mistrial and face the process of being retried at a later time." *Id.*, at 418, 619 P. 2d, at 950.

Before turning to the merits of the double jeopardy claim, we are met with the respondent's contention that the Court

of Appeals' decision is based upon an adequate and independent state ground. Respondent contends in the alternative that the basis for the decision below is sufficiently uncertain that we ought to remand this case in order that the Court of Appeals may clarify the grounds upon which its judgment rested. See *Delaware* v. *Prouse*, 440 U. S. 648, 652 (1979); *California* v. *Krivda*, 409 U. S. 33, 35 (1972).

We reject both of these contentions. A fair reading of the opinion below convinces us that the Court of Appeals rested its decision solely on federal law. With one exception, the cases it cited in outlining the "general rule" that guided its decision are decisions of this Court. The Court of Appeals' citation to *State* v. *Rathbun*, 37 Ore. App. 259, 586 P. 2d 1136 (1978), rev'd, 287 Ore. 421, 600 P. 2d 392 (1979), was clearly to its own decision in that case, rather than the decision of the Oregon Supreme Court. Although the Supreme Court's decision in *Rathbun* was based on state statutory and constitutional grounds, the Court of Appeals' decision in *Rathbun* clearly rested on federal grounds, a fact which was so recognized by the Oregon Supreme Court. *Id.*, at 430–431, 600 P. 2d, at 396–397. Even if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).

II

The Double Jeopardy Clause of the Fifth Amendment[3] protects a criminal defendant from repeated prosecutions for the same offense. *United States* v. *Dinitz*, 424 U. S. 600, 606 (1976). As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a "valued right to have his trial completed by a

[3] This Court held in *Benton* v. *Maryland*, 395 U. S. 784 (1969), that this Clause was made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

particular tribunal." *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). The Double Jeopardy Clause, however, does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding. *United States* v. *Jorn*, 400 U. S. 470, 483–484 (1971) (plurality opinion); *Wade* v. *Hunter*, 336 U. S., at 689. If the law were otherwise, "the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Ibid.*

Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the "manifest necessity" standard first enunciated in Justice Story's opinion for the Court in *United States* v. *Perez*, 9 Wheat. 579, 580 (1824). *Perez* dealt with the most common form of "manifest necessity": a mistrial declared by the judge following the jury's declaration that it was unable to reach a verdict. While other situations have been recognized by our cases as meeting the "manifest necessity" standard, the hung jury remains the prototypical example. See, *e. g.*, *Arizona* v. *Washington*, 434 U. S. 497, 509 (1978); *Illinois* v. *Somerville*, 410 U. S. 458, 463 (1973). The "manifest necessity" standard provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, *supra*, at 689.

But in the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Here the defendant himself has elected to terminate the proceedings against him, and the "manifest necessity" standard has no place in the application of the Double Jeopardy Clause. *United States* v. *Dinitz*, *supra*, at 607–610. Indeed, in *United States* v. *Tateo*, 377 U. S. 463, 467 (1964), the Court stated:

> "If Tateo had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him" (emphasis in original).

Our cases, however, have indicated that even where the defendant moves for a mistrial, there is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial. See, *e. g.*, *United States* v. *DiFrancesco*, 449 U. S. 117, 130 (1980); *United States* v. *Dinitz*, *supra*, at 611; *United States* v. *Jorn*, *supra*, at 485; *United States* v. *Tateo*, *supra*, at 468, n. 3. The circumstances under which respondent's first trial was terminated require us to delineate the bounds of that exception more fully than we have in previous cases.

Since one of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury empaneled to try him, it may be wondered as a matter of original inquiry why the defendant's election to terminate the first trial by his own motion should not be deemed a renunciation of that right for all purposes. We have recognized, however, that there would be great difficulty in applying such a rule where the prosecutor's actions giving rise to the motion for mistrial were done "in order to goad the [defendant] into requesting a mistrial." *United States* v. *Dinitz*, *supra*, at 611.[4] In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances. But the precise phrasing of the circumstances which *will* allow a defendant to interpose the defense of double jeopardy to a second prosecution where the first has terminated on his

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[4] Cf. *United States* v. *Tateo*, 377 U. S. 463, 468, n. 3 (1964) ("If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain").

own motion for a mistrial have been stated with less than crystal clarity in our cases which deal with this area of the law. In *United States* v. *Dinitz*, 424 U. S., at 611, we said:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions."

This language would seem to follow the rule of *United States* v. *Tateo*, *supra*, at 468, n. 3, in limiting the exception to cases of governmental actions intended to provoke mistrial requests. But immediately following the quoted language we went on to say:

> "[The Double Jeopardy Clause] bars retrials where 'bad-faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *United States* v. *Dinitz*, 424 U. S., at 611 (citation omitted).

The language just quoted would seem to broaden the test from one of *intent* to provoke a motion for a mistrial to a more generalized standard of "bad faith conduct" or "harassment" on the part of the judge or prosecutor. It was upon this language that the Oregon Court of Appeals apparently relied in concluding that the prosecutor's colloquy with the expert witness in this case amount to "overreaching."

The difficulty with the more general standards which would permit a broader exception than one merely based on intent is that they offer virtually no standards for their application. Every act on the part of a rational prosecutor during a trial is designed to "prejudice" the defendant by placing before the judge or jury evidence leading to a finding of his guilt. Given the complexity of the rules of evidence, it will be a rare trial of any complexity in which some proffered evi-

dence by the prosecutor or by the defendant's attorney will not be found objectionable by the trial court. Most such objections are undoubtedly curable by simply refusing to allow the proffered evidence to be admitted, or in the case of a particular line of inquiry taken by counsel with a witness, by an admonition to desist from a particular line of inquiry.

More serious infractions on the part of the prosecutor may provoke a motion for mistrial on the part of the defendant, and may in the view of the trial court warrant the granting of such a motion. The "overreaching" standard applied by the court below and urged today by JUSTICE STEVENS, however, would add another classification of prosecutorial error, one requiring dismissal of the indictment, but without supplying any standard by which to assess that error.[5]

By contrast, a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system. When it is remembered that resolution of double jeopardy questions by state trial courts are reviewable not only within the state court system, but in the federal court system on habeas corpus as well, the desirability of an easily applied principle is apparent.

Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on de-

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[5] If the Court were to hold, as would JUSTICE STEVENS, that such a determination requires an assessment of the facts and circumstances but without explaining how such an assessment ought to proceed, the Court would offer little guidance to the federal and state courts that must apply our decisions. JUSTICE STEVENS disagrees with the decision below because his reaction to a cold record is different from that of the Oregon Court of Appeals. The Court of Appeals found "overreaching"; JUSTICE STEVENS finds none. Neither articulates a basis for reaching their respective conclusions which can be applied to other factual situations. We are loath to adopt such an essentially standardless rule.

fendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States* v. *Scott*, 437 U. S. 82, 93 (1978). Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *United States* v. *Dinitz*, *supra*, at 609. Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Were we to embrace the broad and somewhat amorphous standard adopted by the Oregon Court of Appeals, we are not sure that criminal defendants as a class would be aided. Knowing that the granting of the defendant's motion for mistrial would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial.[6] If a mistrial were in fact warranted under the applicable law, of course, the defendant could in many instances successfully appeal a judgment of conviction on the same grounds that he urged a mistrial, and the Double Jeopardy Clause would present no bar to retrial.[7] But some of the advantages secured to him by the Double

[6] This Court has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence. See, *e. g.*, *United States* v. *DiFrancesco*, 449 U. S. 117, 130–131 (1980).

[7] JUSTICE STEVENS' opinion concurring in the judgment criticizes the suggestion that the broader rule he espouses would make it less likely the judges would grant a motion for mistrial than if the narrower rule pre-

Jeopardy Clause—the freedom from extended anxiety, and the necessity to confront the government's case only once—would be to a large extent lost in the process of trial to verdict, reversal on appeal, and subsequent retrial. See *United States* v. *Dinitz*, 424 U. S., at 608.

In adopting the position we now do, we recognize that language taken from our earlier opinions may well suggest a

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vailed. *Post*, at 687–688, n. 22. JUSTICE STEVENS' criticism of our conclusion appears to be based on the erroneous assumption that the courts in such a situation would be applying the narrow rule, rather than the broad rule. Tested by the correct assumption that the courts would be applying the all-encompassing standard denominated "overreaching," which he espouses, *post*, at 689–690, we do not find his criticisms persuasive. If appellate courts and trial courts alike in this branch of the law of double jeopardy were applying a rule of "black letter law" to a predetermined set of facts, it might be true that an appellate court would inevitably reach the conclusion that reprosecution should be barred in a number of cases where the trial court had actually denied the motion for mistrial. But there are two reasons why such a hypothesis is inapplicable here.

First, the rule espoused by JUSTICE STEVENS is anything but a rule of "black letter law." We are admonished that "[i]t is unnecessary and unwise to attempt to identify all the factors that might inform the court's judgment." *Ibid.* Second, appellate courts have traditionally given weight to a trial court's assessment as to the necessity for a mistrial in deciding questions of double jeopardy. As this Court said in *Gori* v. *United States*, 367 U. S. 364, 368 (1961):

"Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."

It seems entirely reasonable to expect, therefore, that appellate judges will continue to defer to the judgment of trial judges who are "on the scene" in this area, and that they will not inexorably reach the same conclusion on a cold record at the appellate stage that they might if any one of them had been sitting as a trial judge. And a trial judge trying to faithfully apply the amorphous standard enunciated by JUSTICE STEVENS could surely be forgiven if in cases he regarded as extremely close he resolved the doubt in favor of continuing a trial to its conclusion rather than aborting it.

broader rule.[8] The Court of Appeals in this case, for example, may have derived its "overreaching" standard from the following language in the plurality opinion in *United States* v. *Jorn*, 400 U. S., at 485:

> "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

A footnote attached to this sentence explains, however, that "where a defendant's mistrial motion is necessitated by judi-

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[8] JUSTICE STEVENS states that we "gratuitously lo[p] off a portion of the previously recognized exception." *Post*, at 681. This charge is simply not borne out by even a moderately careful reading of our cases on the point. The footnote in *United States* v. *Tateo*, 377 U. S., at 468, n. 3, quoted in n. 4, *supra*, states the exception in terms of prosecutorial misconduct motivated by "fear that the jury was likely to acquit the accused." The plurality opinion in *United States* v. *Jorn*, 400 U. S. 470, 485 (1971), quoted in the text, states the test in the broader terms of "prosecutorial or judicial overreaching"; the Court's opinion in *United States* v. *Dinitz*, 424 U. S. 600 (1976), speaks at one point in terms of "governmental actions intended to provoke mistrial requests," *id.*, at 611, and at another point on the same page of "'bad-faith conduct by judge or prosecutor'" which "threatens the '[h]arassment of an accused by successive prosecutions . . . .'" Only last Term, in *United States* v. *DiFrancesco*, *supra*, we said that "reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request." *Id.*, at 130.

Thus, it is quite inaccurate to suggest that our previous cases have single-mindedly adhered to one rule in cases such as this, and that we are now "lopping off" a part of that rule. However this case is decided, we are faced with a choice between two differing lines of authority in our own recent precedents; for the reasons stated in the text, *supra*, at 674–677, we think that the better arguments favor the rule which we adopt. But JUSTICE STEVENS, no less than we, chooses one of two differing rules; the state of our case law indicates that the justification for the choice must be based upon principle, and not authority.

cial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred." *Id.*, at 485, n. 12. There are likewise statements in *United States* v. *Dinitz*, *supra*, at 611, based largely on the plurality opinion in *Jorn* to the same effect.

Because of the confusion which these varying statements of the standard in question have occasioned in other courts, we deem it best to acknowledge the confusion and its justifiability in the light of these statements from previous decisions. We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

Since the Oregon trial court found, and the Oregon Court of Appeals accepted, that the prosecutorial conduct culminating in the termination of the first trial in this case was not so intended by the prosecutor, that is the end of the matter for purposes of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The judgment of the Oregon Court of Appeals is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

I join the Court's opinion holding that the *intention* of a prosecutor determines whether his conduct, viewed by the defendant and the court as justifying a mistrial, bars a retrial of the defendant under the Double Jeopardy Clause. Because "subjective" intent often may be unknowable, I empha-

size that a court—in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case. See *ante*, at 675.

In the present case the mistrial arose from the prosecutor's conduct in pursuing a line of redirect examination of a key witness. The Oregon Court of Appeals identified a single question as constituting "overreaching" so serious as to bar a retrial. Yet, there are few vigorously contested lawsuits—whether criminal or civil—in which improper questions are not asked. Our system *is* adversarial and vigorous advocacy is encouraged.

Nevertheless, this would have been a close case for me if there had been substantial factual evidence of intent beyond the question itself. Here, however, other relevant facts and circumstances strongly support the view that prosecutorial intent to cause a mistrial was absent. First, there was no sequence of overreaching prior to the single prejudicial question. See *ante*, at 669–670, and n. 1. Moreover, it is evident from a colloquy between counsel and the court, out of the presence of the jury, that the prosecutor not only resisted, but also was surprised by, the defendant's motion for a mistrial. See App. 24–29. Finally, at the hearing on respondent's double jeopardy motion, the prosecutor testified—and the trial found as a fact and the appellate court agreed—that there was no "'intention . . . to cause a mistrial.'" *Ante*, at 669.

In view of these circumstances, the Double Jeopardy Clause provides no bar to retrial.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I concur in the judgment and join in the opinion of JUSTICE STEVENS. However, it should be noted that nothing in the holding of the Court today prevents the state courts, on remand, from concluding that respondent's retrial would violate the provision of the Oregon Constitution that prohibits double jeopardy, Ore. Const., Art. I, § 12, as that provision

has been interpreted by the state courts, *State* v. *Rathbun*, 287 Ore. 421, 600 P. 2d 392 (1979). See *South Dakota* v. *Opperman*, 428 U. S. 364, 396 (1976) (MARSHALL, J., dissenting), on remand, *State* v. *Opperman*, 247 N. W. 2d 673 (S. D. 1976) (original State Supreme Court judgment adhered to as a matter of state constitutional law); *Oregon* v. *Hass*, 420 U. S. 714, 726 (1975) (MARSHALL, J., dissenting).

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in the judgment.

Unless the Oregon Court of Appeals based its decision on Oregon law,[1] this is a case in which the state court should have applied the general rule that a defendant's motion for a mistrial removes any double jeopardy bar to retrial. The prosecutor's mistake was not the kind of overreaching or harassment identified in our precedents as an exception to the general rule. Instead of explaining why that conclusion is required by settled law, this Court gratuitously lops off a portion of the previously recognized exception. This exercise in lawmaking is objectionable because it is wholly unnecessary and because it compromises an important protection provided by the Double Jeopardy Clause.

I

The Double Jeopardy Clause represents a constitutional policy of finality for the defendant's benefit in criminal pro-

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[1] Although I am willing to accept the Court's reading of the Oregon Court of Appeals' opinion as having been based on federal law, I find the question somewhat more difficult than does the Court because the Oregon Supreme Court declined to review the case without explaining its reasons. Since the Oregon Supreme Court seems to have interpreted the state constitutional protection against double jeopardy to be broader than the federal provision, see *State* v. *Rathbun*, 287 Ore. 421, 600 P. 2d 392 (1979), it is entirely possible that that court's refusal to review the Court of Appeals' decision was predicated on its view that the decision was sound as a matter of state law regardless of whether it was compelled by federal precedents.

ceedings.[2] If the defendant is acquitted by the jury, or if he is convicted and the conviction is upheld on appeal, he may not be prosecuted again for the same offense.[3] The defendant's interest in finality is not confined to final judgments; he also has a protected interest in having his guilt or innocence decided in one proceeding.[4] That interest must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury.[5] Our decisions in the mistrial setting accordingly have accommodated the defendant's double jeopardy interests[6] with legitimate prosecutorial interests.[7]

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[2] *United States* v. *Jorn*, 400 U. S. 470, 479 (plurality opinion).

[3] *United States* v. *Ball*, 163 U. S. 662.

[4] *Arizona* v. *Washington*, 434 U. S. 497, 503.

[5] *Id.*, at 505. The Court in *Wade* v. *Hunter*, 336 U. S. 684, explained: "The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.*, at 688–689 (footnote omitted).

[6] "The reasons why [the defendant's 'valued right to have his trial completed by a particular tribunal'] merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk than an

[Footnote 7 is on p. 683]

The accommodation is reflected in two general rules that govern the permissibility of reprosecution after a mistrial. Which general rule applies turns on whether the defendant has retained control over the course to be followed once error has substantially tainted the initial proceeding.[8] When a mistrial is declared over the defendant's objection, the general rule is that retrial is barred.[9] An exception to this general rule exists for cases in which the mistrial was justified by "manifest necessity."[10] The other general rule is that the defendant's motion for, or consent to, a mistrial removes any double jeopardy bar to reprosecution.[11] There is an exception to this rule for cases in which the prosecutor[12] intended to provoke a mistrial or otherwise engaged in "overreaching" or "harassment."[13] The prosecutor has the burden

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innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona* v. *Washington*, *supra*, at 503–505 (footnotes omitted).

[7] Society's interest, of course, is not simply to convict the guilty. Rather, its interest is "in fair trials designed to end in just judgments." *Wade* v. *Hunter*, *supra*, at 689.

[8] See *United States* v. *Dinitz*, 424 U. S. 600, 609.

[9] *Arizona* v. *Washington*, 434 U. S., at 505.

[10] *Ibid.*

[11] *United States* v. *Jorn*, 400 U. S., at 485.

[12] The exception also encompasses comparable judicial misconduct. Because we are confronted with prosecutorial error, this opinion will address only that context.

[13] *Ibid.* The Court has never invoked the exception to bar reprosecution after a mistrial. In only two cases has the Court actually been confronted with a claim that the exception applied. In *United States* v. *Dinitz*, *supra*, the trial court had granted the defendant's motion for a mistrial after expelling defense counsel for repeated misconduct. In holding that retrial was not barred by the Double Jeopardy Clause, this Court articulated the exception and the reasons why it was not established on the facts of that case:

"The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecu-

of proving the former exception for manifest necessity, and the defendant has the burden of proving the latter exception for overreaching.

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tions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' *United States* v. *Jorn*, *supra*, at 485, threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum* v. *United States*, 372 U. S., at 736. See *Gori* v. *United States*, 367 U. S., at 369; *United States* v. *Jorn*, *supra*, at 489 (STEWART, J., dissenting); cf. *Wade* v. *Hunter*, 336 U. S., at 692.

"But here the trial judge's banishment of Wagner from the proceedings was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal. As the Court of Appeals noted, Wagner 'was guilty of improper conduct' during his opening statement which 'may have justified disciplinary action,' 492 F. 2d, at 60–61. Even accepting the appellate court's conclusion that the trial judge overreacted in expelling Wagner from the courtroom, *ibid.*, the court did not suggest, the respondent has not contended, and the record does not show that the judge's action was motivated by bad faith or undertaken to harass or prejudice the respondent." 424 U. S., at 611 (footnote omitted).

The exception was also unsuccessfully claimed in *Lee* v. *United States*, 432 U. S. 23. In *Lee* the defendant had moved to dismiss a defective information prior to the attachment of jeopardy. The trial court tentatively denied the motion, but then granted it at the close of the evidence. Treating the motion to dismiss as a motion for a mistrial, this Court quoted extensively from *Dinitz* for the statement of the exception and then explained why the exception had not been established:

"It follows under *Dinitz* that there was no double jeopardy barrier to petitioner's retrial unless the judicial or prosecutorial error that prompted petitioner's motion was 'intended to provoke' the motion or was otherwise 'motivated by bad faith or undertaken to harass or prejudice' petitioner. *Supra*, at 33. Here, two underlying errors are alleged: the prosecutor's failure to draft the information properly and the court's denial of the motion to dismiss prior to the attachment of jeopardy. Neither error—even assuming the court's action could be so characterized—was the product of the kind of overreaching outlined in *Dinitz*. The drafting error was at most an act of negligence, as prejudicial to the Government as to the defendant. And the court's failure to postpone the taking of evidence until it could give full consideration to the defendant's motion, far from evidencing bad faith, was entirely reasonable in light of the last-minute timing of the motion and the failure of counsel to request a continuance or otherwise im-

As an initial matter, it is useful to explain why the defendant's retention of control over the course to be followed once serious prosecutorial error has occurred represents a reasonable accommodation of double jeopardy and prosecutorial interests. A defendant cannot be guaranteed both that there will be only one proceeding and that it will be free of error.[14] When unfair prejudice is injected into the proceeding by the prosecutor, the defendant may choose to continue the proceeding despite the taint and, if convicted, seek a reversal on appeal.[15] Or he may choose to abort the tainted proceeding and begin anew.[16] While it is true that prosecutorial error leaves the defendant with a "Hobson's choice,"[17] it is also true

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press upon the court the importance to petitioner of not being placed in jeopardy on a defective charge." 432 U. S., at 33–34 (footnote omitted).

For other descriptions of the overreaching or harassment exception, see, *e. g.*, *Arizona* v. *Washington*, *supra*, at 508 ("using the superior resources of the State to harass or to achieve a tactical advantage over the accused") (footnote omitted); *Illinois* v. *Somerville*, 410 U. S. 458, 464 (error "that would lend itself to prosecutorial manipulation"); *United States* v. *Jorn*, 400 U. S., at 485 ("prosecutorial . . . overreaching"); *id.*, at 485, n. 12 ("prosecutorial impropriety designed to avoid an acquittal"); *United States* v. *Tateo*, 377 U. S. 463, 468, n. 3 ("prosecutorial . . . impropriety . . . result[ing] from a fear that the jury was likely to acquit the accused").

[14] *United States* v. *Jorn*, 400 U. S., at 484.

[15] *Id.*, at 484, n. 11. See also *United States* v. *Tateo*, *supra*, at 474 (Goldberg, J., dissenting) ("Many juries acquit defendants after trials in which reversible error has been committed, and many experienced trial lawyers will forego a motion for a mistrial in favor of having his case decided by the jury").

[16] "[I]t is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." *United States* v. *Dinitz*, 424 U. S., at 608.

[17] *Id.*, at 609.

that the prosecutor suffers substantial costs no matter how the defendant exercises this choice. If the defendant consents to a mistrial, the prosecutor must go to the time, trouble, and expense of starting all over with the criminal prosecution. If the defendant chooses to continue the proceeding and preserve his objection for appeal, the prosecutor must continue to completion a proceeding in which a conviction may not be sustainable.[18]

The rationale for the exception to the general rule permitting retrial after a mistrial declared with the defendant's consent is illustrated by the situation in which the prosecutor commits prejudicial error with the intent to provoke a mistrial.[19] In this situation the defendant's choice to continue the tainted proceeding or to abort the proceeding and begin anew is inadequate to protect his double jeopardy interests. For, absent a bar to reprosecution, the defendant would simply play into the prosecutor's hands by moving for a mistrial. The defendant's other option—to continue the tainted proceeding—would be no option at all if, as we might expect given the prosecutor's intent, the prosecutorial error has virtually guaranteed conviction. There is no room in the balance of competing interests for this type of manipulation of the mistrial device. Or to put it another way, whereas we tolerate some incidental infringement upon a defendant's double jeopardy interests for the sake of society's interest in obtaining a verdict of guilt or innocence, when the prosecutor seeks to obtain an advantage by intentionally subverting double jeopardy interests, the balance invariably tips in favor of a bar to reprosecution.[20]

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[18] See Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 101–102.

[19] The prosecutor might wish to provoke a mistrial "in order to shop for a more favorable trier of fact, or to correct deficiencies in [his] case, or to obtain an unwarranted preview of the defendant's evidence." *Id.*, at 94.

[20] Cf. *Brock* v. *North Carolina*, 344 U. S. 424, 429 (Frankfurter, J., concurring).

Today the Court once again recognizes that the exception properly encompasses the situation in which the prosecutor commits prejudicial error with the intent to provoke a mistrial. But the Court reaches out to limit the exception to that one situation,[21] rejecting the previous recognition that prosecutorial overreaching or harassment is also within the exception.[22]

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[21] Compare *ante*, at 675–676 ("Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause"), with *ante*, at 676 ("Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion"), and *ante*, at 679 ("But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial").

[22] The Court offers two reasons for cutting back on the exception. First, the Court states that "[t]he difficulty with the more general standards which would permit a broader exception than one merely based on intent is that they offer virtually no standards for their application." *Ante*, at 674. As I indicate in the text, however, some generality in the formula is a virtue and, in any event, meaningful and principled standards can be developed on a case-by-case basis that will not inhibit legitimate prosecution practices. See *infra*, at 689–692. Moreover, the general standards could hardly be more difficult to apply than the Court's subjective intent standard. On this point, it is noteworthy that JUSTICE REHNQUIST recently cited the exception for "prosecutorial overreaching or misconduct" to illustrate that double jeopardy analysis rests on "balancing and fairness" rather than " 'bright line' distinction[s]." *Finch* v. *United States*, 433 U. S. 676, 680 (dissenting opinion).

Second, the Court is "not sure that criminal defendants as a class would be aided" by a broader exception. *Ante*, at 676. If a mistrial will more frequently constitute a bar to reprosecution, the Court supposes that trial judges will tend to refuse the defendant's mistrial motion and permit the error to be corrected on appeal of the conviction, in which event there would be no bar to reprosecution. This reasoning is premised on the

Even if I agreed that the balance of competing interests tipped in favor of a bar to reprosecution only in the situation in which the prosecutor intended to provoke a mistrial, I would not subscribe to a standard that conditioned such a bar on the determination that the prosecutor harbored such intent when he committed prejudicial error. It is almost inconceivable[23] that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant.[24] The defendant must shoulder a strong burden to establish a bar to reprosecution when he has consented to the mistrial, but the Court's subjective intent standard would eviscerate the exception.[25]

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assumption that an appellate court that concluded not only that the defendant's mistrial motion should have been granted but also that the prosecutor intended to provoke a mistrial would not be obligated to bar reprosecution as well as reverse the conviction. The assumption is "irrational." *Commonwealth* v. *Potter*, 478 Pa. 251, 282, 386 A. 2d 918, 933 (1978) (Roberts, J.); see *id.*, at 259–260, 386 A. 2d, at 921–922 (Pomeroy, J.); Westen & Drubel, *supra*, at 103, 106, n. 130; see generally Note, Double Jeopardy: An Illusory Remedy for Governmental Overreaching at Trial, 29 Buffalo L. Rev. 759, 773–776 (1980).

[23] For an example of the kind of case that the Court's limited exception would cover, see *Commonwealth* v. *Warfield*, 424 Pa. 555, 227 A. 2d 177 (1967).

[24] "As an initial matter, I question the validity of the lower court's assumption that the Government in such cases tailors its misconduct to achieve one improper result as opposed to another. It is far more likely that in cases such as this, where the prosecution is concerned that the trial may result in an acquittal, that the Government engages in misconduct with the general purpose of prejudicing the defendant. In this case, for example, the Government stood to benefit from Dixon's misconduct, regardless of whether it resulted in a guilty verdict or a mistrial. Moreover, even if such subtle differences in motivation do exist, I suspect that a defendant seeking to prevent a retrial will seldom be able to prove the Government's actual motivation." *Green* v. *United States*, 451 U. S. 929, 931, n. 2 (MARSHALL, J., dissenting from denial of certiorari).

[25] Moreover, a standard that requires a prosecutor to take the stand to explain his trial strategy and his train of thought prior to making a serious error is of questionable wisdom.

A broader objection to the Court's limitation of the exception is that the rationale for the exception extends beyond the situation in which the prosecutor intends to provoke a mistrial. There are other situations in which the defendant's double jeopardy interests outweigh society's interest in obtaining a judgment on the merits even though the defendant has moved for a mistrial. For example, a prosecutor may be interested in putting the defendant through the embarrassment, expense, and ordeal of criminal proceedings even if he cannot obtain a conviction.[26] In such a case, with the purpose of harassing the defendant the prosecutor may commit repeated prejudicial errors and be indifferent between a mistrial or mistrials and an unsustainable conviction or convictions. Another example is when the prosecutor seeks to inject enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction.[27] This kind of overreaching would not be covered by the Court's standard because, by hypothesis, the prosecutor's intent is to obtain a conviction, not to provoke a mistrial. Yet the defendant's choice—to continue the tainted proceeding or to abort it and begin anew—can be just as "hollow"[28] in this situation as when the prosecutor intends to provoke a mistrial.

To invoke the exception for overreaching, a court need not divine the exact motivation for the prosecutorial error. It is sufficient that the court is persuaded that egregious prosecutorial misconduct has rendered unmeaningful the defendant's choice to continue or to abort the proceeding. It is unnecessary and unwise to attempt to identify all the factors that

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[26] See, *e. g.*, *Shaw* v. *Garrison*, 328 F. Supp. 390 (ED La. 1971), aff'd, 467 F. 2d 113 (CA5 1972), cert. denied, 409 U. S. 1024.

[27] The defendant's successful argument for a bar to reprosecution in *United States* v. *Kessler*, 530 F. 2d 1246, 1253 (CA5 1976), was that "otherwise 'a prosecutor would have the option of first trying his case with inadmissible, prejudicial, and irrelevant evidence—that is, committing known error—in hopes of "getting away" with it, with the ability to retry the case properly if the first trial is aborted by a mistrial.'"

[28] *Ante*, at 673.

might inform the court's judgment, but several considerations follow from the rationale for recognizing the exception. First, because the exception is justified by the intolerance of intentional manipulation of the defendant's double jeopardy interests, a finding of deliberate misconduct normally would be a prerequisite to a reprosecution bar.[29] Second, because the defendant's option to abort the proceeding after prosecutorial misconduct would retain real meaning for the defendant in any case in which the trial was going badly for him,[30] normally a required finding would be that the prosecutorial error virtually eliminated, or at least substantially reduced, the probability of acquittal in a proceeding that was going badly for the government.[31] It should be apparent from these observations that only in a rare and compelling case will a mistrial declared at the request of the defendant or with his consent bar a retrial.

No one case, of course, is a proper vehicle for identifying the limits of the exception. The Court repeatedly has shunned inflexible standards in applying the comparable "manifest necessity" exception to the general rule that a de-

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[29] Deliberate misconduct generally must be inferred from the objective evidence. The more egregious the prosecutorial error, and the harsher its impact on the defendant, the more readily the inference could be drawn.

[30] Justice Harlan aptly described the defendant's interest as "being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn*, 400 U. S., at 486. There is a corresponding societal interest against the historical and abhorrent practice of terminating trials whenever it appeared that the government's evidence was insufficient to convict. See *Arizona* v. *Washington*, 434 U. S., at 507–508.

[31] In a case in which the prosecutor's intent is primarily to harass the defendant, and only secondarily to obtain a conviction, this consideration would, of course, carry much less weight. The Double Jeopardy Clause protects a defendant not only from "declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" but also from "[h]arassment of an accused by successive prosecutions." *Downum* v. *United States*, 372 U. S. 734, 736.

fendant is entitled to go to final judgment before the initial tribunal.[32] The value of the overreaching standard, like "[t]he value of the [manifest necessity standard,] thus lies in [its] capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Wade* v. *Hunter*, 336 U. S. 684, 691. The inexactitude of the standard used to protect defendants in the exceptional case surely should not concern the Court any more than the equally ill-defined formula used to protect prosecutors in the exceptional case. The scarcity of cases in which the exception has been invoked[33] counsels against preempting the judgment reflected in our decisions that an exception for overreaching or harassment should remain available for the rare case in which it may be needed.[34] We

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[32] See especially the Court's opinion in *Illinois* v. *Somerville*, 410 U. S. 458. JUSTICE MARSHALL criticized the majority in that case for "abandon-[ing] th[e] tradition [of elaboration of rules which give increasing guidance as case after case is decided] and [adopting] a new balancing test whose elements are stated on such a high level of abstraction as to give judges virtually no guidance at all in deciding subsequent cases." *Id.*, at 483 (dissenting opinion).

[33] The petitioner and the United States as *amicus curiae* cite only a few cases in which the exception has been invoked to bar reprosecution. One commentator discovered only two cases in which a Federal Court of Appeals barred reprosecution. Note, Double Jeopardy: An Illusory Remedy for Governmental Overreaching at Trial, 29 Buffalo L. Rev. 759, 760, n. 16 (1980).

[34] "We should not be so unmindful, even when constitutional questions are involved, of the principle of *stare decisis*, by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us. . . . Furthermore, we are not here called upon to weigh considerations generated by changing concepts as to minimum standards of fairness, which interpretation of the Due Process Clause inevitably requires. Instead, the defense of double jeopardy is involved, whose contours are the product of history. In this situation the passage of time is not enough, and the conviction borne to the mind of the rightness of an overturning decision must surely be of a highly compelling quality to justify overruling a well-estab-

should simply decide this case on its facts, as we did in *United States* v. *Dinitz* and *Lee* v. *United States*,[35] and thereby continue to give meaning to the "abstract formula"[36] in the context of actual cases.

II

The petitioner,[37] and the state court that denied the respondent's motion to dismiss,[38] have correctly pointed out that it is unnecessary to cut back on the recognized exception, or even to disavow the most liberal construction given it by the federal courts, to conclude that the exception has not been established on the facts of this case. The isolated prosecutorial error occurred early in the trial, too early to determine whether the case was going badly for the prosecution. If anyone was being harassed at that time, it was the prosecutor, who was frustrated by improper defense objections in her attempt to rehabilitate her witness. The gist of the comment that the respondent was a "crook" could fairly have been elicited from the witness, since defense counsel injected the respondent's past alleged improprieties into the trial by questioning the witness about his bias towards the

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lished precedent when we are presented with no considerations fairly deemed to have been wanting to those who preceded us." *Green* v. *United States*, 355 U. S. 184, 215 (Frankfurter, J., dissenting).

[35] See n. 13, *supra*.

[36] *Wade* v. *Hunter*, 336 U. S., at 691.

[37] "The Oregon Court of Appeals' holding that retrial of this case was barred on double jeopardy grounds is erroneous by any standard of prosecutorial overreaching which the lower courts of this country had previously derived from the decisions of this Court." Brief for Petitioner 43.

[38] "I have reviewed the transcript and the wording, as put, and I would agree that the question was improper as put. I do not find, however, that it constitutes bad faith or was intentional impropriety. The question of whether or not it constitutes overreaching is one of those gray areas where we have to determine what 'overreaching' means, and in looking to the case which the defense has cited, *United States* v. *Kessler*, prosecutorial overreaching is there defined as being such as must have been a result of gross

defendant. The comment therefore could not have injected the kind of prejudice that would render unmeaningful the defendant's option to proceed with the trial.

Because the present case quite clearly does not come within the recognized exception, I join the Court's judgment. I cannot, however, join the Court's opinion because it totally fails to justify its disavowal of the Court's precedents.

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negligence or intentional misconduct which prejudiced the defendant so that he cannot receive a fair trial, and I wouldn't find that the overreaching or the erroneous conduct in this matter reaches that degree of aggravation. I don't think it amounted to gross negligence or intentional misconduct." App. 53.

INSURANCE CORPORATION OF IRELAND, LTD., ET AL. *v.* COMPAGNIE DES BAUXITES DE GUINEE

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

No. 81-440. Argued March 23, 1982—Decided June 1, 1982

Federal Rule of Civil Procedure 37(b)(2)(A) provides that a district court, as a sanction for failure to comply with discovery orders, may enter "[a]n order that the matters regarding which the [discovery] order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Asserting diversity jurisdiction, respondent, a Delaware corporation with its principal place of business in the Republic of Guinea, filed suit against various insurance companies in the United States District Court for the Western District of Pennsylvania to recover on a business interruption policy. When certain of the defendants (a group of foreign insurance companies, including petitioners) raised the defense of lack of personal jurisdiction, respondent attempted to use discovery in order to establish jurisdictional facts. After petitioners repeatedly failed to comply with the court's orders for production of the requested information, the court warned them that unless they complied by a specified date, it would assume, pursuant to Rule 37(b)(2)(A), that it had personal jurisdiction. When petitioners again failed to comply, the court imposed the sanction, and the Court of Appeals affirmed, concluding that imposition of the sanction fell within the trial court's discretion under Rule 37(b)(2)(A) and that the sanction did not violate petitioners' due process rights.

Held:

1. Rule 37(b)(2)(A) may be applied to support a finding of personal jurisdiction without violating due process. Unlike subject-matter jurisdiction, which is an Art. III as well as a statutory requirement, the requirement that a court have personal jurisdiction flows from the Due Process Clause and protects an individual liberty interest. Because it protects an individual interest, it may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. Due process is violated by a rule establishing legal consequences of a failure to produce evidence only if the defendant's behavior will not support the presumption that "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in

the asserted defense." *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 351. A proper application of Rule 37(b)(2)(A) will, as a matter of law, support such a presumption. Pp. 701–707.

2. The District Court did not abuse its discretion in applying Rule 37(b)(2)(A) in this case. The record establishes that imposition of the sanction here satisfied the Rule's requirements that the sanction be both "just" and specifically related to the particular "claim" that was at issue in the discovery order. Pp. 707–709.

651 F. 2d 877, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 709.

Edmund K. Trent argued the cause for petitioners. With him on the briefs was *Thomas P. Lawton III*.

Cloyd R. Mellott argued the cause for respondent. With him on the brief were *Dale Hershey*, *Robert W. Doty*, *Robert L. Byer*, and *Jordan S. Weltman*.

JUSTICE WHITE delivered the opinion of the Court.

Rule 37(b), Federal Rules of Civil Procedure, provides that a district court may impose sanctions for failure to comply with discovery orders. Included among the available sanctions is:

> "An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Rule 37(b)(2)(A).

The question presented by this case is whether this Rule is applicable to facts that form the basis for personal jurisdiction over a defendant. May a district court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, proceed on the basis that personal jurisdiction over the recalcitrant party has been established?

Petitioners urge that such an application of the Rule would violate due process: If a court does not have jurisdiction over a party, then it may not create that jurisdiction by judicial fiat.[1] They contend also that until a court has jurisdiction over a party, that party need not comply with orders of the court; failure to comply, therefore, cannot provide the ground for a sanction. In our view, petitioners are attempting to create a logical conundrum out of a fairly straightforward matter.

I

Respondent Compagnie des Bauxites de Guinee (CBG) is a Delaware corporation, 49% of which is owned by the Republic of Guinea and 51% is owned by Halco (Mining) Inc. CBG's principal place of business is in the Republic of Guinea, where it operates bauxite mines and processing facilities. Halco, which operates in Pennsylvania, has contracted to perform certain administrative services for CBG. These include the procurement of insurance.

In 1973, Halco instructed an insurance broker, Marsh & McLennan, to obtain $20 million worth of business interruption insurance to cover CBG's operations in Guinea. The first half of this coverage was provided by the Insurance Company of North America (INA). The second half, or what is referred to as the "excess" insurance, was provided by a group of 21 foreign insurance companies,[2] 14 of which are petitioners in this action (the excess insurers).[3]

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[1] The petition with which we deal in this case was filed as a cross-petition in response to the petition for certiorari filed in No. 81–290, *Compagnie des Bauxites de Guinee* v. *Insurance Corp. of Ireland, Ltd.* We granted the cross-petition, limiting the grant to the question of the validity of the Rule 37(b)(2) sanction. 454 U. S. 963 (1981). We shall refer to the cross-petitioners as "petitioners" and to the cross-respondent as "respondent."

[2] The District Court described these excess insurers as follows:

"Of the 21 Excess Insurers, five are English companies representing English domestic interests but insuring risks throughout the world, partic-

[Footnote 3 is on p. 697]

Marsh & McLennan requested Bland Payne to obtain the excess insurance in the London insurance market. Pursuant to normal business practice

> "[i]n late January and in February, 1974, Bland Payne presented to the excess insurer [petitioners] a placing slip in the amount of $10,000,000, in excess of the first $10,000,000. [Petitioners] initialed said placing slip, effective February 12, 1974, indicating the part of said $10,000,000 each was willing to insure."[4] Finding 27 of the District Court, 2 App. 347a.

Once the offering was fully subscribed, Bland Payne issued a cover note indicating the amount of the coverage and specifying the percentage of the coverage that each excess insurer had agreed to insure. No separate policy was issued; the excess insurers adopted the INA policy "as far as applicable."

Sometime after February 12, CBG allegedly experienced mechanical problems in its Guinea operation, resulting in a business interruption loss in excess of $10 million. Contending that the loss was covered under its policies, CBG brought suit when the insurers refused to indemnify CBG for the loss. Whatever the mechanical problems experienced by CBG, they were perhaps minor compared to the legal difficulties encountered in the courts.

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ularly in Pennsylvania. Seven are English companies which represent non English parents, or affiliates. The United States, Japan and Israel are the nationalities of two each of the Excess Insurer Defendants. Switzerland and the Republic of Ireland are the nationalities of one each of the Excess Insurer Defendants. The remaining Excess Insurer Defendant is a Belgium Company which represents the United States parent." 1 App. 196a.

[3] Four of the excess insurers did not contest personal jurisdiction in the District Court. *Id.*, at 105a. The Court of Appeals directed the dismissal of the complaint with respect to three others. *Compagnie des Bauxites de Guinee* v. *Insurance Co. of North America*, 651 F. 2d 877, 886 (1981). CBG challenges the latter action in its petition for certiorari in No. 81–290.

[4] One of the excess insurers, L'Union Atlantique S.A. d'Assurances, does business in Brussels, and was sent a separate placing slip.

In December 1975, CBG filed a two-count suit in the Western District of Pennsylvania, asserting jurisdiction based on diversity of citizenship. The first count was against INA; the second against the excess insurers. INA did not challenge personal or subject-matter jurisdiction of the District Court. The answer of the excess insurers, however, raised a number of defenses, including lack of *in personam* jurisdiction. Subsequently, this alleged lack of personal jurisdiction became the basis of a motion for summary judgment filed by the excess insurers.[5] The issue in this case requires an account of respondent's attempt to use discovery in order to demonstrate the court's personal jurisdiction over the excess insurers.

Respondent's first discovery request—asking for "[c]opies of all business interruption insurance policies issued by Defendant during the period from January 1, 1972 to December 31, 1975"—was served on each defendant in August 1976. In January 1977, the excess insurers objected, on grounds of burdensomeness, to producing such policies. Several months later, respondent filed a motion to compel petitioners to produce the requested documents. In June 1978, the court orally overruled petitioners' objections. This was followed by a second discovery request in which respondent narrowed the files it was seeking to policies which "were delivered in . . . Pennsylvania . . . or covered a risk located in . . . Pennsylvania." Petitioners now objected that these documents were not in their custody or control; rather, they were kept by the brokers in London. The court ordered petitioners to request the information from the brokers, limiting the request to policies covering the period from 1971 to date. That was in July 1978; petitioners were given 90 days to produce the information. On November 8, petitioners

[5] The motion for summary judgment was filed on May 20, 1977. In it, 17 of the excess insurers alleged a lack of *in personam* jurisdiction and all 21 excess insurers sought dismissal on the ground of *forum non conveniens*. The District Court denied the motion on April 19, 1979.

were given an additional 30 days to complete discovery. On November 24, petitioners filed an affidavit offering to make their records, allegedly some 4 million files, available at their offices in London for inspection by respondent. Respondent countered with a motion to compel production of the previously requested documents. On December 21, 1978, the court, noting that no conscientious effort had yet been made to produce the requested information and that no objection had been entered to the discovery order in July, gave petitioners 60 more days to produce the requested information. The District Judge also issued the following warning:

> "[I]f you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume, under Rule of Civil Procedure 37(b), subsection 2(A), that there is jurisdiction." 1 App. 115a.

A few moments later he restated the warning as follows: "I will assume that jurisdiction is here with this court unless you produce statistics and other information in that regard that would indicate otherwise." *Id.*, at 116a.

On April 19, 1979, the court, after concluding that the requested material had not been produced, imposed the threatened sanction, finding that "for the purpose of this litigation the Excess Insurers are subject to the in personam jurisdiction of this Court due to their business contacts with Pennsylvania." *Id.*, at 201a. Independently of the sanction, the District Court found two other grounds for holding that it had personal jurisdiction over petitioners. First, on the record established, it found that petitioners had sufficient business contacts with Pennsylvania to fall within the Pennsylvania long-arm statute. Second, in adopting the terms of the INA contract with CBG—a Pennsylvania insurance contract—the excess insurers implicitly agreed to submit to the jurisdiction of the court.[6]

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[6] On March 22, 1979, the excess insurers instituted a suit against CBG in England, attacking the validity of the insurance contract. In its April 19 deci-

Except with respect to three excess insurers, the Court of Appeals for the Third Circuit affirmed the jurisdictional holding, relying entirely upon the validity of the sanction.[7] *Compagnie des Bauxites de Guinea* v. *Insurance Co. of North America*, 651 F. 2d 877 (1981). That court specifically found that the discovery orders of the District Court did not constitute an abuse of discretion and that imposition of the sanction fell within the limits of trial court discretion under Rule 37(b):

> "The purpose and scope of the ordered discovery were directly related to the issue of jurisdiction and the rule 37 sanction was tailored to establish as admitted those jurisdictional facts that, because of the insurers' failure to comply with discovery orders, CBG was unable to adduce through discovery." 651 F. 2d, at 885.

Furthermore, it held that the sanction did not violate petitioners' due process rights, because it was no broader than "reasonably necessary" under the circumstances.

Because the decision below directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Familia de Boom* v. *Arosa Mercantil, S.A.*, 629 F. 2d 1134 (1980), we granted certiorari.[8] 454 U. S. 963 (1981).

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sion, the District Court found that "the commencement of the separate action in England [was] oppressive, unfair, and an act of bad faith under all of the circumstances." 1 App. 203a. It, therefore, enjoined the continuation of that suit. This aspect of the District Court decision was reversed by the Court of Appeals. Respondent seeks certiorari review of that decision (see n. 1, *supra*).

[7] It reversed as to three of the excess insurers on the grounds that they had complied with the discovery orders and that their contacts with Pennsylvania were not sufficient to justify exercise of the Pennsylvania long-arm statute. It also held that the District Court had abused its discretion in enjoining the action in England. Judge Gibbons dissented on the propriety of the sanction, arguing that the District Court had abused its discretion. He also expressed some doubt that a Rule 37 sanction could ever be used as the source of personal jurisdiction. 651 F. 2d, at 892, n. 4.

[8] In *Familia de Boom*, the Fifth Circuit held that a sanction under Rule 37(b)(2) is valid only if the court has personal jurisdiction over the party

II

In *McDonald* v. *Mabee*, 243 U. S. 90 (1917), another case involving an alleged lack of personal jurisdiction, Justice Holmes wrote for the Court, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *Id.*, at 91. Petitioners' basic submission is that to apply Rule 37(b)(2) to jurisdictional facts is to allow fiction to get the better of fact and that it is impermissible to use a fiction to establish judicial power, where, as a matter of fact, it does not exist. In our view, this represents a fundamental misunderstanding of the nature of personal jurisdiction.

The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. *Stoll* v. *Gottlieb*, 305 U. S. 165, 171–172 (1938); *Thompson* v. *Whitman*, 18 Wall. 457, 465 (1874). The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements. Petitioners fail to recognize the distinction between the two concepts—speaking instead in general terms of "jurisdiction"—although their argument's strength comes from conceiving of jurisdiction only as subject-matter jurisdiction.

Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art. III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only

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that has refused compliance with a court order. Personal jurisdiction must, it held, appear from the record independently of the sanction. The Courts of Appeals for the Fourth and Eighth Circuits, on the other hand, have agreed with the Third Circuit on the appropriateness of a sanction on the issue of personal jurisdiction. *Lekkas* v. *Liberian M/V Caledonia*, 443 F. 2d 10, 11 (CA4 1971); *English* v. *21st Phoenix Corp.*, 590 F. 2d 723 (CA8 1979).

exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1.

Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California* v. *LaRue*, 409 U. S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17–18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).[9]

None of this is true with respect to personal jurisdiction. The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.[10] Thus, the test for personal jurisdiction

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[9] A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal. See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940); *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938).

[10] It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the

requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945), quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940).

Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. In *McDonald* v. *Mabee*, *supra*, the Court indicated that regardless of the power of the State to serve process, an individual may submit to the jurisdiction of the court by appearance. A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court. In *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U. S. 311, 316 (1964), we

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character of state sovereignty vis-à-vis other States. For example, in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 291–292 (1980), we stated:

"[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (Citation omitted.)

Contrary to the suggestion of JUSTICE POWELL, *post*, at 713–714, our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

stated that "parties to a contract may agree in advance to submit to the jurisdiction of a given court," and in *Petrowski* v. *Hawkeye-Security Co.*, 350 U. S. 495 (1956), the Court upheld the personal jurisdiction of a District Court on the basis of a stipulation entered into by the defendant. In addition, lower federal courts have found such consent implicit in agreements to arbitrate. See *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354 (CA2 1964); 2 J. Moore & J. Lucas, Moore's Federal Practice ¶4.02[3], n. 22 (1982) and cases listed there. Furthermore, the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures. See *Adam* v. *Saenger*, 303 U. S. 59, 67–68 (1938) ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts . . . . It is the price which the state may exact as the condition of opening its courts to the plaintiff"); *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29–30 (1917) ("[W]hat acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ"). Finally, unlike subject-matter jurisdiction, which even an appellate court may review *sua sponte*, under Rule 12(h), Federal Rules of Civil Procedure, "[a] defense of lack of jurisdiction over the person . . . is waived" if not timely raised in the answer or a responsive pleading.

In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—*i. e.*, certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submis-

sion to the jurisdiction of the court, whether voluntary or not.

The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights. Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection. A sanction under Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction has precisely the same effect. As a general proposition, the Rule 37 sanction applied to a finding of personal jurisdiction creates no more of a due process problem than the Rule 12 waiver. Although "a court cannot conclude all persons interested by its mere assertion of its own power," *Chicago Life Ins. Co.* v. *Cherry*, *supra*, at 29, not all rules that establish legal consequences to a party's own behavior are "mere assertions" of power.

Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322 (1909), for the due process limits on such rules.[11] There the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. Such a rule was permissible as an expression of "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered . . . . [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.*, at 350–351.

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[11] The Advisory Committee Notes to the Rule specifically stated that "the provisions of the rule find support in [*Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322 (1909)]." Final Report of Advisory Committee on Rules for Civil Procedure 25 (1937). See also *Societe Internationale* v. *Rogers*, 357 U. S. 197, 209 (1958).

The situation in *Hammond* was specifically distinguished from that in *Hovey* v. *Elliott*, 167 U. S. 409 (1897), in which the Court held that it did violate due process for a court to take similar action as "punishment" for failure to obey an order to pay into the registry of the court a certain sum of money. Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption. See *Societe Internationale* v. *Rogers*, 357 U. S. 197, 209–213 (1958). If there is no abuse of discretion in the application of the Rule 37 sanction, as we find to be the case here (see Part III), then the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver.

Petitioners argue that a sanction consisting of a finding of personal jurisdiction differs from all other instances in which a sanction is imposed, including the default judgment in *Hammond Packing*, because a party need not obey the orders of a court until it is established that the court has personal jurisdiction over that party. If there is no obligation to obey a judicial order, a sanction cannot be applied for the failure to comply. Until the court has established personal jurisdiction, moreover, any assertion of judicial power over the party violates due process.

This argument again assumes that there is something unique about the requirement of personal jurisdiction, which prevents it from being established or waived like other rights. A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. See *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525 (1931). By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That decision will be res judicata on that issue in any further proceedings. *Id.*, at 524; *American Surety Co.*

v. *Baldwin*, 287 U. S. 156, 166 (1932). As demonstrated above, the manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straightforward factfinding. A particular rule may offend the due process standard of *Hammond Packing*, but the mere use of procedural rules does not in itself violate the defendant's due process rights.

III

Even if Rule 37(b)(2) may be applied to support a finding of personal jurisdiction, the question remains as to whether it was properly applied under the circumstances of this case. Because the District Court's decision to invoke the sanction was accompanied by a detailed explanation of the reasons for that order and because that decision was upheld as a proper exercise of the District Court's discretion by the Court of Appeals, this issue need not detain us for long. What was said in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U. S. 639, 642 (1976), is fully applicable here: "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have [applied the sanction]; it is whether the District Court abused its discretion in so doing" (citations omitted). For the reasons that follow, we hold that it did not.

Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing*, *supra*, the former represents the general due process restrictions on the court's discretion.

In holding that the sanction in this case was "just," we rely specifically on the following. First, the initial discovery request was made in July 1977. Despite repeated orders from the court to provide the requested material, on December 21, 1978, the District Court was able to state that the petitioners

"haven't even made any effort to get this information up to this point." 1 App. 112a. The court then warned petitioners of a possible sanction. Confronted with continued delay and an obvious disregard of its orders, the trial court's invoking of its powers under Rule 37 was clearly appropriate. Second, petitioners repeatedly agreed to comply with the discovery orders within specified time periods. In each instance, petitioners failed to comply with their agreements. Third, respondent's allegation that the court had personal jurisdiction over petitioners was not a frivolous claim, and its attempt to use discovery to substantiate this claim was not, therefore, itself a misuse of judicial process. The substantiality of the jurisdictional allegation is demonstrated by the fact that the District Court found, as an alternative ground for its jurisdiction, that petitioners had sufficient contacts with Pennsylvania to fall within the State's long-arm statute. *Supra*, at 699. Fourth, petitioners had ample warning that a continued failure to comply with the discovery orders would lead to the imposition of this sanction. Furthermore, the proposed sanction made it clear that, even if there was not compliance with the discovery order, this sanction would not be applied if petitioners were to "produce statistics and other information" that would indicate an absence of personal jurisdiction. 1 App. 116a. In effect, the District Court simply placed the burden of proof upon petitioners on the issue of personal jurisdiction.[12] Petitioners failed to comply with the discovery order; they also failed to make any attempt to meet this burden of proof. This course of behavior, coupled with the ample warnings, demonstrates the "justice" of the trial court's order.

Neither can there be any doubt that this sanction satisfies the second requirement. CBG was seeking through discov-

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[12] Counsel for petitioners agreed to this characterization of the sanction at oral argument. Tr. of Oral Arg. 47–48.

ery to respond to petitioners' contention that the District Court did not have personal jurisdiction. Having put the issue in question, petitioners did not have the option of blocking the reasonable attempt of CBG to meet its burden of proof. It surely did not have this option once the court had overruled petitioners' objections. Because of petitioners' failure to comply with the discovery orders, CBG was unable to establish the full extent of the contacts between petitioners and Pennsylvania, the critical issue in proving personal jurisdiction. Petitioners' failure to supply the requested information as to its contacts with Pennsylvania supports "the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense." *Hammond Packing*, 212 U. S., at 351. The sanction took as established the facts—contacts with Pennsylvania—that CBG was seeking to establish through discovery. That a particular legal consequence—personal jurisdiction of the court over the defendants—follows from this, does not in any way affect the appropriateness of the sanction.

IV

Because the application of a legal presumption to the issue of personal jurisdiction does not in itself violate the Due Process Clause and because there was no abuse of the discretion granted a district court under Rule 37(b)(2), we affirm the judgment of the Court of Appeals.

So ordered.

JUSTICE POWELL, concurring in the judgment.

The Court rests today's decision on a constitutional distinction between "subject matter" and "*in personam*" jurisdiction. Under this distinction, subject-matter jurisdiction defines an Art. III limitation on the power of federal courts. By contrast, the Court characterizes the limits on *in personam* jurisdiction solely in terms of waivable personal rights and notions of "fair play." Having done so, it determines

that fundamental questions of judicial power do not arise in this case concerning the personal jurisdiction of a federal district court.

In my view the Court's broadly theoretical decision misapprehends the issues actually presented for decision. Federal courts are courts of limited jurisdiction. Their personal jurisdiction, no less than their subject-matter jurisdiction, is subject both to constitutional and to statutory definition. When the applicable limitations on federal jurisdiction are identified, it becomes apparent that the Court's theory could require a sweeping but largely unexplicated revision of jurisdictional doctrine. This revision could encompass not only the personal jurisdiction of federal courts but "sovereign" limitations on state jurisdiction as identified in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 291–293 (1980). Fair resolution of this case does not require the Court's broad holding. Accordingly, although I concur in the Court's judgment, I cannot join its opinion.

I

This lawsuit began when the respondent Compagnie des Bauxites brought a contract action against the petitioner insurance companies in the United States District Court for the Western District of Pennsylvania. Alleging diversity jurisdiction, respondent averred that the District Court had personal jurisdiction of the petitioners, all foreign corporations, under the long-arm statute of the State of Pennsylvania. See *Compagnie des Bauxites de Guinea* v. *Insurance Co. of North America*, 651 F. 2d 877, 880–881 (CA3 1981). Petitioners, however, denied that they were subject to the court's personal jurisdiction under that or any other statute. Viewing the question largely as one of fact, the court ordered discovery to resolve the dispute.

Meantime, while respondent unsuccessfully sought compliance with its discovery requests, petitioners brought a parallel action in England's High Court of Justice, Queens Bench

Division. It was at this juncture that the current issues arose. Seeking to enjoin the English proceedings, respondent sought an injunction in the District Court. Petitioners protested that they were not subject to that court's personal jurisdiction and thus that they lay beyond its injunctive powers. But the District Court disagreed. As a jurisdictional prerequisite to its entry of the injunction, the court upheld its personal jurisdiction over petitioners.[1] It characterized its finding of jurisdiction partly as a sanction for petitioners' noncompliance with its discovery orders under Federal Rule of Civil Procedure 37(b).[2]

Rule 37(b) is not, however, a jurisdictional provision. As recognized by the Court of Appeals, the governing jurisdictional statute remains the long-arm statute of the State of Pennsylvania. See 651 F. 2d, at 881. In my view the Court fails to make clear the implications of this central fact: that the District Court in this case relied on state law to obtain personal jurisdiction.

As courts of limited jurisdiction, the federal district courts possess no warrant to create jurisdictional law of their own. Under the Rules of Decision Act, 28 U. S. C. § 1652, they must apply state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide . . . ." See generally *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Thus, in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State. See, *e. g.*, *Intermeat, Inc.* v. *American Poultry Co.*, 575 F. 2d 1017 (CA2 1978); *Wilkerson* v. *Fortuna Corp.*,

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[1] A district court must have personal jurisdiction over a party before it can enjoin its actions. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 111–112 (1969).

[2] The court also found that petitioners in fact had undertaken sufficient business activity in the State to bring them within the reach of the Pennsylvania long-arm statute. See App. to Pet. for Cert. 51a, 53a.

554 F. 2d 745 (CA5), cert. denied, 434 U. S. 939 (1977); *Poyner* v. *Erma Werke Gmbh*, 618 F. 2d 1186, 1187 (CA6 1980); *Lakeside Bridge & Steel Co.* v. *Mountain State Constr. Co.*, 597 F. 2d 596 (CA7 1979), cert. denied, 445 U. S. 907 (1980); *Lakota Girl Scout Council, Inc.* v. *Havey Fundraising Management, Inc.*, 519 F. 2d 634 (CA8 1975); *Arrowsmith* v. *United Press International*, 320 F. 2d 219, 226 (CA2 1963); *Forsythe* v. *Overmyer*, 576 F. 2d 779, 782 (CA9), cert. denied, 439 U. S. 864 (1978); *Quarles* v. *Fuqua Industries, Inc.*, 504 F. 2d 1358 (CA10 1974).[3]

As a result of the District Court's dependence on the law of Pennsylvania to establish personal jurisdiction—a dependence mandated by Congress under 28 U. S. C. § 1652—its jurisdiction in this case normally would be subject to the same due process limitations as a state court. See, *e. g.*, *Forsythe* v. *Overmyer*, *supra*, at 782; *Washington* v. *Norton Mfg., Inc.*, 588 F. 2d 441, 445 (CA5 1979); *Fisons Ltd.* v. *United States*, 458 F. 2d 1241, 1250 (CA7 1972).[4] Thus, the question arises how today's decision is related to cases restricting the personal jurisdiction of the States.

Before today our decisions had established that "minimum contacts" represented a constitutional prerequisite to the exercise of *in personam* jurisdiction over an unconsenting defendant. See, *e. g.*, *World-Wide Volkswagen Corp.* v. *Wood-*

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[3] As Judge Friendly explained in the leading case of *Arrowsmith* v. *United Press International*, 320 F. 2d, at 226:

"State statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whimsy; like most legislation they represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations. We see nothing in the concept of diversity jurisdiction that should lead us to read into the governing statutes a Congressional mandate, unexpressed by Congress itself, to disregard the balance thus struck by the states."

[4] It is not contended that there is any federal basis for the exercise of personal jurisdiction by the District Court.

son, 444 U. S., at 291–293; *Hanson* v. *Denckla*, 357 U. S. 235, 251 (1958); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). In the absence of a showing of minimum contacts, a finding of personal jurisdiction over an unconsenting defendant, even as a sanction, therefore would appear to transgress previously established constitutional limitations. The cases cannot be reconciled by a simple distinction between the constitutional limits on state and federal courts. Because of the District Court's reliance on the Pennsylvania long-arm statute—the applicable jurisdictional provision under the Rules of Decisions Act—the relevant constitutional limits would not be those imposed directly on federal courts by the Due Process Clause of the Fifth Amendment, but those applicable to state jurisdictional law under the Fourteenth.

The Court's decision apparently must be understood as related to our state jurisdictional cases in one of two ways. Both involve legal theories that fail to justify the doctrine adopted by the Court in this case.

A

Under traditional principles, the due process question in this case is whether "minimum contacts" exist between petitioners and the forum State that would justify the State in exercising personal jurisdiction. See, *e. g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 291–293; *Shaffer* v. *Heitner*, 433 U. S. 186, 216 (1977); *Hanson* v. *Denckla*, *supra*, at 251. By finding that the establishment of minimum contacts is not a prerequisite to the exercise of jurisdiction to impose sanctions under Federal Rule of Civil Procedure 37, the Court may be understood as finding that "minimum contacts" no longer are a constitutional requirement for the exercise by a state court of personal jurisdiction over an unconsenting defendant.[5] Whenever the Court's no-

[5] The Court refers to the respondent's prima facie showing of "minimum contacts" only as one factor indicating that the District Court did not abuse

tions of fairness are not offended, jurisdiction apparently may be upheld.

Before today, of course, our cases had linked minimum contacts and fair play as *jointly* defining the "sovereign" limits on state assertions of personal jurisdiction over unconsenting defendants. See *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 292–293; see *Hanson* v. *Denckla*, *supra*, at 251. The Court appears to abandon the rationale of these cases in a footnote. See *ante*, at 702–703, n. 10. But it does not address the implications of its action. By eschewing reliance on the concept of minimum contacts as a "sovereign" limitation on the power of States—for, again, it is the State's long-arm statute that is invoked to obtain personal jurisdiction in the District Court—the Court today effects a potentially substantial change of law. For the first time it defines personal jurisdiction solely by reference to abstract notions of fair play. And, astonishingly to me, it does so in a case in which this rationale for decision was neither argued nor briefed by the parties.

B

Alternatively, it is possible to read the Court opinion, not as affecting state jurisdiction, but simply as asserting that Rule 37 of the Federal Rules of Civil Procedure represents a congressionally approved basis for the exercise of personal jurisdiction by a federal district court. On this view Rule 37 vests the federal district courts with authority to take jurisdiction over persons not in compliance with discovery orders. This of course would be a more limited holding. Yet the Court does not cast its decision in these terms. And it provides no support for such an interpretation, either in the language or in the history of the Federal Rules.

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its discretion in entering a finding of personal jurisdiction as a sanction under Rule 37(b). See *ante*, at 708. Generally it views the requirement of personal jurisdiction as a right that may be "established or waived like other rights." *Ante*, at 706.

In the absence of such support, I could not join the Court in embracing such a construction of the Rules of Civil Procedure.[6] There is nothing in Rule 37 to suggest that it is intended to confer a grant of personal jurisdiction. Indeed, the clear language of Rule 82 seems to establish that Rule 37 should *not* be construed as a jurisdictional grant: "These rules shall not be construed to extend . . . the jurisdiction of the United States district courts or the venue of actions therein." Moreover, assuming that minimum contacts remain a constitutional predicate for the exercise of a State's *in personam* jurisdiction over an unconsenting defendant, constitutional questions would arise if Rule 37 were read to permit a plaintiff in a diversity action to subject a defendant to a "fishing expedition" in a foreign jurisdiction. A plaintiff is not entitled to discovery to establish essentially speculative allegations necessary to personal jurisdiction. Nor would the use of Rule 37 sanctions to enforce discovery orders constitute a mere abuse of discretion in such a case.[7] For me at least, such a use of discovery would raise serious questions as to the constitutional as well as the statutory authority of a federal court—in a diversity case—to exercise personal juris-

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[6] Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained. Although Rule 4 deals expressly only with service of process, not with the underlying jurisdictional prerequisites, jurisdiction may not be obtained unless process is served in compliance with applicable law. See, *e. g.*, *Intermeat, Inc.* v. *American Poultry Co.*, 575 F. 2d 1017 (CA2 1978); *Washington* v. *Norton Mfg., Inc.*, 588 F. 2d 441, 445 (CA5 1979); D. Currie, Federal Courts 858 (2d ed. 1975). For this reason Rule 4 frequently has been characterized as a jurisdictional provision. See, *e. g.*, 374 U. S. 869 (1963) (statement of Black and Douglas, JJ., dissenting from adoption of amendments to the Federal Rules of Civil Procedure); Currie, *supra*, at 858; Foster, Long-Arm Jurisdiction in Federal Courts, 1969 Wis. L. Rev. 9, 11. As applicable here, Rule 4 relies expressly on state law. See Fed. Rules Civ. Proc. 4(d)(7) and (e).

[7] Compare the Court's view. *Ante*, at 707.

diction absent some showing of minimum contacts between the unconsenting defendant and the forum State.

II

In this case the facts alone—unaided by broad jurisdictional theories—more than amply demonstrate that the District Court possessed personal jurisdiction to impose sanctions under Rule 37 and otherwise to adjudicate this case. I would decide the case on this narrow basis.

As recognized both by the District Court and the Court of Appeals, the respondent adduced substantial support for its jurisdictional assertions. By affidavit and other evidence, it made a prima facie showing of "minimum contacts." See 651 F. 2d, at 881–882, 886, and n. 9. In the view of the District Court, the evidence adduced actually was sufficient to sustain a finding of personal jurisdiction independently of the Rule 37 sanction. App. to Pet. for Cert. 51a, 53a.[8]

Where the plaintiff has made a prima facie showing of minimum contacts, I have little difficulty in holding that its showing was sufficient to warrant the District Court's entry of discovery orders. And where a defendant then fails to comply with those orders, I agree that the prima facie showing may be held adequate to sustain the court's finding that minimum contacts exist, either under Rule 37 or under a theory of "presumption" or "waiver."

Finding that the decision of the Court of Appeals should be affirmed on this ground, I concur in the judgment of the Court.

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[8] The Court of Appeals deemed it unnecessary to review this alternative basis for the District Court's finding of jurisdiction. See 651 F. 2d, at 886, and n. 9.

SUMMIT VALLEY INDUSTRIES, INC. *v.* LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA

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

No. 81-497. Argued April 28, 1982—Decided June 1, 1982

As the result of a labor dispute between petitioner employer and respondent union, petitioner filed an unfair labor practice charge against the union, alleging that it had violated the secondary boycott and jurisdictional picketing prohibitions of § 8(b)(4) of the National Labor Relations Act (NLRA). The National Labor Relations Board (Board) found against the union, and the Board's order was judicially enforced. Petitioner filed this action in Federal District Court pursuant to § 303 of the Labor Management Relations Act (LMRA), seeking damages resulting from the union's illegal activity in an amount that included both business losses and attorney's fees incurred during the Board proceedings. Section 303(a) makes it unlawful for a union to engage in conduct defined as an unfair labor practice under § 8(b)(4) of the NLRA, and § 303(b) provides that whoever is injured in his business or property because of a violation of § 303(a) may sue in a federal district court "and shall recover the damages by him sustained and the cost of the suit." The District Court entered judgment for petitioner, awarding it an amount that represented its business losses, but concluded that petitioner was not entitled to recover attorney's fees as part of its damages. The Court of Appeals affirmed.

Held: Attorney's fees incurred during Board proceedings are not a proper element of damages under § 303(b) of the LMRA. Pp. 721–727.

(a) Neither the language nor the legislative history of § 303 supports petitioner's contention that § 303 provides statutory authorization for such attorney's fees for purposes of the American Rule that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. The legislative history instead shows that Congress did not intend to expand the ordinary meaning of the term "damages" in § 303(b) to include attorney's fees. Cf. *Teamsters* v. *Morton*, 377 U. S. 252. Pp. 721–724.

(b) Nor can allowance of attorney's fees incurred during Board proceedings be justified on the asserted ground that it would further Congress' intent to protect employers from the adverse effects of a union's illegal secondary activity. This interest is adequately protected by the

award of compensatory damages for the business losses resulting from the union's prohibited conduct. Even assuming that attorney's fees are necessary to "fully" compensate the victimized employer, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority. Cf. *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 128–129. To adopt petitioner's analysis would authorize the recovery of attorney's fees in every case where the plaintiff has prevailed against the defendant in prior litigation involving the same issues. Such a result is clearly barred by this Court's prior decisions and by the American Rule. Pp. 724–726.

652 F. 2d 65, affirmed.

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

Donald C. Robinson argued the cause and filed briefs for petitioner.

David S. Paull argued the cause for respondent. With him on the brief was *Paul T. Bailey*.*

JUSTICE MARSHALL delivered the opinion of the Court.

We granted certiorari to decide whether § 303 of the Labor Management Relations Act (LMRA), 61 Stat. 158, as amended, 29 U. S. C. § 187, authorizes the recovery of attorney's fees incurred in prior proceedings before the National Labor Relations Board (Board). 454 U. S. 1079 (1981). The Courts of Appeals have divided on this issue.[1] In this

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

[1] The Fifth, Sixth, and Eighth Circuits have held that attorney's fees may be recovered. See *Texas Distributors, Inc.* v. *Local Union No. 100*, 598 F. 2d 393 (CA5 1979); *Local Union No. 984, International Brotherhood of Teamsters* v. *Humko Co.*, 287 F. 2d 231 (CA6), cert. denied, 366 U. S. 962 (1961); *Associated General Contractors of Minnesota* v. *Construction and General Laborers Local No. 563*, 612 F. 2d 1060 (CA8 1979). The First Circuit has expressed approval of this rule in dicta. See *F. F. Instrument Corp.* v. *Union de Tronquistas de Puerto Rico*, 558 F. 2d 607, 611 (1977). The Ninth Circuit alone has reached a contrary conclusion. See *Mead* v. *Retail Clerks International Assn.*, 523 F. 2d 1371 (1975).

case, the Court of Appeals for the Ninth Circuit held that attorney's fees may not be recovered. We affirm.

I

Petitioner Summit Valley Industries, Inc. (Summit Valley), manufactures prefabricated modular homes. These homes are completed at petitioner's plant and sold directly to home buyers. The buyer then independently obtains the services of a local contractor to install the completed home and to attach ancillary structures. In June 1972, Summit Valley opened a plant in the Butte, Mont., area. Rather than utilizing skilled union carpenters at this plant, petitioner hired unskilled workers. These workers were represented by Butte Teamsters Union, Local No. 2 (Teamsters), under a collective-bargaining agreement between the Teamsters and Summit Valley.

Upon learning that Summit Valley employed no skilled carpenters, respondent Local 112 of the United Brotherhood of Carpenters and Joiners of America (Union) filed unfair labor practice charges against Summit Valley. The Union claimed that Summit Valley had violated a valid work-preservation agreement between the Union and area contractor associations. Although the Union withdrew these charges when it realized that Summit Valley was not a signatory to the agreement, it ordered its members not to work on the installation of petitioner's homes. On at least two occasions, Summit Valley sent its own employees to complete the installation work that would otherwise have been done by the Union. As a result, respondent began picketing petitioner's plant.

Summit Valley filed an unfair labor practice charge against the Union, alleging that respondent's work stoppage and picketing violated the secondary boycott and jurisdictional picketing prohibitions of the National Labor Relations Act (NLRA). §§ 8(b)(4)(B) and (D) of the NLRA, 29 U. S. C. §§ 158(b)(4)(B) and (D). The Regional Director of the Board

initiated a § 10(*l*) proceeding, 29 U. S. C. § 160(*l*), in the United States District Court for the District of Montana. The District Court imposed a temporary restraining order pending the outcome of the proceeding before the Board. *Henderson* v. *United Brotherhood of Carpenters and Joiners of America, Local 112*, Civ. Nos. 2235 & 2239 (1972). The Union ceased picketing in November 1972, and its members resumed the installation of Summit Valley's homes.

Summit Valley then initiated a § 10(k) proceeding, 29 U. S. C. § 160(k), seeking resolution of its claim that the Union had engaged in illegal jurisdictional picketing, prohibited by § 8(b)(4)(D). After a 2-day hearing, the Board found against the Union, holding that Summit Valley had validly assigned the work in question to the Teamsters. *Carpenters, Local 112 (Summit Valley Industries)*, 202 N. L. R. B. 974, 83 LRRM 1013 (1973). The Union agreed not to pressure Summit Valley to reassign work in violation of its collective-bargaining agreement with the Teamsters. However, the Union maintained that it had the right to truthfully advise the public that petitioner did not employ its members in the construction of modular homes.

After the § 10(k) proceeding, an Administrative Law Judge (ALJ) conducted 15 days of hearings on the unfair labor practice charges. The ALJ concluded that the Union had violated §§ 8(b)(4)(B) and (D), but that the Union had sought to enforce the work-preservation clause on the good-faith belief that its actions were lawful. The Board adopted the findings of the ALJ, and it ordered the Union to cease and desist from these unfair labor practices, and to fully comply with the Board's order obtained as a result of the § 10(k) proceeding. *Carpenters, Local 112 (Summit Valley Industries)*, 217 N. L. R. B. 902, 89 LRRM 1799 (1975). The Court of Appeals for the Ninth Circuit enforced the Board's order. *Chamber of Commerce of United States* v. *NLRB*, 574 F. 2d 457 (1978).

This action was filed pursuant to § 303 of the LMRA in the United States District Court for the District of Montana.

Summit Valley sought damages resulting from the Union's illegal secondary and jurisdictional activity in the amount of $17,279.33: $3,675.00 in business losses, and $13,604.33 in attorney's fees incurred during the Board proceedings. The District Court found that the Board's decision that the Union had committed unfair labor practices collaterally estopped the Union from relitigating this issue in the § 303 action. Relying on *Mead* v. *Retail Clerks International Assn.*, 523 F. 2d 1371 (CA9 1975), the District Court concluded that Summit Valley was not entitled to recover attorney's fees as part of its damages. The court entered judgment for Summit Valley, awarding it an amount that represented its business losses. 475 F. Supp. 665 (1979). The Court of Appeals affirmed in an unpublished *per curiam.* Civ. No. 79–4663 (CA9 1981); 652 F. 2d 65 (1981) (affirmance order).

II

Under the American Rule it is well established that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967). This Court has endorsed certain exceptions to this rule where necessary to further the interests of justice. See, *e. g.*, *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962) (bad faith); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399 (1923) (willful disobedience of a court order); *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885) (common fund). In the absence of one of these equitable exceptions, however, the rule has been consistently followed for almost 200 years. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 249–250 (1975); *Arcambel* v. *Wiseman*, 3 Dall. 306 (1796). Recognizing this consistent adherence to the American Rule, petitioner contends that § 303 provides express statutory authorization for the recovery of attorney's fees incurred in prior Board proceedings. We find this contention unsupported by either the language or the legislative history of § 303.

Section 303 authorizes a private damages action for an employer who has been injured by a union's unfair labor practice. Section 303(a), 29 U. S. C. § 187(a), makes it unlawful for a labor organization to engage in conduct defined as an unfair labor practice under § 8(b)(4) of the NLRA. As a remedy for this conduct § 303(b) provides that "[w]hoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit." 29 U. S. C. § 187(b).

Section 303 does not expressly provide for the recovery of attorney's fees, so we are not presented with a situation where Congress has made "specific and explicit provisions for the allowance of" such fees. *Alyeska Pipeline Co.* v. *Wilderness Society*, *supra*, at 260, and n. 33 (collecting statutes). Nonetheless, Summit Valley argues that § 303 does specifically authorize a district court to award attorney's fees incurred for the purpose of terminating the Union's illegal secondary activity by providing for the recovery of "damages" resulting from this activity. Because attorney's fees expended to compel "'resumption of work in effect take the place of other compensable damages which would continue to be suffered if work were not resumed,'" petitioner asserts that such fees are part of the damages caused by the Union's illegal activity. Brief for Petitioner 13, quoting *Associated General Contractors* v. *Construction and General Laborers Local 563*, 612 F. 2d 1060, 1064 (CA8 1979).

In assessing petitioner's interpretation of the word "damages" in § 303(b), we begin with the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U. S. 37, 42 (1979); *Burns* v. *Alcala*, 420 U. S. 575, 580–581 (1975). Ordinarily a statutory right to "damages" does not include an implicit authorization to award attorney's fees. Indeed, the

American Rule presumes that the word "damages" means damages exclusive of fees. See, *e. g.*, *Arcambel* v. *Wiseman*, *supra; Day* v. *Woodworth*, 13 How. 363 (1852); cf. *Teamsters* v. *Morton*, 377 U. S. 252, 260, n. 15 (1964). Thus, petitioner's claim can succeed only if an examination of the relevant legislative history demonstrates that Congress intended to give a broader than normal scope to the term "damages."

Our review of the legislative history of § 303 reveals no such intention. To the contrary, the little discussion pertaining to the scope of an employer's recovery under § 303(b) indicates that Congress did not intend to expand the term "damages" to include attorney's fees. The following colloquy between Senator Taft and Senator Morse is particularly instructive. In response to Senator Morse's suggestion that § 303(b) would impose virtually unlimited liability on unions, Senator Taft stated: "Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees. In this case *we simply provide for the amount of the actual damages*." 93 Cong. Rec. 4872–4873 (1947) (emphasis added). We find these remarks persuasive evidence that Congress did not intend attorney's fees which were expended to stop a union from engaging in illegal activity to be recovered as "damages" under § 303(b).[2]

In this respect, petitioner's claim is analogous to that presented in *Teamsters* v. *Morton*, *supra*. In *Teamsters*, this Court reviewed the history and policies underlying § 303 in order to determine whether that provision authorized an award of punitive damages. Relying on the same colloquy quoted above, we concluded that "recovery for

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[2] Of course, these remarks are not conclusive. It is possible that Senator Taft's remarks may have been confined to a rejection of the recovery of attorney's fees expended during the § 303 proceeding itself. See *Mead* v. *Retail Clerks International Assn.*, 523 F. 2d, at 1380.

an employer's business losses caused by a union's peaceful secondary activity proscribed by § 303 should be limited to actual, compensatory damages." *Id.*, at 260. As we have often noted, one of the primary justifications for the American Rule is that "one should not be *penalized* for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S., at 718 (emphasis added). See also, *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 129 (1974); *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 235 (1964). The congressional intention discerned in *Teamsters* to limit recovery to actual, compensatory damages, counsels against reading the word "damages" to include attorney's fees incurred during prior Board proceedings.

Nevertheless Summit Valley contends that allowing it to recover reasonable attorney's fees incurred during Board proceedings furthers the statutory intent to protect employers from the adverse effects of a union's illegal secondary activity. We agree that Congress was concerned about protecting employers from injury arising out of this type of activity when it enacted § 303. See generally S. Rep. No. 105, 80th Cong., 1st Sess., 54–55 (1947), 1 Legislative History of the LMRA 460–461 (1974) (Leg. Hist.); 93 Cong. Rec. 5060 (1947), 2 Leg. Hist. 1371 (remarks of Sen. Taft). However, we fail to see why this interest cannot be adequately protected by the award of compensatory damages for the business losses resulting from the Union's prohibited conduct.

Ultimately, petitioner's argument rests on the assumption that "Congress plainly intended Section 303 to be *fully* remedial and to restore to the victimized employer *all* . . . *losses* caused by the illegal activity." Brief for Petitioner 23 (emphasis added). Even assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority. See *F. D.*

Rich Co. v. *United States ex rel. Industrial Lumber Co.*, *supra*, at 128–129. In *F. D. Rich*, this Court rejected the argument that attorney's fees should be awarded under the Miller Act, 49 Stat. 793, as amended, 80 Stat. 1139, 40 U. S. C. § 270a *et seq.*, because the Act provided for recovery of "sums justly due," 40 U. S. C. § 270b(a), and, unless fees were awarded, the legislative intent in favor of full compensation would be frustrated. 417 U. S., at 128.

In squarely rejecting this claim, we found it to be nothing more than a "restate[ment] of one of the oft-repeated criticisms of the American Rule." *Ibid.* Although this Court acknowledged that "there is some force to the argument that a party who must bear the cost of his attorneys' fees out of his recovery is not made whole," we concluded that the countervailing considerations which support the American Rule argue against placing exclusive reliance on the need to provide full compensation. *Id.*, at 129. These considerations include the possible deterrent effect that fee shifting would have on poor litigants with meritorious claims, the time, expense, and difficulty of litigating the fee question, and the possibility that the principle of independent advocacy might be threatened by having "the earnings of the attorney flow from the pen of the judge before whom he argues." *Ibid.* These same considerations persuade us not to infer that Congress intended to authorize fee shifting in § 303 actions in order to fully compensate an employer for the "damages sustained by him" as a result of a union's illegal activity.

Furthermore, petitioner's analysis would authorize the recovery of attorney's fees in every case where the plaintiff has prevailed against the defendant in prior litigation involving the same issues. See *Mead* v. *Retail Clerks International Assn.*, 523 F. 2d, at 1380.[3] Quite simply, anytime a plaintiff

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[3] The rationale of petitioner's position would seem to require that fees be awarded whenever a defendant's wrongful conduct requires a plaintiff to incur more litigation expenses, even if those expenses are incurred *in the same action.* Furthermore, because the District Court gave the

must resort to litigation to enjoin the defendant from engaging in illegal conduct, arguably the plaintiff has been injured in the amount of its attorney's fees spent to obtain the injunction. Under petitioner's analysis, each plaintiff could recover the costs of this prior litigation as part of its damages in any subsequent action involving the same conduct. Such a result, however, is clearly barred by our prior decisions. The American Rule precludes courts from awarding attorney's fees incurred during prior proceedings in the same case. See *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*. Similarly, courts have uniformly concluded that "where an action based on the same wrongful act has been prosecuted by the plaintiff against the defendant to a successful issue, he can not in a subsequent action recover, as damages, his costs and expenses in the former action." *Ritter* v. *Ritter*, 381 Ill. 549, 555, 46 N. E. 2d 41, 44 (1943). See also *Flanders* v. *Tweed*, 15 Wall. 450 (1873); *Mead* v. *Retail Clerks International Assn.*, *supra*, at 1380–1381; *Ritter* v. *Ritter*, 381 Ill., at 557, 46 N. E. 2d, at 45 (collecting cases).

This rule is universally followed in order to avoid the endless stream of litigation that might ensue if successful litigants could recover their attorney's fees in subsequent actions: "immediately upon the entry of judgment the plaintiff would start another action against the defendant for his attorney fees and expenses incurred in obtaining the preceding judgment." *Id.*, at 555, 46 N. E. 2d, at 44. Under petitioner's construction of § 303(b) the word "damages" would always encompass attorney's fees expended in prior litigation. In the absence of clear support for this construction in the language or the legislative history of § 303 we decline to adopt such a broad exception to the American Rule.

Board's findings collateral-estoppel effect in the § 303 action, petitioner did not have to relitigate the question whether the Union had committed an unfair labor practice. In effect, Summit Valley is therefore asking for fees that it would have incurred in the § 303 action had it not first litigated the issues before the Board.

III

Attorney's fees incurred during prior Board proceedings are not a proper element of damages under § 303(b) of the LMRA. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

ARMY AND AIR FORCE EXCHANGE SERVICE *v.* SHEEHAN

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

No. 80-1437. Argued February 23, 1982—Decided June 1, 1982

Respondent, while employed in a data processing position with petitioner Army and Air Force Exchange Service (AAFES), was selected for participation in the AAFES Executive Management Program (EMP). A regulation provided that EMP status could be withdrawn for conduct off the job reflecting discredit upon the AAFES. Respondent was discharged from the AAFES after pleading guilty to misdemeanor charges of violating state drug laws off the base. His administrative appeal was denied. While that appeal was pending before the Judge Advocate General of the Air Force, respondent filed suit against the AAFES in Federal District Court, alleging that his rights to due process and to a free and impartial appeal pursuant to AAFES regulations were infringed, and seeking reinstatement and damages, including backpay. The District Court dismissed the complaint for want of subject-matter jurisdiction. The Court of Appeals reversed, concluding that the Tucker Act, which gives the federal courts jurisdiction over certain suits against the United States founded upon express or implied contracts, provided a basis for jurisdiction over respondent's claims for monetary relief. The court held that, whether or not respondent's employment was initiated by appointment or contract, the AAFES regulations governing separation procedures created an implied-in-fact contract that the AAFES would adhere to those regulations while respondent continued in AAFES employment, and that respondent's allegation that his dismissal violated those regulations was equivalent to an allegation of breach of an implied-in-fact contract.

Held: The Tucker Act did not confer jurisdiction over respondent's claim for money damages. Pp. 733–741.

(a) Nothing in the record or relevant regulations indicates that respondent was employed pursuant to an express contract. Rather, the evidence shows that he was appointed to his positions. With respect to employment in the data processing position, regulations prohibited the AAFES from negotiating a contract with him, and his selection to the EMP clearly was pursuant to an appointment. There is no reason to remand for an evidentiary hearing on the nature of respondent's employment status. Pp. 735–738.

(b) The Court of Appeals erred in implying a contract based solely on the AAFES personnel regulations and in premising Tucker Act jurisdiction on those regulations, which do not specifically authorize awards of money damages. *United States* v. *Testan*, 424 U. S. 392, is controlling. Moreover, Congress' intent to prohibit Back Pay Act claims by AAFES employees, as opposed to federal employees generally, would be subverted if an AAFES employee could sue under the Tucker Act whenever he asserted a violation of the AAFES regulations governing termination. In fact, the Court of Appeals' reasoning would extend Tucker Act jurisdiction to reach any complaint filed by a federal employee alleging the violation of a personnel statute or regulation. Pp. 738–741.

619 F. 2d 1132, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., concurred in the judgment.

Samuel A. Alito, Jr., argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, and *William Kanter*.

Ira E. Tobolowsky argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented by this case is whether the federal courts have jurisdiction over a civil action for monetary damages brought by a former military exchange employee who contests the validity of his discharge. The employee claims that federal jurisdiction exists under the Tucker Act, 28 U. S. C. § 1346(a)(2) (1976 ed., Supp. IV).

I

A

In 1962, respondent, Arthur Edward Sheehan, was selected for a data processing position with petitioner Army and Air Force Exchange Service (AAFES or Service).[1]

[1] AAFES is a nonappropriated fund instrumentality of the United States, that is, one that does not receive funds by congressional appropria-

Five years later, respondent was designated by the AAFES commander for participation in the Service's Executive Management Program (EMP); this program is "intended to fulfill the continuing requirement of AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of AAFES." Army Regulation (AR) 60–21/Air Force Regulation (AFR) 147–15, ch. 5, § II, ¶ 5–6 (1 Aug. 1979).[2] Employees in the program enjoy special retention, insurance, and retirement benefits. On the other hand, those employees are subject to certain obligations, a principal one being that EMP personnel must accept transfer to any AAFES facility in this country or abroad. ¶ 5–9(a)(2). EMP status may be withdrawn for, among other things, "conduct off the job reflecting discredit upon AAFES." ¶ 5–9(c). Pursuant to the regulations governing the EMP, respondent was required to "acknowledg[e] in writing that he underst[ood] and accept[ed] the conditions of the EMP as prescribed by the Commander, AAFES." ¶ 5–7(b).

In 1975, while respondent was serving as a shopping center manager at Fort Jackson, S. C., he was arrested off the base for possession of controlled substances. Pursuant to a plea bargain, respondent pleaded guilty to four misdemeanor counts of violating state drug laws. He was sentenced to 18 months' probation and a $1,000 fine was imposed.

On March 16, 1976, respondent received advance written notice of separation from the Service for cause. Referring specifically to respondent's conviction, the notice stated that

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tion. See 10 U. S. C. §§ 4779(c) and 9779(c). AAFES is under the control of the Secretaries of the Army and Air Force and, like other military post exchanges, is intended "to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices." *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 484–485 (1942).

[2] The regulations cited are those currently in effect. They differ in no material respect from the regulations that were outstanding and applicable while respondent was employed by the AAFES.

the reason for the separation was "conduct off the job which reflects discredit on the AAFES and which is of such a nature that your retention in any capacity is incompatible with the best interests of AAFES." App. 11. James J. Stapleton, the AAFES General Manager for the Piedmont Area Exchange, signed the notice, but, because of respondent's participation in the EMP, prior approval had been obtained from Major General C. W. Hospelhorn, Commander, AAFES. Following an investigation, Stapleton issued a final notice of separation for cause, effective April 19, 1976. *Id.*, at 17. This notice advised respondent that he was to be dismissed "in view of the entire weight of evidence which resulted in your plea of guilty." *Ibid.*

Respondent, in accord with authorized AAFES procedures, filed an administrative appeal. The hearing examiner determined that the Service had acted in compliance with applicable laws and regulations, but concluded that respondent's conduct off the job did not reflect discredit on the AAFES and that his retention in some capacity was not incompatible with the interests of the Service. The examiner therefore recommended that respondent's appeal be granted and that he be reinstated with backpay to his former grade but transferred to an assignment in another region. General Hospelhorn, however, acting as the appellate authority, disagreed, and denied respondent's appeal.

In 1978, respondent, by a letter from counsel addressed to the new AAFES Commander, Major General Bobby W. Presley, requested reconsideration. *Id.*, at 40. Respondent asserted that his separation was contrary to AAFES rules and regulations and that he had been denied due process of law. General Presley reopened the case and referred it to Lieutenant General Charles E. Buckingham, Chairman of the Board of Directors of AAFES. At General Buckingham's request, the administrative record was reviewed by the Judge Advocate General of the Air Force. He concluded that the record evidence supported the charge that respond-

ent's conduct reflected discredit upon the AAFES and that his retention was inconsistent with the Service's best interests. The Judge Advocate General, however, agreed with respondent that General Hospelhorn was disqualified from acting as the appellate authority; he felt that it was appropriate for General Buckingham to act in that capacity, and he recommended that respondent's appeal be denied. General Buckingham followed that advice and denied respondent's appeal.

B

While the matter was pending before the Judge Advocate General, respondent filed suit against the AAFES in the United States District Court for the Northern District of Texas. The first count of respondent's complaint alleged that his rights to due process and to a free and impartial appeal pursuant to AAFES regulations were infringed when General Hospelhorn acted as both the separation authority and the appellate authority. In the second count, respondent claimed that the denial of his appeal was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence and unwarranted by the facts, and in violation of statutory and constitutional provisions. Respondent sought reinstatement and damages, including backpay.

The District Court, without opinion, dismissed the complaint for want of subject-matter jurisdiction. App. to Pet. for Cert. 17a.

The United States Court of Appeals for the Fifth Circuit reversed. It concluded that the Tucker Act, 28 U. S. C. § 1346(a)(2), which gives the federal courts jurisdiction over certain suits against the United States founded upon express or implied contracts, provided a basis for jurisdiction over respondent's claims for monetary relief. 619 F. 2d 1132 (1980). Whether respondent's employment was initiated by appointment or by contract, the court held, the AAFES regulations providing for separation for cause only under certain conditions and guaranteeing an administrative appeal "mani-

fest[ed] the understanding of the parties concerning discharge procedures while Sheehan *continued* in AAFES employment." *Id.*, at 1138 (emphasis in original). Accordingly, the court considered those regulations to be "part of a collateral implied-in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him." *Ibid.* In the court's view, the understanding of the parties was reinforced by the well-established legal principle that a federal agency must comply with its own regulations. The court concluded that respondent's allegation that his dismissal violated applicable regulations was "equivalent to an allegation of breach of an implied-in-fact contract," *ibid.*, and that the District Court therefore had erred in ruling that it had no jurisdiction to award respondent monetary relief.[3]

Because this ruling appeared to be in conflict with our precedents, we granted certiorari. 454 U. S. 813 (1981).

II

The AAFES, like other military exchanges, is an "'ar[m] of the government deemed by it essential for the performance of governmental functions . . . and partake[s] of whatever immunities it may have under the constitution and federal

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[3] Reasoning that § 1346(a)(2) does not confer federal jurisdiction to award nonmonetary relief, the Court of Appeals looked to the general federal-question jurisdictional provision, 28 U. S. C. § 1331(a), to support its finding of jurisdiction over respondent's request for reinstatement. Although the court concluded that § 1331(a) does not constitute a waiver of sovereign immunity, it interpreted the 1976 amendment to § 10 of the Administrative Procedure Act, 5 U. S. C. § 702, as effecting a waiver for actions against federal agencies, where the agency conduct is otherwise subject to judicial review. 619 F. 2d, at 1138–1140. Given its determination that the District Court could provide respondent both monetary and nonmonetary relief under alternative statutes, the Court of Appeals held, finally, that the District Court did not have jurisdiction over respondent's complaint pursuant to the mandamus statute, 28 U. S. C. § 1361. 619 F. 2d, at 1140–1141. Neither side seeks review of those rulings here.

statutes.'" *United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599, 606 (1975), quoting, with approval, language of the District Court in the same case, 378 F. Supp. 558, 562–563 (SD Miss. 1974). As a result, the federal courts may entertain actions against the Service only if Congress has consented to suit; "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States* v. *Testan*, 424 U. S. 392, 399 (1976), quoting *United States* v. *King*, 395 U. S. 1, 4 (1969).

The Tucker Act effects one such explicit waiver when it provides in pertinent part:

> "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
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> . . . . .
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> ". . . Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, *or upon any express or implied contract with the United States*, or for liquidated or unliquidated damages in cases not sounding in tort. . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service . . . shall be considered an express or implied contract with the United States."[4] 28 U. S. C. § 1346(a)(2) (1976 ed., Supp. IV) (emphasis added).[5]

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[4] The last sentence of § 1346(a)(2) was added in 1970 by Pub. L. 91–350, 84 Stat. 449, following this Court's decision some years before in *Standard Oil Co.* v. *Johnson*, 316 U. S. 481 (1942). Relying on the Court's observation in that case that the "Government assumes none of the financial obligations" of military post exchanges, *id.*, at 485, the Court of Claims, in a series of decisions, had held that it could not entertain contract claims against nonappropriated fund instrumentalities. See *United States* v. *Hopkins*, 427 U. S. 123, 125 (1976). In 1970, Congress sought to close this "loophole" by expressly affording contractors a Tucker Act remedy against such instrumentalities. See *id.*, at 126; S. Rep. No. 91–268, p. 2 (1969); H. R. Rep. No. 91–933, p. 2 (1970).

[5] Section 1346(a)(2) gives the district courts concurrent jurisdiction with the Court of Claims over all civil actions or claims seeking damages of

Respondent does not assert Tucker Act jurisdiction on the basis of the Constitution or a specific statute or regulation. He claims only that the Tucker Act affords him a remedy because of an "express or implied contract with the United States" agreed to by the parties. Specifically, respondent urges that he became an AAFES employee, or at least entered the EMP, by virtue of an employment contract, not by appointment, and that the AAFES regulations governing dismissal of employees created an implied contract. We must reject both contentions.

A

In determining whether respondent's employment was the result of appointment or contract, we look to *United States* v. *Hopkins*, 427 U. S. 123 (1976), a wrongful-discharge action brought by an AAFES employee who alleged that his separation from the Service constituted a breach of an employment contract. The Court in its *per curiam* opinion in *Hopkins* noted that Tucker Act jurisdiction may be premised on an employment contract, as well as on one for goods or other services, *id.*, at 126, and that the AAFES regulations authorize the Service to enter into service contracts. *Id.*, at 127–128. But the Court also observed that many AAFES employees are appointed to their positions, and it remanded the case for consideration of the question whether the plaintiff had been employed by contract or by appointment, a determination dependent upon "an analysis of the statutes and regulations previously described in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case." *Id.*, at 130.

Although respondent alleges that he was employed, both initially and upon entering the EMP, by express employment

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$10,000 or less. The Court of Claims has sole jurisdiction under the Tucker Act, however, for claims greater than $10,000. See 28 U. S. C. § 1491 (1976 ed., Supp. IV). Both jurisdictional provisions are otherwise identical. See *Richardson* v. *Morris*, 409 U. S. 464, 466 (1973); *United States* v. *Sherwood*, 312 U. S. 584, 590–591 (1941).

contracts, he points to nothing in the record or in the relevant AAFES regulations that substantiates that claim. In fact, his complaint supports the contrary view. The complaint observes that respondent was first "employed" by the AAFES in 1962, App. 3; the regulations pertaining to "employees" refer to Service personnel as "Federal employees of an instrumentality of the United States" who are appointed to their positions. AR 60–21/AFR 147–15, ch. 1, § I, ¶ 1–6(a); ch. 2, § I, ¶¶ 2–2, 2–3 (1 Aug. 1979). Moreover, if, as respondent alleges, he was "employed" in a data processing position, AAFES regulations prohibit the Service from negotiating a contract with him. See AR 60–20/AFR 147–14, ch. 3, § III, ¶ 3–26(d) (15 Nov. 1978).

Respondent's selection to the EMP plainly was pursuant to appointment. The regulations governing the EMP appear in the provision entitled "Exchange Service Personnel Policies," AR 60–21/AFR 147–15, ch. 5, § II, rather than in the regulation providing for service contracts, AR 60–20/AFR 147–14, ch. 3, §§ II, III.[6] And, in language that connotes appointment rather than contract, the EMP regulations refer to one's "nomination, selection, and designation to EMP status," AR 60–21/AFR 147–15, ch. 5, § II, ¶ 5–8.[7] Furthermore, respondent complains that he was separated from the

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[6] The AAFES regulations define "service contract" as follows:

"A contract whereby a contractor performs a service for AAFES off a military installation, such as laundry, drycleaning, photo processing, and repair service. This type contract may also include procurement of direct services such as janitorial and window cleaning service." AR 60–20/AFR 147–14, App. A, ¶ A–8(e) (15 Nov. 1978).

[7] Respondent points to the portion of the EMP regulations providing that an EMP employee must have "acknowledged in writing that he understands and accepts the conditions of the EMP as prescribed by the Commander, AAFES." AR 60–21/AFR 147–15, ch. 5, § II, ¶ 5–7(b). An employee's acknowledgment and acceptance of the conditions of his employment, however, hardly demonstrate that he is employed pursuant to a contract; surely, an employer could require a nominee to acknowledge and accept the conditions of his appointment.

EMP in violation of discharge procedures described in the regulation applicable to appointed employees, not to those who have contracted with the AAFES to provide services. App. 4–5, 7; see AR 60–21/AFR 147–15, ch. 3.

Despite these clear indications that respondent was appointed to his position, he maintains, citing *United States* v. *Hopkins*, *supra*, that he is entitled to an evidentiary hearing aimed at ascertaining the nature of his employment status. In *Hopkins*, however, the plaintiff's complaint alleged that he had been employed pursuant to contract. The Court of Claims did not examine this allegation because it erroneously assumed that AAFES employees could never be appointed. This Court held that the plaintiff's allegation was sufficient to withstand the Government's motion to dismiss for want of jurisdiction and remanded the case because "the question of whether plaintiff was employed by virtue of a contract or by appointment is not susceptible of determination at this time." 427 U. S., at 130. Resolution of the question, the Court noted, depended upon an analysis of the applicable statutes and regulations "in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case." *Ibid.*[8]

Respondent's complaint, in contrast, does not claim that he was employed pursuant to a contract. In fact, it supports the Government's view that he was appointed. Even after the AAFES moved in the District Court to dismiss for want of jurisdiction on the ground that respondent had been "an appointed (non-contract) employee," Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment 8, respondent did not seek to amend his complaint and did not allege any facts indicating the existence of an employment contract. See Memorandum of Authorities in Opposition to Defendants' *(sic)* Motion to Dismiss or in the Alternative, for Summary

[8] We are advised that Hopkins' suit was settled on the remand, and that no further inquiry was made into his employment status. See Brief for Petitioner 16, n. 9; Brief for Respondent 14; Tr. of Oral Arg. 28.

Judgment 5–6; see also *id.*, at 1–3 (referring to respondent's status as an "employee" and to violations of regulations governing AAFES employees).[9] Moreover, as discussed above, all the evidence in the record is to the effect that respondent was appointed to his positions with the AAFES. Under these circumstances, we conclude that a remand on this question would serve no purpose and that respondent will not now be able to adduce evidence, which he has heretofore declined to present, that he was employed—either initially or upon entering the EMP—pursuant to an express employment contract.

B

The Court of Appeals' decision rests on a different theory—that, whether or not respondent was initially employed by virtue of a contract or by appointment, the AAFES regulations governing separation procedures created an implied-in-fact contract that the Service would adhere to those regulations while respondent continued in AAFES employment.[10] This approach, however, is foreclosed by our prior decisions.

In *United States* v. *Testan*, 424 U. S. 392 (1976), the Court concluded, without dissent, that the Tucker Act did not confer jurisdiction over a complaint filed by civil service employees who claimed that they were entitled to reclassification at a higher grade. The Act, the Court observed, "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money dam-

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[9] Respondent did seek to amend his complaint, however, following the Court of Appeals' decision that the AAFES discharge regulations created an implied-in-fact contract between the parties. The amended complaint alleges that a contract was executed when respondent signed an acknowledgment of the conditions of the EMP, includes a breach-of-contract count, and refers repeatedly to the "employment agreement." First Amended Complaint 2, 6–7.

[10] Claims grounded on implied-in-fact contracts may be brought under the Tucker Act, but the Act does not confer jurisdiction with respect to contracts implied in law. See *Hatzlachh Supply Co.* v. *United States*, 444 U. S. 460, 465, n. 5 (1980).

ages." *Id.*, at 398. Rather, a plaintiff's "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.*, at 400, quoting *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967). The Court explicitly rejected the argument that "the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages." 424 U. S., at 401; see also *United States* v. *Hopkins*, 427 U. S., at 130.

As *Testan* makes clear, jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages.[11] Respondent cannot escape the force of *Testan* by relying on the Court's observation that the plaintiffs in that case did not "rest their claims upon a contract," 424 U. S., at 400, and distinguishing this case on the ground that the regulations effected an implied contract. To accept this reasoning would be to undermine the Court's ruling in *Testan* that the Tucker Act provides a remedy only where damages

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[11] Like *Testan*, this case does not involve a suit "for money improperly exacted or retained" or a claim based on a regulation that promises money. 424 U. S., at 401, 402. This case is therefore distinguishable from those cited by respondent where contracts were inferred from regulations promising payment. See *Griffin* v. *United States*, 215 Ct. Cl. 710, 714–715 (1978); *New York Airways, Inc.* v. *United States*, 177 Ct. Cl. 800, 816–817, 369 F. 2d 743, 751–752 (1966); *Radium Mines, Inc.* v. *United States*, 139 Ct. Cl. 144, 147–148, 153 F. Supp. 403, 405–406 (1957); *Aycock-Lindsey Corp.* v. *United States*, 171 F. 2d 518, 521 (CA5 1948); *Augusta Aviation, Inc.* v. *United States*, 500 F. Supp. 785, 786–787 (SD Ga. 1980), rev'd, 671 F. 2d 445 (CA11 1982). Because respondent has not demonstrated that the parties entered into an express contract, this case is also different from those where regulations were considered an implied part of an express contract. See *Bodek* v. *Department of Treasury, Bureau of Public Debt*, 532 F. 2d 277, 279, n. 7 (CA2), cert. denied, 429 U. S. 849 (1976); *Wolak* v. *United States*, 366 F. Supp. 1106, 1110 (Conn. 1973); *Spicer* v. *United States*, 217 F. Supp. 44, 50 (Kan. 1963), aff'd, 332 F. 2d 750 (CA10 1964).

claims against the United States have been authorized explicitly. Admittedly, the *Testan* plaintiffs did not assert the existence of an employment contract, but neither did respondent until very late in the litigation. And if employment statutes and regulations create an implied-in-fact contract, surely the Court would have so noted in *Testan* instead of directing that the complaint be dismissed. See *id.*, at 408. Moreover, the plaintiff in *Hopkins* did claim that he had been employed pursuant to a contract; the Court's remand for consideration of the plaintiff's status as an appointed or contract employee, despite a claim that his discharge contravened applicable regulations, clearly suggests that employment regulations do not automatically give rise to an implied-in-fact contract.[12]

In addition to mandating different results in *Testan* and *Hopkins*, the Court of Appeals' approach would "rende[r] superfluous" "many of the federal statutes—such as the Back Pay Act—that expressly provide money damages as a remedy against the United States in carefully limited circumstances." *United States* v. *Testan*, 424 U. S., at 404. The Back Pay Act, which permits an employee to recover lost wages due to "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part" of the compensation to which he was otherwise entitled, 5 U. S. C. § 5596(b)(1) (1976 ed., Supp. IV), expressly denies that cause of action to AAFES personnel. See 5 U. S. C. § 2105(c)(1) (1976 ed., Supp. IV). Congress' intent to prohibit a backpay claim by a Service employee would obviously be subverted if the employee could sue under the

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[12] The Court's observation in *Testan* that the case was "not one concerning a wrongful discharge or a wrongful suspension," 424 U. S., at 402, does not indicate, as respondent urges, that any termination or suspension suit may be brought under the Tucker Act. In *Hopkins*, the Court relied on *Testan* in disposing, summarily and adversely, of the contention that "plaintiff's discharge in violation of executive regulations constituted a claim enforceable under the Tucker Act." 427 U. S., at 130.

Tucker Act whenever he asserted a violation of the Service's regulations governing termination. And the impact of the Court of Appeals' decision would not be limited to such circumstances: as counsel for respondent appeared to concede at oral argument, the Court of Appeals' reasoning would extend Tucker Act jurisdiction to reach any complaint filed by a federal employee alleging the violation of a personnel statute or regulation. Tr. of Oral Arg. 20–21.

We therefore conclude that *Testan* is controlling, and we hold that the Court of Appeals erred in implying a contract based solely on the existence of AAFES personnel regulations and in premising Tucker Act jurisdiction on those regulations, which do not explicitly authorize damages awards. Because the court's judgment may not be sustained on the ground that respondent was hired pursuant to an express employment contract, we find that the Tucker Act did not confer jurisdiction over respondent's claims for monetary relief.

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

FEDERAL ENERGY REGULATORY COMMISSION ET AL. *v.* MISSISSIPPI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 80-1749. Argued January 19, 1982—Decided June 1, 1982

The Public Utility Regulatory Policies Act of 1978 (PURPA) was enacted as part of a legislative package designed to combat the nationwide energy crisis. To further this effort, Titles I and III of PURPA direct state utility regulatory commissions and nonregulated utilities to "consider" the adoption and implementation of specific "rate design" and regulatory standards, and require state commissions to follow certain notice and comment procedures when acting on proposed federal standards. Section 210 of PURPA's Title II seeks to encourage the development of cogeneration and small power facilities, and directs the Federal Energy Regulatory Commission (FERC), in consultation with state regulatory authorities, to promulgate rules to carry out this goal. Section 210 then requires the state authorities, after notice and hearing, to implement such rules, and authorizes the FERC to exempt cogeneration and small power facilities from certain state and federal regulations. The State of Mississippi and the Mississippi Public Service Commission (appellees) brought an action in Federal District Court against the FERC and the Secretary of Energy (appellants), seeking a declaratory judgment that Titles I and III and § 210 are unconstitutional because they exceed congressional power under the Commerce Clause and constitute an invasion of state sovereignty in violation of the Tenth Amendment. The District Court so held and pronounced the challenged provisions void.

Held:

1. The challenged provisions are within Congress' power under the Commerce Clause. Pp. 753–758.

(a) To assert that PURPA is facially unconstitutional because it does not regulate "commerce," or because it does not have "a substantial effect" on such activity, disregards the specific congressional finding in § 2 of PURPA that the regulated activities do have an immediate effect on interstate commerce. Pp. 754–755.

(b) The legislative history amply supports the congressional conclusion that limited federal regulation of retail sales of electricity and natural gas, and of the relationships between cogenerators and electric utilities, was essential to protect interstate commerce and the Nation's economy. Pp. 756–758.

2. The challenged provisions do not trench on state sovereignty in violation of the Tenth Amendment. Pp. 758–771.

(a) Insofar as § 210 authorizes the FERC to exempt qualified power facilities from state laws and regulations, it does nothing more than pre-empt conflicting state enactments in the traditional way. Because of the substantial interstate effect of such activity, Congress may pre-empt the States completely in the regulation of retail sales by electric and gas utilities and of transactions between such utilities and cogenerators. With respect to § 210's requirement that state authorities implement FERC's rules, the statute and its implementing regulations simply require state commissions to settle disputes arising under the statute, the very type of adjudicatory activity customarily engaged in by the Mississippi Public Service Commission. *Testa* v. *Katt*, 330 U. S. 386. Pp. 759–761.

(b) The "mandatory consideration" provisions of Titles I and III do not involve the compelled exercise of Mississippi's sovereign powers or set a mandatory agenda to be considered in all events by state legislative or administrative decisionmakers, but simply establish requirements for continued state activity in an otherwise pre-emptible field. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264. Pp. 761–770.

(c) Similarly, the procedural requirements of Titles I and III do not compel the exercise of a State's sovereign power or purport to set standards to be followed in all areas of the state commission's endeavors. If Congress may require a state administrative body to consider proposed federal regulations as a condition to its continued involvement in a pre-emptible field, it may require the use of certain procedural minima during that body's deliberations on the subject. Pp. 770–771.

Reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 771. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 775.

Solicitor General Lee argued the cause for appellants. With him on the briefs were *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, *Elliott Schulder*, *Kathryn A. Oberly*, *Susan Virginia Cook*, *Jerome M. Feit*, and *Joanne Leveque*.

Alex A. Alston, Jr., argued the cause for appellees. With him on the brief for appellees State of Mississippi et al. were *Hiram Eastland*, *Hubbard T. Saunders IV*, *Bill Allain*, Attorney General of Mississippi, and *Bennett E. Smith*, Assistant Attorney General. *Joshua Green* and *James K. Child, Jr.*, filed a brief for appellee Mississippi Power & Light Co.*

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*Briefs of *amici curiae* urging reversal were filed by *Roger E. Warin*, *Stephen H. Sachs*, Attorney General of Maryland, *Eleanor M. Carey*, Associate Deputy Attorney General, *Roger Davis*, *Norman L. Dean, Jr.*, and *Alan S. Miller* for the State of Maryland et al.; by *Peter N. Wells* for the County of Onondaga, N. Y.; by *William M. Bradner, Jr.*, and *Rigdon H. Boykin* for the American Paper Institute, Inc.; by *Janice E. Kerr*, *Hector Anninos*, and *Randolph W. Deutsch* for the California Public Utilities Commission; by *Peter W. Brown*, *Richard A. Hesse*, and *James E. Tierney*, Attorney General of Maine, for the Energy Law Institute et al.; by *Robert E. Bethea*, *A. Bernard Bays*, and *Gerald A. Sumida* for the Hawaii Sugar Planters' Association; by *Samuel Efron*, *David J. Bardin*, *James P. Mercurio*, and *Lewis E. Leibowitz* for Hoffman-La Roche Inc. et al.; by *Gerry Levenberg*, *R. Keith Guthrie*, *William Brashares*, and *John J. Gunther* for the National Alliance for Hydroelectric Energy et al.; and by *Robert H. Loeffler*, *Alan Cope Johnston*, and *Henry D. Levine* for Windfarms, Ltd., et al.

Briefs of *amici curiae* urging affirmance were filed by *Northcutt Ely*, *Frederick H. Ritts*, and *Robert F. Pietrowski, Jr.*, for the American Public Power Association; by *David G. Hanes*, *John D. McGrane*, and *Andrew P. Carter* for Arkansas Power & Light Co. et al.; by *Walter A. Bossert, Jr.*, and *Davison W. Grant* for Central Hudson Gas & Electric Corp.; by *Harold R. Schmidt*, *William R. Cockrell, Jr.*, and *Steve C. Griffith, Jr.*, for Duke Power Co. et al.; by *William B. Killian* for Florida Power & Light Co.; by *R. Gordon Gooch*, *J. Patrick Berry*, and *William R. Brown* for Houston Lighting & Power Co. et al.; by *Roger J. Marzulla* and *Gale A. Norton* for the Mountain States Legal Foundation; by *Edward A. Caine* and *William Dana Shapiro* for Potomac Electric Power Co.; and by *Wayne T. Elliott*, *Allen R. Hirons*, and *G. Stephen Parker* for the Southeastern Legal Foundation, Inc.

Briefs of *amici curiae* were filed by *David Frohnmayer*, Attorney General of Oregon, and *William F. Gary*, Solicitor General, for the Department of Energy of the State of Oregon; by *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *James R. Myers*, *Justin Andrew Kever*, and *John Stuart Fryer*, Assistant Attorneys Gen-

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, appellees successfully challenged the constitutionality of Titles I and III, and of § 210 of Title II, of the Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117 (PURPA or Act). We conclude that appellees' challenge lacks merit and we reverse the judgment below.

I

On November 9, 1978, President Carter signed PURPA into law.[1] The Act was part of a package of legislation,[2] approved the same day, designed to combat the nationwide energy crisis.

At the time, it was said that the generation of electricity consumed more than 25% of all energy resources used in the United States. S. Rep. No. 95–442, p. 7 (1977). Approximately one-third of the electricity in this country was generated through use of oil and natural gas, and electricity generation was one of the fastest growing segments of the Nation's economy. S. Rep. No. 95–361, p. 32 (1977). In part because of their reliance on oil and gas, electricity utilities were plagued with increasing costs and decreasing efficiency in the use of their generating capacities; each of these

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eral, for the State of Texas; by *William M. Chamberlain* for the California Energy Resources Conservation and Development Commission; by *David Crump* for the Legal Foundation of America; by *Marshall B. Brinkley* for the Louisiana Public Service Commission; and by *S. Eason Balch, S. Eason Balch, Jr.*, and *Ben H. Stone*, for Southern Company Services, Inc., et al.

[1] The Senate vote was taken on October 9, 1978. The Mississippi Senators voted against the bill. See 124 Cong. Rec. 34780. The House vote was taken on October 14, 1978. The five-member Mississippi delegation voted three "ayes" and two "nays." See *id.*, at 38503.

[2] In addition to PURPA, the package included the Energy Tax Act of 1978, Pub. L. 95–618, 92 Stat. 3174; the National Energy Conservation Policy Act, Pub. L. 95–619, 92 Stat. 3206; the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289; and the Natural Gas Policy Act of 1978, Pub. L. 95–621, 92 Stat. 3351.

factors had an adverse effect on rates to consumers and on the economy as a whole. S. Rep. No. 95–442, at 9. Congress accordingly determined that conservation by electricity utilities of oil and natural gas was essential to the success of any effort to lessen the country's dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had been experienced in 1977, and to control consumer costs.

A

Titles I and III

PURPA's Titles I and III, which relate to regulatory policies for electricity and gas utilities, respectively, are administered (with minor exceptions) by the Secretary of Energy. These provisions are designed to encourage the adoption of certain retail regulatory practices. The Titles share three goals: (1) to encourage "conservation of energy supplied by . . . utilities"; (2) to encourage "the optimization of the efficiency of use of facilities and resources" by utilities; and (3) to encourage "equitable rates to . . . consumers." §§ 101 and 301, 92 Stat. 3120 and 3149, 16 U. S. C. § 2611 (1976 ed., Supp. IV), 15 U. S. C. § 3201 (1976 ed., Supp. IV).[3] To achieve these goals, Titles I and III direct state utility regulatory commissions and nonregulated utilities to "consider" the adoption and implementation of specific "rate design" and regulatory standards.

Section 111(d) of the Act, 16 U. S. C. § 2621(d), requires each state regulatory authority and nonregulated utility to consider the use of six different approaches to structuring rates: (1) promulgation, for each class of electricity consumers, of rates that, "to the maximum extent practicable," would "reflect the costs of . . . service to such class"; (2)

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[3] For simplicity of citation, and to avoid repetition, unless otherwise noted herein, any reference to 15 or 16 U. S. C. relates to Supplement IV of the 1976 edition of the Code.

elimination of declining block rates;[4] (3) adoption of time-of-day rates;[5] (4) promulgation of seasonal rates;[6] (5) adoption of interruptible rates;[7] and (6) use of load management techniques.[8] The Act directed each state authority and nonregulated utility to consider these factors not later than two years after PURPA's enactment, that is, by November 8, 1980, and provided that the authority or utility by November 8, 1981, was to have made a decision whether to adopt the standards. § 2622(b). The statute does not provide penalties for failure to meet these deadlines; the state authority or nonregulated utility is merely directed to consider the standards at the first rate proceeding initiated by the authority after November 9, 1980. § 2622(c).

Section 113 of PURPA, 16 U. S. C. § 2623, requires each state regulatory authority and nonregulated utility to consider the adoption of a second set of standards relating to the

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[4] "Declining block rates" are a traditional and still common approach used by utilities in their charges for electricity. The highest unit rate is charged for basic electrical consumption, with a declining per-unit price for each block of additional consumption. See S. Rep. No. 95–442, pp. 26–27 (1977).

[5] "Time-of-day rates" are designed to reduce "peak load," the term used to describe the greatest demand for a utility's electricity. Demand varies by hour and season, usually reaching a daily maximum in the afternoon and a seasonal maximum in midsummer or midwinter. A utility must have enough generating capacity to meet that demand; steps that reduce peak demand also reduce the required amount of generating capacity and the use of "peaking" generating equipment, which frequently is gas- or oil-fueled. Under time-of-day rates, utilities charge more for electricity consumed during peak load hours. See *id.*, at 29.

[6] "Seasonal rates" operate to reduce peak load by imposing higher rates during the seasons when demand is greatest.

[7] "Interruptible rates" tend to reduce peak load by charging less for service which the utility can interrupt, or stop, during peak demand periods.

[8] "Load management techniques" are methods used to reduce the demand for electricity at peak times. For example, a utility might employ remote-control devices that temporarily turn off applicances during periods when the demand is particularly great.

terms and conditions of electricity service: (1) prohibition of master-metering in new buildings;[9] (2) restrictions on the use of automatic adjustment clauses;[10] (3) disclosure to consumers of information regarding rate schedules; (4) promulgation of procedural requirements relating to termination of service; and (5) prohibition of the recovery of advertising costs from consumers. Similarly, § 303, 15 U. S. C. § 3203, requires consideration of the last two standards—procedures for termination of service and the nonrecovery of advertising costs—for natural gas utilities. A decision as to the standards contained in §§ 113 and 303 was to have been made by November 1980, although, again, no penalty was provided by the statute for failure to meet the deadline.

Finally, § 114 of the Act, 16 U. S. C. § 2624, directs each state authority and nonregulated utility to consider promulgation of "lifeline rates"—that is, lower rates for service that meets the essential needs of residential consumers—if such rates have not been adopted by November 1980.

Titles I and III also prescribe certain procedures to be followed by the state regulatory authority and the nonregulated utility when considering the proposed standards. Each standard is to be examined at a public hearing after notice, and a written statement of reasons must be made available to the public if the standards are not adopted. 16 U. S. C. §§ 2621(b) and (c)(2), and §§ 2623(a) and (c); 15 U. S. C. §§ 3203(a) and (c). "Any person" may bring an action in state court to enforce the obligation to hold a hearing and

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[9] "Master-metering" is the use of one meter for several living units. Studies have shown that tenants of master-metered buildings use 35% more electricity, on the average, than tenants of buildings where each apartment has its own meter. See *id.*, at 31.

[10] An "automatic adjustment clause" provides that as a utility's fuel costs rise it may increase its rates without public hearing or review by the state regulatory authority. A clause of this kind provides the utility with no incentive to reduce its costs or to shift away from oil- or gas-fueled generating facilities, and therefore tends to discourage the efficient use of energy resources.

make determinations on the PURPA standards. 16 U. S. C. § 2633(c)(1); 15 U. S. C. § 3207(b)(1).

The Secretary of Energy, any affected utility, and any consumer served by an affected utility is given the right to intervene and participate in any rate-related proceeding considering the Title I standards. 16 U. S. C. § 2631(a). Under Title III, the Secretary alone has the right to intervene. 15 U. S. C. § 3205. Any person (including the Secretary) who intervenes or otherwise participates in the proceeding may obtain review in state court of any administrative determination concerning the Title I standards, 16 U. S. C. § 2633 (c)(1), and the Secretary has the right to participate as an *amicus* in any Title III judicial review proceeding initiated by another. 15 U. S. C. § 3207(b)(2). The right to intervene is enforceable against the state regulatory authority by an action in federal court. 16 U. S. C. § 2633(b); 15 U. S. C. § 3207(a)(2).

Titles I and III also set forth certain reporting requirements. Within one year of PURPA's enactment, and annually thereafter for 10 years, each state regulatory authority and nonregulated utility is to report to the Secretary "respecting its consideration of the standards established." 16 U. S. C. § 2626(a); 15 U. S. C. § 3209(a). The Secretary, in turn, is to submit a summary and analysis of these reports to Congress. 16 U. S. C. § 2626(b); 15 U. S. C. § 3209(b). Electricity utilities also are required to collect information concerning their service costs. 16 U. S. C. § 2643. This information is to be filed periodically with appellant Federal Energy Regulatory Commission (FERC) and with appropriate state regulatory agencies, and is to be made available to the public. Title III requires the Secretary, in consultation with FERC, state regulatory authorities, gas utilities, and gas consumers, to submit a report to Congress on gas utility rate design. 15 U. S. C. § 3206.

Despite the extent and detail of the federal proposals, however, no state authority or nonregulated utility is required to

adopt or implement the specified rate design or regulatory standards. Thus, 16 U. S. C. §§ 2621(a) and 2623(a) and 15 U. S. C. § 3203(a) all provide: "Nothing in this subsection prohibits any State regulatory authority or nonregulated . . . utility from making any determination that it is not appropriate to implement [or adopt] any such standard, pursuant to its authority under otherwise applicable State law." Similarly, 16 U. S. C. § 2627(b) and 15 U. S. C. § 3208 make it clear that any state regulatory authority or nonregulated utility may adopt regulations or rates that are "different from any standard established by this [subchapter or] chapter."

B

Section 210

Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U. S. C. § 824a–3, seeks to encourage the development of cogeneration and small power production facilities.[11] Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities,[12] and (2) the regulation of these alternative energy sources by state and federal utility

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[11] A "cogeneration facility" is one that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U. S. C. § 796(18)(A). A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. § 796(17)(A).

[12] See 123 Cong. Rec. 25848 (1977) (remarks of Sen. Percy); *id.*, at 32403 (remarks of Sen. Durkin); *id.*, at 32437 (remarks of Sen. Haskell); *id.*, at 32419 (remarks of Sen. Hart); National Energy Act: Hearings on H. R. 6831 et al. before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., 552–553 (1977).

authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.[13]

In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities. Section 210(f), 16 U. S. C. § 824a–3(f), requires each state regulatory authority and nonregulated utility to implement FERC's rules. And § 210(h), 16 U. S. C. § 824a–3(h), authorizes FERC to enforce this requirement in federal court against any state authority or nonregulated utility; if FERC fails to act after request, any qualifying utility may bring suit.

To solve the second problem perceived by Congress, § 210(e), 16 U. S. C. § 824a–3(e), directs FERC to prescribe rules exempting the favored cogeneration and small power facilities from certain state and federal laws governing electricity utilities.

Pursuant to this statutory authorization, FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. See 18 CFR pt. 292 (1980); 45 Fed. Reg. 12214–12237 (1980). These afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented. Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.[14]

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[13] See H. R. Conf. Rep. No. 95–1750, p. 98 (1978); H. R. Rep. No. 95–496, pt. 4, p. 157 (1977); 123 Cong. Rec. 32399 (1977) (remarks of Sen. Cranston); *id.*, at 32660 (remarks of Sen. Percy).

[14] Congress recognized that a State's compliance with the requirements of PURPA would involve the expenditure of funds. Accordingly, it author-

II

In April 1979, the State of Mississippi and the Mississippi Public Service Commission, appellees here, filed this action in the United States District Court for the Southern District of Mississippi against FERC and the Secretary of Energy, seeking a declaratory judgment that PURPA's Titles I and III and § 210 are unconstitutional. App. 3.[15] Appellees maintained that PURPA was beyond the scope of congressional power under the Commerce Clause and that it constituted an invasion of state sovereignty in violation of the Tenth Amendment.[16]

Following cross-motions for summary judgment, the District Court, in an unreported opinion, held that in enacting PURPA Congress had exceeded its powers under the Commerce Clause. App. to Juris. Statement 1a. The court observed that the Mississippi Public Service Commission by state statute possessed the "power and authority to regulate and control intrastate activities and policies of all utilities operating within the sovereign state of Mississippi." *Id.*, at 2a. Relying on *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), the court stated: "There is literally nothing in the Commerce Clause of the Constitution which authorizes or justifies the federal government in taking over the regulation and control of public utilities. These public utilities were ac-

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ized the Secretary of Energy to make grants to state regulatory authorities to assist them in carrying out the provisions of Titles I and III, including the reporting requirements, and the provisions of § 210. See 42 U. S. C. § 6807 (1976 ed., Supp. IV).

For each of the fiscal years 1979 and 1980, Congress authorized for appropriation up to $40 million to help state regulatory authorities defray the costs of complying with PURPA. Pub. L. 95–617, § 142(1), 92 Stat. 3134, 42 U. S. C. § 6808(1) (1976 ed., Supp. IV).

[15] Mississippi Power & Light Company was permitted to intervene in the action as a plaintiff and is also an appellee here.

[16] "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." U. S. Const., Amdt. 10.

tually unknown at the writing of the Constitution." App. to Juris. Statement 4a. Indeed, in the court's view, the legislation "does not even attempt to regulate commerce among the several states but it is a clear usurpation of power and authority which the United States simply does not have under the Commerce Clause of the Constitution." *Id.*, at 7a.

Relying on *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), the court also concluded that PURPA trenches on state sovereignty.[17] It therefore pronounced the statutory provisions void because "they constitute a direct intrusion on integral and traditional functions of the State of Mississippi." App. to Juris. Statement 8a–9a. For reasons it did not explain, the court also relied on the guarantee of a republican form of government, U. S. Const., Art. IV, § 4, and on the Supremacy Clause, Art. VI, cl. 2. App. to Juris. Statement 2a, n. 1, and 9a.

FERC and the Secretary of Energy appealed directly to this Court pursuant to 28 U. S. C. § 1252. See *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S. 264, 274, n. 15 (1981). We noted probable jurisdiction. 452 U. S. 936 (1981).

III

The Commerce Clause

We readily conclude that the District Court's analysis and the appellees' arguments are without merit so far as they concern the Commerce Clause. To say that nothing in the Commerce Clause justifies federal regulation of even the intrastate operations of public utilities misapprehends the proper role of the courts in assessing the validity of federal legislation promulgated under one of Congress' plenary powers. The applicable standard was reiterated just last Term in *Hodel* v. *Indiana*, 452 U. S. 314 (1981):

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[17] "The sovereign state of Mississippi is not a robot, or lackey which may be shuttled back and forth to suit the whim and caprice of the federal government." App. to Juris. Statement 2a.

"It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . . .' *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976). . . . A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Id.*, at 323–324.[18]

Despite these expansive observations by this Court, appellees assert that PURPA is facially unconstitutional because it does not regulate "commerce"; instead, it is said, the Act directs the nonconsenting State to regulate in accordance with federal procedures. This, appellees continue, is beyond Congress' power: "In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation." *Carter*

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[18] In the companion case decided the same day, this Court observed:

"Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. . . . This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824). Moreover, this Court has made clear that the commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce . . . or persons or things in commerce,' but also to 'activities affecting commerce.' *Perez* v. *United States*, 402 U. S. 146, 150 (1971). As we explained in *Fry* v. *United States*, 421 U. S. 542, 547 (1975), '[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S. 264, 276–277 (1981).

v. *Carter Coal Co.*, 298 U. S., at 297. The "governance of commerce" by the State is to be distinguished from commerce itself, for regulation of the former is said to be outside the plenary power of Congress.[19]

It is further argued that the proper test is not whether the regulated activity merely "affects" interstate commerce but, instead, whether it has "a substantial effect" on such commerce, citing JUSTICE REHNQUIST's opinion concurring in the judgment in the *Hodel* cases, 452 U. S., at 311–312. PURPA, appellees maintain, does not meet this standard.

The difficulty with these arguments is that they disregard entirely the specific congressional finding, in § 2 of the Act, 16 U. S. C. § 2601, that the regulated activities have an immediate effect on interstate commerce. Congress there determined that "the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require," among other things, a program for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electricity utilities, and equitable retail rates for electricity consumers, as well as a program to improve the wholesale distribution of electric energy, and a program for the conservation of natural gas while ensuring that rates to gas consumers are equitable. 16 U. S. C. § 2601. The findings, thus, are clear and specific.

The Court heretofore has indicated that federal regulation of intrastate power transmission may be proper because of the interstate nature of the generation and supply of electric power. *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453 (1972). Our inquiry, then, is whether the congressional find-

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[19] For this proposition, appellees rely on *Brown* v. *EPA*, 521 F. 2d 827, 839 (CA9 1975), vacated and remanded, 431 U. S. 99 (1977), and *District of Columbia* v. *Train*, 172 U. S. App. D. C. 311, 332, 521 F. 2d 971, 992 (1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U. S. 99 (1977).

ings have a rational basis. *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 277; *Hodel* v. *Indiana*, 452 U. S., at 323–324.

The legislative history provides a simple answer: there is ample support for Congress' conclusions. The hearings were extensive. Committees in both Houses of Congress noted the magnitude of the Nation's energy problems and the need to alleviate those problems by promoting energy conservation and more efficient use of energy resources. See S. Rep. No. 95–442, at 7–10; H. R. Rep. No. 95–543, vol. I, pp. 5–10 (1977); H. R. Rep. No. 95–496, pt. 4, pp. 3–7, 125–130 (1977).[20] Congress was aware that domestic oil production had lagged behind demand and that the Nation had become increasingly dependent on foreign oil. *Id.*, at 3. The House Committee observed: "Reliance upon imported oil to meet the bulk of U. S. oil demands could seriously jeopardize the stability of the Nation's economy and could undermine the independence of the United States." *Ibid.* See H. R. Rep. No. 95–543, vol. I, at 5–6. Indeed, the Nation had recently experienced severe shortages in its supplies of natural gas. *Id.*, at 7. The House and Senate Committees both noted that the electricity industry consumed more than 25% of the total energy resources used in this country while supplying only 12% of the user demand for energy. S. Rep. No. 95–442, at 7–8; H. R. Rep. No. 95–496, pt. 4, at 125. In recent years, the electricity utility industry had been beset by numerous problems, *id.*, at 129, which resulted in higher bills for the consuming public, a result exacerbated by the rate structures employed by most utilities. S. Rep. No. 95–442, at 26. Congress naturally concluded that the energy prob-

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[20] See also 124 Cong. Rec. 34558 (1978) (remarks of Sen. Jackson); *id.*, at 34560 (remarks of Sen. Bumpers); *id.*, at 34776 (remarks of Sen. Robert C. Byrd); *id.*, at 38350 (remarks of Rep. Ashley); *id.*, at 38370–38371 (remarks of Rep. Dingell); 123 Cong. Rec. 25894 (1977) (remarks of Rep. Ashley); *id.*, at 25916–25917 (remarks of Rep. Ottinger); *id.*, at 27063-27064 (remarks of Rep. Wolff).

lem was nationwide in scope,[21] and that these developments demonstrated the need to establish federal standards regarding retail sales of electricity, as well as federal attempts to encourage conservation and more efficient use of scarce energy resources. See *id.*, at 24–32; H. R. Rep. No. 95–496, pt. 4, at 131–133, 136–138, 170–171.

Congress also determined that the development of cogeneration and small power production facilities would conserve energy. The evidence before Congress showed the potential contribution of these sources of energy: it was estimated that if proper incentives were provided, industrial cogeneration alone could account for 7%–10% of the Nation's electrical generating capacity by 1987. S. Rep. No. 95–442, at 21, 23.

We agree with appellants that it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect. See *FPC* v. *Florida Power & Light Co.*, *supra.* Indeed, the utilities involved in this very case, Mississippi Power & Light Company and Mississippi Power Company, sell their retail customers power that is generated in part beyond Mississippi's borders, and offer reciprocal services to utilities in other States. App. 93–94. The intrastate activities of these utilities, although regulated by the Mississippi Public Service Commission, bring them within the reach of Congress' power over interstate commerce. See *FPC* v. *Florida Power & Light Co.*, 404 U. S., at 458; *New England Power Co.* v. *New Hampshire*, 455 U. S. 331 (1982).[22]

Even if appellees were correct in suggesting that PURPA

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[21] See, *e. g.*, *id.*, at 32437–32438 (remarks of Sen. Brooke); *id.*, at 32444 (remarks of Sen. Percy).

[22] PURPA could be upheld even if some of its provisions were not directly related to the purpose of fostering interstate commerce: "A complex regulatory program . . . can survive a Commerce Clause challenge without a

will not significantly improve the Nation's energy situation, the congressional findings compel the conclusion that "'the means chosen by [Congress are] reasonably adapted to the end permitted by the Constitution.'" *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 276, quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 262 (1964). It is not for us to say whether the means chosen by Congress represent the wisest choice. It is sufficient that Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, and of relationships between cogenerators and electric utilities, was essential to protect interstate commerce. That is enough to place the challenged portions of PURPA within Congress' power under the Commerce Clause.[23] Because PURPA's provisions concern private nonregulated utilities as well as state commissions, the statute necessarily is valid at least insofar as it regulates private parties. See *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 286.

IV

The Tenth Amendment

Unlike the Commerce Clause question, the Tenth Amendment issue presented here is somewhat novel. This case obviously is related to *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), insofar as both concern principles of state sovereignty. But there is a significant difference as well. *National League of Cities*, like *Fry* v. *United States*, 421 U. S. 542 (1975), presented a problem the Court often con-

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showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Hodel* v. *Indiana*, 452 U. S. 314, 329, n. 17 (1981).

[23] This is not to say the Congress can regulate in an area that is only tangentially related to interstate commerce. See *Maryland* v. *Wirtz*, 392 U. S. 183, 196–197, n. 27 (1968). That obviously is not the case here.

fronts: the extent to which state sovereignty shields the States from generally applicable federal regulations. In PURPA, in contrast, the Federal Government attempts to use state regulatory machinery to advance federal goals. To an extent, this presents an issue of first impression.

PURPA, for all its complexity, contains essentially three requirements: (1) § 210 has the States enforce standards promulgated by FERC; (2) Titles I and III direct the States to consider specified ratemaking standards; and (3) those Titles impose certain procedures on state commissions. We consider these three requirements in turn:

A. Section 210. On its face, this appears to be the most intrusive of PURPA's provisions. The question of its constitutionality, however, is the easiest to resolve. Insofar as § 210 authorizes FERC to exempt qualified power facilities from "State laws and regulations," it does nothing more than pre-empt conflicting state enactments in the traditional way. Clearly, Congress can pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators. Cf. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769 (1945). The propriety of this type of regulation—so long as it is a valid exercise of the commerce power—was made clear in *National League of Cities*, and was reaffirmed in *Hodel* v. *Virginia Surface Mining & Recl. Assn.*: the Federal Government may displace state regulation even though this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." 452 U. S., at 290.

Section 210's requirement that "each State regulatory authority shall, after notice and opportunity for public hearing, *implement* such rule (or revised rule) for each electric utility for which it has ratemaking authority," 16 U. S. C. § 824a–3(f)(1) (emphasis added), is more troublesome. The statute's substantive provisions require electricity utilities to purchase electricity from, and to sell it to, qualifying co-

generator and small power production facilities. § 824a–3(a). Yet FERC has declared that state commissions may implement this by, among other things, "an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA]." 18 CFR § 292.401(a) (1980). In essence, then, the statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission. See, *e. g.*, Miss. Code Ann. §§ 77–1–31, 77–3–5, 77–3–13(3), 77–3–21, 77–3–405 (1973).

Testa v. *Katt*, 330 U. S. 386 (1947), is instructive and controlling on this point. There, the Emergency Price Control Act, 56 Stat. 34, as amended, created a treble-damages remedy, and gave jurisdiction over claims under the Act to state as well as federal courts. The courts of Rhode Island refused to entertain such claims, although they heard analogous state causes of action. This Court upheld the federal program. It observed that state courts have a unique role in enforcing the body of federal law, and that the Rhode Island courts had "jurisdiction adequate and appropriate under established local law to adjudicate this action." 330 U. S., at 394. Thus the state courts were directed to heed the constitutional command that "the policy of the federal Act is the prevailing policy in every state," *id.*, at 393, "'and should be respected accordingly in the courts of the State.'" *Id.*, at 392, quoting *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 57 (1912).

So it is here. The Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy § 210's requirements simply by opening its doors to claimants. That the Commission has administrative as well as judicial duties is of no significance.[24] Any other

[24] In another context, the Court has noted that "the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally

conclusion would allow the States to disregard both the preeminent position held by federal law throughout the Nation, cf. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 340–341 (1816), and the congressional determination that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery. Such an approach, *Testa* emphasized, "flies in the face of the fact that the States of the Union constitute a nation," and "disregards the purpose and effect of Article VI of the Constitution." 330 U. S., at 389.

B. Mandatory Consideration of Standards. We acknowledge that "the authority to make . . . fundamental . . . decisions" is perhaps the quintessential attribute of sovereignty. See *National League of Cities* v. *Usery*, 426 U. S., at 851. Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. See *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 360 (1977) (State Supreme Court speaks as sovereign because it is the "ultimate body wielding the State's power over the practice of law"). It would follow that the ability of a state legislative (or, as here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system. Indeed, the 19th-century view, expressed in a well-known slavery case, was that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Kentucky* v. *Dennison*, 24 How. 66, 107 (1861).

Recent cases, however, demonstrate that this rigid and isolated statement from *Kentucky* v. *Dennison*—which suggests that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.[25] While this Court never

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comparable' to that of a judge." *Butz* v. *Economou*, 438 U. S. 478, 513 (1978).

[25] JUSTICE O'CONNOR reviews the constitutional history at some length, ultimately deriving the proposition that the Framers intended to deny the

has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA* v. *Brown*, 431 U. S. 99 (1977), there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions. In *Fry* v. *United States*, 421 U. S. 542 (1975), for example, state executives were held restricted, with respect to state employees, to the wage and salary limitations established by the Economic Stabilization Act of 1970. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658 (1979), acknowledged a federal court's power to enforce a treaty by compelling a state agency to "prepare" certain rules "even if state law withholds from [it] the power to do so." *Id.*, at 695.[26] And certainly *Testa* v. *Katt*, *supra*, by declaring that "the policy of the federal Act is the prevailing policy in every state," 330 U. S., at 393, reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further federal ends.[27] In doing so, *Testa* clearly

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Federal Government the authority to exercise "military or legislative power over state governments," *instead* "allow[ing] Congress to pass laws directly affecting individuals." *Post*, at 795. If JUSTICE O'CONNOR means this rhetorical assertion to be taken literally, it is demonstrably incorrect. See, *e. g.*, *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982); *Fry* v. *United States*, 421 U. S. 542 (1975); *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964); *California* v. *Taylor*, 353 U. S. 553 (1957); *Case* v. *Bowles*, 327 U. S. 92 (1946); *United States* v. *California*, 297 U. S. 175 (1936).

[26] The Court did express doubt as to whether a state agency "may be ordered actually to promulgate regulations having effect as a matter of state law." 443 U. S., at 695. As we have noted, however, PURPA does not require promulgation of particular regulations.

[27] JUSTICE O'CONNOR's partial dissent finds each of these cases inapposite. Yet the purported distinctions are little more than exercises in the art of *ipse dixit*. Thus she suggests that *Testa* v. *Katt* provides no support for the imposition of federal responsibilities on state legislatures, because "the requirement that [state courts] evenhandedly adjudicate state and federal claims falling within their jurisdiction does not infringe any sovereign authority to set an agenda." *Post*, at 784–785. Yet the courts have

cut back on both the quoted language and the analysis of the *Dennison* case of the preceding century.[28]

Whatever all this may forebode for the future, or for the scope of federal authority in the event of a crisis of national

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always been recognized as a coequal part of the State's sovereign decision-making apparatus, see *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 360 (1977), and it seems evident that requiring state tribunals to entertain federal claims interferes, at least to a degree, with the State's sovereign prerogatives, see n. 25, *supra*, as well as with the amount of time that state courts may devote to adjudicating state claims. Conversely, it is difficult to perceive any fundamental distinction between the state legislature's power to establish limits on the jurisdiction of state courts, and its prerogative to set ratemaking criteria for use by quasi-legislative utilities commissions. JUSTICE O'CONNOR fails to explain, however, why this does not implicate her concern that "[w]hile engaged in . . . congressionally mandated tasks, state utility commissions are less able to pursue local proposals . . . ." *Post*, at 787.

The partial dissent finds *Fry* v. *United States* inapposite because the wage freeze there at issue "'displaced no state choices as to how governmental operations should be structured . . . . Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained . . . .'" *Post*, at 784, n. 13, quoting *National League of Cities* v. *Usery*, 426 U. S. 833, 853 (1976). It seems absurd to suggest, however, that a federal veto of the States' chosen method of structuring their employment relationships is less intrusive in any realistic sense than are PURPA's mandatory consideration provisions. Finally, JUSTICE O'CONNOR would distinguish *Fishing Vessel Assn.* as involving only "[t]he power of a court to enjoin adjudicated violations of federal law." *Post*, at 784, n. 13. In doing so, however, the Court unambiguously held that federal law could impose an affirmative obligation upon state officials to prepare administrative regulations—a holding of obvious relevance to this case.

[28] In *Dennison*, the Court concluded that the state courts entertained federal actions solely as a discretionary "matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution." 24 How., at 109. That analysis cannot survive *Testa*, which squarely held "that state courts do not bear the same relation to the United States that they do to foreign countries." 330 U. S., at 389. And *Testa*, of course, placed the obligation of state officials to enforce federal law squarely in the Supremacy Clause.

[Footnote 28 is continued on p. 764]

proportions, it plainly is not necessary for the Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity. Titles I and III of PURPA require only *consideration* of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals. As we have noted, the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities. In a sense, then, this case is only one step beyond *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, *supra*. There, the Federal Government could have pre-empted all surface mining regulations; instead, it allowed the States to enter the field if they promulgated regulations consistent with federal standards. In the Court's view, this raised no Tenth Amendment problem: "We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." 452 U. S., at 290. "[T]here can be no suggestion that the Act commandeers the legislative

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Our recent cases also demonstrate that the Federal Government, at least in certain circumstances, can structure the State's exercise of its sovereign powers. In *National League of Cities* v. *Usery*, *supra*, for example, the Court made clear that the State's regulation of its relationship with its employees is an "undoubted attribute of state sovereignty." 426 U. S., at 845. Yet, by holding "unimpaired" *California* v. *Taylor*, 353 U. S. 553 (1957), which upheld a federal labor regulation as applied to state railroad employees, 426 U. S., at 854, n. 18, *National League of Cities* acknowledged that not all aspects of a State's sovereign authority are immune from federal control. This analysis was restated in *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, *supra*, which indicated that federal regulations are subject to Tenth Amendment attack only if they "regulat[e] the 'States as States,'" "address matters that are indisputably 'attributes of state sovereignty,'" *and* impair the States' "ability 'to structure integral operations in areas of traditional functions.'" 452 U. S., at 287–288, quoting *National League of Cities* v. *Usery*, 426 U. S., at 854, 845, 852. And even when these requirements are met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 288, n. 29.

processes of the States by directly compelling them to enact and enforce a regulatory program." *Id.*, at 288.

Similarly here, Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards.[29] While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence," *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869); *Coyle* v. *Oklahoma*, 221 U. S. 559, 580 (1911), and do not impair the ability of the States "to function effectively

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[29] It seems evident that Congress intended to defer to state prerogatives—and expertise—in declining to pre-empt the utilities field entirely. See, *e. g.*, S. Rep. No. 95–442, pp. 9, 13–14 (1977); 124 Cong. Rec. 34558 (1978) (remarks of Sen. Jackson); *id.*, at 34560 (remarks of Sen. Bumpers); *id.*, at 34763 (remarks of Sen. Metzenbaum); *id.*, at 34768 (remarks of Sen. Durkin); 123 Cong. Rec. 32430 (1977) (remarks of Sen. Johnston); *id.*, at 32395 (remarks of Sen. Bartlett).

JUSTICE O'CONNOR's partial dissent's response to this is peculiar. On the one hand, she suggests that the States might prefer that Congress simply pre-empt the field, since that "would leave them free to exercise their power in other areas." *Post*, at 787. Yet JUSTICE O'CONNOR elsewhere acknowledges the importance of utilities regulation to the States, *post*, at 781, and emphasizes that local experimentation and self-determination are essential aspects of the federal system. *Post*, at 787–791. PURPA, of course, *permits* the States to play a continued role in the utilities field, and gives full force to the States' ultimate policy choices. Certainly, it is a curious type of federalism that encourages Congress to pre-empt a field entirely, when its preference is to let the States retain the primary regulatory role.

in a federal system." *Fry* v. *United States*, 421 U. S., at 547, n. 7; *National League of Cities* v. *Usery*, 426 U. S., at 852. To the contrary, they offer the States a vehicle for remaining active in an area of overriding concern.

We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one. And that is particularly true when Congress, as is the case here, has failed to provide an alternative regulatory mechanism to police the area in the event of state default. Yet in other contexts the Court has recognized that valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority. Thus in *Oklahoma* v. *CSC*, 330 U. S. 127 (1947), the Court upheld Congress' power to attach conditions to grants-in-aid received by the States, although the condition under attack involved an activity that "the United States is not concerned with, and has no power to regulate." *Id.*, at 143. The Tenth Amendment, the Court declared, "has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,'" *ibid.*, quoting *United States* v. *Darby*, 312 U. S. 100, 124 (1941)—the end there being the disbursement of federal funds. Thus it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to "coerc[e] the States" into assuming a regulatory role by affecting their "freedom to make decisions in areas of 'integral governmental functions.'" *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 289.

Equally as important, it has always been the law that state legislative and judicial decisionmakers must give preclusive effect to federal enactments concerning nongovernmental activity, no matter what the strength of the competing local interests. See *Martin* v. *Hunter's Lessee*, 1 Wheat., at 340–341. This requirement follows from the nature of gov-

ernmental regulation of private activity. "[I]ndividual businesses necessarily [are] subject to the dual sovereignty of the government of the Nation and of the State in which they reside," *National League of Cities* v. *Usery*, 426 U. S., at 845; when regulations promulgated by the sovereigns conflict, federal law necessarily controls. This is true though Congress exercises its authority "in a manner that displaces the States' exercise of their police powers," *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 291, or in such a way as to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important," *id.*, at 290—or, to put it still more plainly, in a manner that is "extraordinarily intrusive." *Id.*, at 305 (POWELL, J., concurring). Thus it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements. But this does not change the constitutional analysis: as in *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, "[t]he most that can be said is that the . . . Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.*, at 289.[30]

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[30] JUSTICE O'CONNOR's partial dissent suggests that our analysis is an "absurdity," *post*, at 781, and variously accuses us of "conscript[ing] state utility commissions into the national bureaucratic army," of transforming state legislative bodies into "field offices of the national bureaucracy," of approving the "dismemberment of state government," of making state agencies "bureaucratic puppets of the Federal Government," and—most colorfully—of permitting "Congress to kidnap state utility commissions." *Post*, at 775, 777, 782, 783, 790. While these rhetorical devices make for absorbing reading, they unfortunately are substituted for useful constitutional analysis. For while JUSTICE O'CONNOR articulates a view of state sovereignty that is almost mystical, she entirely fails to address our central point.

The partial dissent does not quarrel with the propositions that Congress may pre-empt the States in the regulation of private conduct, that Con-

To be sure, PURPA gives virtually any affected person the right to compel consideration of the statutory standards through judicial action. We fail to see, however, that this places any particularly onerous burden on the State. Mississippi by statute already grants "*[a]ny interested person* . . . the right to petition the [Public Service] [C]ommission for issuance, amendment or repeal of a rule or regulation," Miss. Code Ann. § 77–3–45 (1973) (emphasis added), and provides that "*any party* aggrieved by any final finding, order or judgment of the commission shall have the right, regardless of the amount involved, of appeal in chancery court." Miss. Code Ann. § 77–3–67(1) (Supp. 1981) (emphasis added). Indeed, "[a]ny person whose rights may be directly affected by said appeal may appear and become a party . . . ." *Ibid.* And

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gress may condition the validity of State enactments in a pre-emptible area on their conformity with federal law, and that Congress may attempt to "coerce" the States into enacting nationally desirable legislation. Given this, the partial dissent fails to identify precisely what is "absurd" about a scheme that gives the States a choice between regulating in conformity with federal requirements, or abandoning regulation in a given field. Though the partial dissent finds *Hodel* v. *Virginia Surface Mining & Recl. Assn.* inapposite, in our view the parallel is striking: there, the States were directed to legislate consistently with congressional enactments, or not at all; here, the States are asked to regulate in conformity with federal requirements, or not at all. While it is true that PURPA conditions continued state regulatory activity on the performance of certain affirmative tasks, the partial dissent nowhere explains why—so long as the field is preemptible—the nature of the condition is relevant. And while PURPA's requirements in practice may be more intrusive and more difficult for the States to avoid than was the legislation at issue in *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, JUSTICE O'CONNOR herself acknowledges that an "evaluation of intrusiveness . . . is simply irrelevant to the constitutional inquiry." *Post*, at 785–786. Similarly, the difference between PURPA and the Surface Mining Control and Reclamation Act of 1977 identified by the partial dissent cannot be that only the former affects a "traditional function of state government," *post*, at 781, for regulation of land use is perhaps the quintessential state activity. In short, while the area of state action potentially foreclosed by PURPA may be broader than was the case in *Hodel*, the partial dissent has pointed to no constitutionally significant theoretical distinction between the two statutory schemes.

"[a]ppeals in accordance with law may be had to the supreme court of the State of Mississippi from any final judgment of the chancery court." Miss. Code Ann. § 77–3–71 (1973).

It is hardly clear on the statute's face, then, that PURPA's standing and appeal provisions grant any rights beyond those presently accorded by Mississippi law, and appellees point to no specific provision of the Act expanding on the State's existing, liberal approach to public participation in ratemaking.[31] In this light, we again find the principle of *Testa* v. *Katt*, *supra*, controlling: the State is asked only to make its administrative tribunals available for the vindication of federal as well as state-created rights. PURPA, of course, establishes as federal policy the requirement that state commissions consider various ratemaking standards, and it gives individuals a right to enforce that policy; once it is established that the requirement is constitutionally supportable, "the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide." *Testa* v. *Katt*, 330 U. S., at 391. See *Second Employers' Liability Cases*, 223 U. S. 1, 57 (1912).

In short, Titles I and III do not involve the compelled exercise of Mississippi's sovereign powers. And, equally important, they do not set a mandatory agenda to be considered in all events by state legislative or administrative decision-makers. As we read them, Titles I and III simply establish requirements for continued state activity in an otherwise preemptible field.[32] Whatever the constitutional problems as-

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[31] We believe that this seemingly precise parallel between state and federal procedures suffices to overcome JUSTICE POWELL's objections to PURPA, at *least* where, as here, the statute is subjected to a facial attack. See also n. 34, *infra*.

[32] JUSTICE O'CONNOR's partial dissent accuses us of undervaluing *National League of Cities*, and maintains that our analysis permits Congress to "dictate the agendas and meeting places of state legislatures." *Post*, at 782. These apocalyptic observations, while striking, are overstated and patently inaccurate. We hold only that Congress may impose conditions

sociated with more intrusive federal programs, the "mandatory consideration" provisions of Titles I and III must be validated under the principle of *Hodel* v. *Virginia Surface Mining & Recl. Assn.*[33]

C. The Procedural Requirements. Titles I and III also require state commissions to follow certain notice and comment procedures when acting on the proposed federal standards. In a way, these appear more intrusive than the "consideration" provisions; while the latter are essentially hortatory, the procedural provisions obviously are prescriptive. Appellants and *amici* Maryland et al. argue that the procedural requirements simply establish minimum due process standards, something Mississippi appears already to provide,[34] and therefore may be upheld as an exercise of Con-

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on the State's regulation of private conduct in a pre-emptible area. This does not foreclose a Tenth Amendment challenge to federal interference with the State's ability "to structure employer-employee relationships," 426 U. S., at 851, while providing "those governmental services which [its] citizens require," *id.*, at 847, as was the case in *National League of Cities*. It does not suggest that the Federal Government may impose conditions on state activities in fields that are not pre-emptible, or that are solely of intrastate concern. And it does not purport to authorize the imposition of general affirmative obligations on the States.

[33] As we note above, PURPA imposes certain reporting requirements on state commissions. But because these attach only if the State chooses to continue its regulatory efforts in the field, we find them supportable for the reasons addressed in connection with the other provisions of Titles I and III. Appellees nevertheless suggest that PURPA's requirements must fall because compliance will impose financial burdens on the States. We are unconvinced: in a Tenth Amendment challenge to congressional activity, "the determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 292, n. 33. In any event, Congress has taken steps to reduce or eliminate the economic burden of compliance. See n. 14, *supra*.

[34] Mississippi law provides for reasonable notice in the fixing of rates and conditions of service of utilities. Miss. Code Ann. § 77–3–33(2) (1973). It also requires the Public Service Commission to keep a "full and complete record" of all proceedings, § 77–3–63, and to "make and file its findings and order, and its opinion, if any," § 77–3–59. Indeed, the state statute re-

gress' Fourteenth Amendment powers. We need not go that far, however, for we uphold the procedural requirements under the same analysis employed above in connection with the "consideration" provisions. If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks. The procedural requirements obviously do not compel the exercise of the State's sovereign powers, and do not purport to set standards to be followed in all areas of the state commission's endeavors.

The judgment of the District Court is reversed.

It is so ordered.

JUSTICE POWELL, concurring in part and dissenting in part.

The Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117 *et seq.* (PURPA), imposes unprecedented burdens on the States. As JUSTICE O'CONNOR ably demonstrates, it intrusively requires them to make a place on their administrative agenda for consideration and potential adoption of federally proposed "standards." The statute does not simply ask States to consider quasi-legislative matters that Congress believes they would do well to adopt. It also prescribes administrative and judicial procedures that States must follow in deciding whether to adopt the proposed standards. At least to this extent, I think the PURPA violates the Tenth Amendment.

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quires that "[a]ll findings of the commission and the determination of every matter by it shall be in writing and placed upon its minutes." § 77–1–41. These "shall be deemed a public record, and shall at all seasonable times be subject to the inspection of the public." *Ibid.* Thus, the requirements that appellees characterize as an extraordinary burden on the State appear to accord few, if any, procedural rights not already established by Mississippi law.

I

Most, if not all, of the States have administrative bodies—usually commissions—that regulate electric and gas public utility companies. As these utilities normally are given monopoly jurisdiction, they are extensively regulated both substantively and procedurally by state law. Until now, with limited exceptions, the Federal Government has not attempted to pre-empt this important state function, and certainly has not undertaken to prescribe the procedures by which state regulatory bodies make their decisions. The PURPA, for the first time, breaks with this longstanding deference to principles of federalism.

Now, regardless of established procedures before state administrative regulatory agencies and of state law with respect to judicial review, the PURPA forces federal procedures on state regulatory institutions. The PURPA prescribes rules directing that "the Secretary [of Energy], any affected electric utility, or any electric consumer of an affected electric utility may intervene and participate as a matter of right" in regulatory proceedings required by the PURPA respecting electrical rates.[1] It directs that "[a]ny person (including the Secretary) may bring an action to enforce" the obligations with respect to electrical rate consideration that the PURPA lays upon state regulatory commissions.[2] The statute provides that "[a]ny person (including

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[1] 16 U. S. C. § 2631(a) (1976 ed., Supp. IV). "[A]ny electric utility or electric consumer" may enforce its intervention and participation rights in federal court. § 2633(b)(2). See also § 2633(b)(1).

The PURPA grants similar intervention and participation rights to the Secretary with respect to state natural gas utility rate proceedings. See 15 U. S. C. § 3205 (1976 ed., Supp. IV). These rights also are specified to be enforceable in federal court. See § 3207(a)(2).

[2] 16 U. S. C. § 2633(c)(1) (1976 ed., Supp. IV). A similar enforcement right is granted in the case of natural gas rate proceedings. 15 U. S. C. § 3207(b)(1) (1976 ed., Supp. IV).

Under the PURPA's Title II, § 210, States must implement federal rules relating to the interconnection of electrical utilities with qualifying cogeneration and small power production facilities. 16 U. S. C. § 824a–3

the Secretary) may obtain [judicial] review of any determination" made by a state regulatory commission regarding the PURPA's electrical rate policies.[3] The foregoing requirements by the PURPA intrude upon—in effect pre-empt—core areas of a State's administrative and judicial procedure.

II

In sustaining these provisions of the Act, the Court reasons that Congress can condition the utility regulatory activities of States on any terms it pleases since, under the Commerce Clause, Congress has the power to pre-empt completely all such activities. *Ante*, at 765–766. Under this "threat of pre-emption" reasoning, Congress—one supposes—could reduce the States to federal provinces. But as *National League of Cities* v. *Usery*, 426 U. S. 833, 841 (1976), stated, and indeed as the structure of the Court's opinion today makes plain, *ante*, at 753 and 758, the Commerce Clause and the Tenth Amendment embody distinct limitations on federal power. That Congress has satisfied the one demonstrates nothing as to whether Congress has satisfied the other.[4]

(1976 ed., Supp. IV). The Federal Energy Regulatory Commission and (under certain conditions) "[a]ny electrical utility, qualifying cogenerator, or qualifying small power producer" may bring judicial actions against state regulatory commissions to require the implementation of the federal rules prescribed by the PURPA. §§ 824a–3(h)(2)(A) and (B).

[3] 16 U. S. C. § 2633(c)(1) (1976 ed., Supp. IV). The PURPA also makes available a right of judicial review in the same manner with respect to the interconnection of electrical utilities with cogeneration and small power production facilities. § 824a–3(g)(1). No similar right is available in the case of natural gas rate proceedings. See 15 U. S. C. § 3207(b)(2) (1976 ed., Supp. IV).

As a separate matter, the PURPA specifies the procedural requirements for the state regulatory agencies' consideration and determination of the PURPA's federally proposed standards. See § 3203(c); 16 U. S. C. § 2621(b)(1) (1976 ed., Supp. IV).

[4] The Court cites *Testa* v. *Katt*, 330 U. S. 386 (1947), in support of the proposition that under some conditions the Federal Government may call

"The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954). I believe the same principle must apply to other organs of state government. It may be true that the procedural provisions of the PURPA that prompt this dissent may not effect dramatic changes in the laws and procedures of some States. But I know of no other attempt by the Federal Government to supplant state-prescribed procedures that in part define the nature of their administrative agencies. If Congress may do this, presumably it has the power to pre-empt state-court rules of civil procedure and judicial review in classes of cases found to affect commerce. This would be the type of gradual encroachment hypothesized by Professor Tribe: "Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If

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upon state governmental institutions to decide matters of federal policy. But *Testa* recognized that, when doing so, Congress must respect the state institution's own decisionmaking structure and method. That opinion limited its holding to circumstances under which the state court has "jurisdiction adequate and appropriate *under established local law* to adjudicate this [federal] action." *Id.*, at 394 (emphasis added). The *Testa* Court then emphasized its meaning by citing *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), where the Court stated that "[i]t would not be open to us" to insist on adjudication in a state court of a federal claim arising beyond the jurisdiction of the local court. *Id.*, at 121. See Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 Harv. L. Rev. 966, 971 (1947) (nothing in *Testa* upsets "the traditional doctrine that Congress may not interfere with a state's sovereign right to determine and control the jurisdictional requirements of its own courts").

The Court also cites *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658 (1979), to support its holding. *Ante*, at 762. The case stands for the unremarkable proposition that a district court, after adjudicating a contest under federal law between a State and Indian tribes over fishing rights, may order the losing State to abide by the court's decision. Nothing in our *Fishing Vessel Assn.* opinion authorized the federal court to amend the structure of a state political institution.

there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[5]

I limit this dissent to the provisions of the PURPA identified above. Despite the appeal—and indeed wisdom—of JUSTICE O'CONNOR's evocation of the principles of federalism, I believe precedents of this Court support the constitutionality of the substantive provisions of this Act on this facial attack. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981); *Testa* v. *Katt*, 330 U. S. 386 (1947). Accordingly, to the extent the procedural provisions may be separable, I would affirm in part and reverse in part.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.

I agree with the Court that the Commerce Clause supported Congress' enactment of the Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117 (PURPA). I disagree, however, with much of the Court's Tenth Amendment analysis. Titles I and III of PURPA conscript state utility commissions into the national bureaucratic army. This result is contrary to the principles of *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), antithetical to the values of federalism, and inconsistent with our constitutional history. Accordingly, I dissent from Parts IV–B and IV–C of the Court's opinion.[1]

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[5] L. Tribe, American Constitutional Law 302 (1978).

[1] I concur in the Court's decision to uphold Title II, § 210, of PURPA against appellees' facial attack. As the Court explains, part of that section permits the Federal Energy Regulatory Commission (FERC) to exempt cogeneration and small power production facilities from otherwise applicable state and federal laws. 16 U. S. C. § 824a–3(e) (1976 ed., Supp. IV). This exemption authority does not violate the Tenth Amendment, for it merely pre-empts state control of private conduct, rather than regulating

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Titles I and III of PURPA require state regulatory agencies to decide whether to adopt a dozen federal standards governing gas and electric utilities.[2] The statute describes, in some detail, the procedures state authorities must fol-

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the "States as States." See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 287–293 (1981).

Section 210's requirement that the States "implement" rules promulgated by the Secretary of Energy, 16 U. S. C. § 824a–3(f) (1976 ed., Supp. IV), is more disturbing. Appellants, however, have interpreted this statutory obligation to include "an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [§ 210], or any other action reasonably designed to implement [that section]." 18 CFR § 292.401(a) (1981). It appears, therefore, that state regulatory authorities may satisfy § 210's implementation requirement simply by adjudicating private disputes arising under that section. As the Court points out, *ante*, at 760–761, the Mississippi Public Service Commission has jurisdiction over similar state disputes, and it is settled that a State may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action. See *Testa* v. *Katt*, 330 U. S. 386 (1947). Under these circumstances, but without foreclosing the possibility that particular applications of § 210's implementation provision might uncover hidden constitutional defects, I would not sustain appellees' facial attack on the provision.

Section 210 also authorizes FERC, electric utilities, cogenerators, and small power producers to "enforce" the above implementation provision against state utility commissions. 16 U. S. C. § 824a–3(h)(2) (1976 ed., Supp. IV). As applied, it is conceivable that this enforcement provision would raise troubling federalism issues. Once again, however, I decline to accept appellees' facial challenge to the provision, preferring to consider the constitutionality of this provision in the setting of a concrete controversy.

[2] The statute imposes the same requirements upon nonregulated utilities. In this respect, it regulates purely private conduct and does not violate the Tenth Amendment. Throughout this dissent, I consider only the constitutionality of Titles I and III as applied to state regulatory authorities. I would allow the District Court, on remand, to decide whether the constitutionally defective aspects of Titles I and III are severable from the unobjectionable portions.

low when evaluating these standards,[3] but does not compel the States to adopt the suggested federal standards. 15 U. S. C. § 3203(a) (1976 ed., Supp. IV); 16 U. S. C. §§ 2621 (a), 2623(a), 2627(b) (1976 ed., Supp. IV). The latter, deceptively generous feature of PURPA persuades the Court that the statute does not intrude impermissibly into state sovereign functions. The Court's conclusion, however, rests upon a fundamental misunderstanding of the role that state governments play in our federalist system.

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes. The Constitution contemplates "an indestructible Union, composed of indestructible States," a system in which both the State and National Governments retain a "separate and independent existence." *Texas* v.

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[3] See *ante*, at 748–749. The Court overlooks several of PURPA's procedural mandates. For example, with respect to six of the standards, the state agency must publish a written determination, including findings, even if it decides to adopt the federal standard. 16 U. S. C. § 2621(b) (1976 ed., Supp. IV). In addition, PURPA guarantees certain rights to discover information, § 2631(b); requires the State to provide transcripts, at the cost of reproduction, to parties to ratemaking proceedings or other "regulatory proceeding[s] relating to [electric utility] rates or rate design," § 2632(c); and, under some circumstances, mandates compensation for reasonable attorney's fees, expert witness fees, and other costs to consumers who contribute substantially to the adoption of a Title I standard, §§ 2632 (a), (b). These requirements, as well as the ones described by the Court, may impose special burdens on state administrative agencies. I do not weigh the constitutionality of these individual procedural requirements, however, because I would invalidate the entire regimen that Titles I and III impose on state regulatory authorities.

White, 7 Wall. 700, 725 (1869); *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869).

Adhering to these principles, the Court has recognized that the Tenth Amendment restrains congressional action that would impair "a state's ability to function as a state." *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 686 (1982); *National League of Cities* v. *Usery*, 426 U. S., at 842–852; *Fry* v. *United States*, 421 U. S. 542, 547, n. 7 (1975). See also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 423–424 (1978) (BURGER, C. J., concurring in judgment). For example, in *National League of Cities* v. *Usery*, *supra*, the Court held that Congress could not prescribe the minimum wages and maximum hours of state employees engaged in "traditional governmental functions," *id.*, at 852, because the power to set those wages and hours is an "attribute of state sovereignty" that is "'essential to [a] separate and independent existence.'" *Id.*, at 845 (quoting *Lane County* v. *Oregon*, *supra*, at 76).

Just last Term this Court identified three separate inquiries underlying the result in *National League of Cities*. A congressional enactment violates the Tenth Amendment, we observed, if it regulates the "'States as States,'" addresses "matters that are indisputably 'attribute[s] of state sovereignty,'" and "directly impair[s] [the States'] ability to 'structure integral operations in areas of traditional governmental functions.'" *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 287–288 (1981) (quoting *National League of Cities*, *supra*, at 854, 845, 852). See also *Transportation Union*, *supra*, at 684.[4]

Application of these principles to the present case reveals the Tenth Amendment defects in Titles I and III. Plainly

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[4] In both *Hodel* and *United Transportation Union* we further noted that, even when these three requirements are met, "the nature of the federal interest advanced may be such that it justifies state submission." *Hodel*, 452 U. S., at 288, n. 29; *Transportation Union*, 455 U. S., at 684, n. 9. Neither of those cases involved such an exception to *National League of Cities*, and the Court has not yet explored the circumstances that might justify such an exception.

those Titles regulate the "States as States." While the statute's ultimate aim may be the regulation of private utility companies, PURPA addresses its commands solely to the States. Instead of requesting private utility companies to adopt lifeline rates, declining block rates, or the other PURPA standards, Congress directed state agencies to appraise the appropriateness of those standards. It is difficult to argue that a statute structuring the regulatory agenda of a state agency is not a regulation of the "State."

I find it equally clear that Titles I and III address "attribute[s] of state sovereignty." Even the Court recognizes that "the power to make decisions and to set policy is what gives the State its sovereign nature." *Ante*, at 761. The power to make decisions and set policy, however, embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration, the order in which they should be taken up, and the precise form in which they should be debated. PURPA intrudes upon all of these functions. It chooses 12 proposals, forcing their consideration even if the state agency deems other ideas more worthy of immediate attention. In addition, PURPA hinders the agency's ability to schedule consideration of the federal standards.[5] Finally, PURPA specifies, with exacting detail, the content of the standards that will absorb the agency's time.[6]

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[5] As the Court recognizes, *ante*, at 748, PURPA permits "[a]ny person" to bring an action in state court to enforce the agency's obligation to consider the federal standards. 15 U. S. C. § 3207(b)(1) (1976 ed., Supp. IV); 16 U. S. C. § 2633(c)(1) (1976 ed., Supp. IV). The Secretary of Energy, moreover, may intervene in any ongoing ratemaking proceeding to require consideration of PURPA's standards. 15 U. S. C. § 3205(a) (1976 ed., Supp. IV); 16 U. S. C. §§ 2631(a), 2622(a) (1976 ed., Supp. IV). Title I grants affected utilities and consumers the same right of intervention. 16 U. S. C. § 2631(a) (1976 ed., Supp. IV). Because of these rights of intervention and enforcement, state agencies lack even the power to schedule their consideration of PURPA's standards.

[6] For example, the proposed standards governing advertising provide that "[n]o electric [or gas] utility may recover from any person other than

If Congress routinely required the state legislatures to debate bills drafted by congressional committees, it could hardly be questioned that the practice would affect an attribute of state sovereignty. PURPA, which sets the

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the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising as [further] defined in . . . this title." 16 U. S. C. § 2623(b)(5) (1976 ed., Supp. IV); 15 U. S. C. § 3203(b)(2) (1976 ed., Supp. IV). PURPA then defines the terms "advertising," "political advertising," and "promotional advertising":

"(1) For purposes of this section and section 2623(b)(5) of this title—

"(A) The term 'advertising' means the commercial use, by an electric utility, of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to such utility's electric consumers.

"(B) The term 'political advertising' means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance.

"(C) The term 'promotional advertising' means any advertising for the purpose of encouraging any person to select or use the service or additional service of an electric utility or the selection or installation of any appliance or equipment designed to use such utility's service.

"(2) For purposes of this subsection and section 2623(b)(5) of this title, the terms 'political advertising' and 'promotional advertising' do not include—

"(A) advertising which informs electric consumers how they can conserve energy or can reduce peak demand for electric energy,

"(B) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act . . . ,

"(C) advertising regarding service interruptions, safety measures, or emergency conditions,

"(D) advertising concerning employment opportunities with such utility,

"(E) advertising which promotes the use of energy efficient appliances, equipment or services, or

"(F) any explanation or justification of existing or proposed rate schedules, or notifications of hearings thereon." 16 U. S. C. § 2625(h) (1976 ed., Supp. IV).

See also 15 U. S. C. § 3204(b) (1976 ed., Supp. IV) (containing similar provisions for gas utilities).

agendas of agencies exercising delegated legislative power in a specific field, has a similarly intrusive effect.

Finally, PURPA directly impairs the States' ability to "structure integral operations in areas of traditional governmental functions." Utility regulation is a traditional function of state government,[7] and the regulatory commission is the most integral part of that function. By taxing the limited resources of these commissions, and decreasing their ability to address local regulatory ills, PURPA directly impairs the power of state utility commissions to discharge their traditional functions efficiently and effectively.[8]

The Court sidesteps this analysis, suggesting that the States may escape PURPA simply by ceasing regulation of public utilities. Even the Court recognizes that this choice "may be a difficult one," *ante*, at 766, and that "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements." *Ante*, at 767. In fact, the Court's "choice" is an absurdity, for if its analysis is sound, the Constitution no longer limits federal regulation of state governments. Under the Court's analysis, for example, *National League of Cities* v. *Usery*, 426

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[7] The Court has not explored fully the extent of "traditional" state functions. Utility regulation, however, should fall within any definition of that term. See generally W. Jones, Cases and Materials on Regulated Industries 25–44 (2d ed. 1976) (tracing history of state regulation of utilities).

[8] PURPA thus offends each of the criteria named in *Hodel*. I do not believe, moreover, that this is a case in which "the nature of the federal interest advanced may be such that it justifies state submission." See n. 4, *supra*. Whatever the ultimate content of that standard, it must refer not only to the weight of the asserted federal interest, but also to the necessity of vindicating that interest in a manner that intrudes upon state sovereignty. In this case, the Government argues that PURPA furthers vital national interests in energy conservation. Although the congressional goal is a noble one, appellants have not shown that Congress needed to commandeer state utility commissions to achieve its aim. Consistent with the Tenth Amendment, Congress could have assigned PURPA's tasks to national officials. Alternatively, it could have requested state commissions to comply with Titles I and III and directed the Secretary to shoulder the burden of any State choosing not to comply.

U. S. 833 (1976), would have been wrongly decided, because the States could have avoided the Fair Labor Standards Act by "choosing" to fire all employees subject to that Act and to close those branches of state government.[9] Similarly, Congress could dictate the agendas and meeting places of state legislatures, because unwilling States would remain free to abolish their legislative bodies.[10] I do not agree that this dismemberment of state government is the correct solution to a Tenth Amendment challenge.

The choice put to the States by the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. IV), the federal statute upheld in

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[9] The Court attempts to distinguish *National League of Cities*, suggesting that it involved "the State's ability 'to structure employer-employee relationships,' . . . while providing 'those governmental services which [its] citizens require.'" *Ante*, at 770, n. 32 (quoting *National League of Cities*, 426 U. S., at 851, 847). This case, the Court declares, "hold[s] only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area." *Ante*, at 769–770, n. 32. The Court, however, does not explain why our *National League of Cities* opinion did not consider compliance with the Fair Labor Standards Act in fields such as "licensing of occupations and businesses, . . . preservation of environmental quality, . . . [and] protection of the public against fraud and sharp practice," App. in *National League of Cities* v. *Usery*, O. T. 1975, No. 74–878, p. 16 (reprinting complaint), a "conditio[n] on the State's regulation of private conduct in a pre-emptible area." In that case, Congress had required the States to pay their employees specified amounts if they wished to continue regulating a variety of pre-emptible fields. Here, it has required the States to burden their officials with evaluation of a dozen legislative proposals if they wish to continue regulating private utilities. To me, the parallel is obvious, not "overstated." *Ante*, at 769, n. 32.

I am nevertheless confident that, as the Court itself stresses, *ibid.*, today's decision is not intended to overrule *National League of Cities*. Instead, the novelty of PURPA's scheme, see *ante*, at 758–759, merely seems to have obscured the relevance of *National League of Cities* to this case.

[10] But cf. *Coyle* v. *Oklahoma*, 221 U. S. 559, 565 (1911) ("The power to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers. That one of the . . . States could now be shorn of such powers by an act of Congress would not be for a moment entertained").

Hodel v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), and discussed by the Court, *ante*, at 764–765, 768, n. 30, is quite different from the decision PURPA mandates. The Surface Mining Act invites the States to submit proposed surface mining regulations to the Secretary of the Interior. 30 U. S. C. § 1253 (1976 ed., Supp. IV). If the Secretary approves a state regulatory program, then the State enforces that program. If a State chooses not to submit a program, the Secretary develops and implements a program for that State. § 1254. Even States in the latter category, however, may supplement the Secretary's program with consistent state laws.[11] The Surface Mining Act does not force States to choose between performing tasks set by Congress and abandoning all mining or land use regulation. That statute is "a program of cooperative federalism," *Hodel, supra*, at 289, because it allows the States to choose either to work with Congress in pursuit of federal surface mining goals or to devote their legislative resources to other mining and land use problems. By contrast, there is nothing "cooperative" about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority.[12]

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[11] Title 30 U. S. C. § 1254(g) (1976 ed., Supp. IV) only pre-empts state laws "insofar as they interfere with the achievement of the purposes and the requirements of this chapter and the Federal program." Similarly, § 1255(a) provides that no state law or regulation "shall be superseded by any provision of this chapter or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter." Section 1255(b) explains that neither state laws that are more stringent than the federal standards nor state laws governing operations "for which no provision is contained in this chapter" are "inconsistent" with the congressional Act.

[12] As one scholar has written: "A federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action. It does not imply a system of collaboration in which one of the collaborators is annihilated by the other." L. White, The States and the Nation 3 (1953).

Yet this is the "choice" the Court today forces upon the States.

The Court defends its novel decision to permit federal conscription of state legislative power by citing three cases upholding statutes that "in effect directed state decisionmakers to take or to refrain from taking certain actions." *Ante*, at 762. *Testa* v. *Katt*, 330 U. S. 386 (1947), is the most suggestive of these decisions.[13] In *Testa*, the Court held that state trial courts may not refuse to hear a federal claim if "th[e] same type of claim arising under [state] law would be enforced by that State's courts." *Id.*, at 394. A facile reading of *Testa* might suggest that state legislatures must also entertain congressionally sponsored business, as long as the federal duties are similar to existing state obligations. Application of *Testa* to legislative power, however, vastly expands the scope of that decision. Because trial courts of general jurisdiction do not choose the cases that they hear, the

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[13] The other two decisions, *Fry* v. *United States*, 421 U. S. 542 (1975), and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658 (1979), are readily distinguishable. *Fry* upheld a temporary wage freeze as applied to state and local governmental employees. As we subsequently observed, this emergency restraint "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during [a] period of . . . emergency." *National League of Cities* v. *Usery*, *supra*, at 853. In *Washington State Fishing Vessel Assn.*, state agencies were defendants to a suit charging violations of federal treaties, and we upheld the lower court's power to enforce its judgment by ordering the defendants to comply with federal law. The power of a court to enjoin adjudicated violations of federal law, however, is far different from the power of Congress to demand state legislative action in the absence of any showing that the State has violated existing federal duties. See Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 515–516 (1954); Salmon, The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act, 2 Colum. J. Envtl. L. 290, 334–337 (1976).

requirement that they evenhandedly adjudicate state and federal claims falling within their jurisdiction does not infringe any sovereign authority to set an agenda.[14] As explained above, however, the power to choose subjects for legislation is a fundamental attribute of legislative power, and interference with this power unavoidably undermines state sovereignty. Accordingly, the existence of a congressional authority to "enlist . . . the [state] judiciary . . . to further federal ends," *ante*, at 762, does not imply an equivalent power to impress state legislative bodies into federal service.

The Court, finally, reasons that because Congress could have pre-empted the entire field of intrastate utility regulation, the Constitution should not forbid PURPA's "less intrusive scheme." *Ante*, at 765, and n. 29.[15] The Court's eval-

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[14] The Court suggests, *ante*, at 762–763, n. 27, that the requirement that state courts adjudicate federal claims may, as a practical matter, undermine the capacity of those courts to decide state controversies. Whatever the force of that observation, it does not demonstrate *Testa*'s relevance to this case. State legislative bodies possess at least one attribute of sovereignty, the power to set an agenda, that trial courts lack. This difference alone persuades me not to embrace the Court's expansion of *Testa*.

[15] The Court's suggestion is somewhat disingenuous because Congress concluded that federal pre-emption of the matters governed by Titles I and III would be inappropriate. The administration's original proposal, as well as the version of PURPA approved by the House, would have pre-empted state law by establishing minimum federal ratemaking standards. See generally H. R. Conf. Rep. No. 95–1750, pp. 63–65 (1978); S. Conf. Rep. No. 95–1292, pp. 63–65 (1978). The Senate Committee on Energy and Natural Resources, however, rejected this approach because

"the committee felt that setting minimum federal standards for utility rates, or mandating the use of certain costing methods for ratesetting, would be an unnecessary intrusion into an area which has traditionally been regulated by the States. It was apparent to the committee that many State utility commissions are currently involved in innovative ratemaking and are working toward the goal of conservation of energy through rate reform. At present, the State regulatory agencies rather than the Federal Government, possess the expertise to conduct the detailed costing and demand studies required to implement rate structure revision. Moreover, the committee recognized that rate structures must re-

uation of intrusiveness, however, is simply irrelevant to the constitutional inquiry. The Constitution permits Congress to govern only through certain channels. If the Tenth Amendment principles articulated in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), and *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), foreclose PURPA's approach, it is no answer to argue that Congress could have reached the same destination by a different route. This Court's task is to enforce constitutional limits on congressional power, not to decide whether alternative courses would better serve state and federal interests.[16]

I do not believe, moreover, that Titles I and III of PURPA are less intrusive than pre-emption.[17] When Congress pre-

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flect the individual needs and local peculiarities of each utilities' service area . . . . Finally the committee felt that the potential uncertainty and delays accompanying Federal regulation threatened to have an adverse impact on the financial health of the utility industry which outweighed the projected savings in capital expenditures claimed by supporters of the administration's proposal." S. Rep. No. 95–442, p. 9 (1977).

See also 123 Cong. Rec. 32392–32393 (1977) (remarks of Sen. Johnston); *id.*, at 32394 (remarks of Sen. Domenici). The Senate version of PURPA, accordingly, eschewed the pre-emption route. See H. R. Conf. Rep. No. 95–1750, *supra*, at 65–66; S. Conf. Rep. No. 95–1292, *supra*, at 65–66. While the Conferees produced a compromise bill, they too stopped short of pre-emption. Today's decision, therefore, permits Congress to set state legislative agendas in a field that Congress might have occupied but expressly found unsuited to pre-emption.

[16] Justice Harlan once commented that times of "international unrest and domestic uncertainty" are "bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even to short-cut the processes of change which the Constitution establishes." Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A. B. A. J. 943 (1963). Justice Harlan then cautioned that it "[i]s . . . the special responsibility of lawyers, whether on or off the bench, to see to it that such things do not happen." *Ibid.*

[17] In 1975, then Attorney General Edward H. Levi responded to a similar argument that the "greater" power of pre-emption includes the "lesser" power of demanding affirmative action from state governments. Attorney General Levi remarked that "it is an insidious point to say that there is more federalism by compelling a State instrumentality to work for the Fed-

empts a field, it precludes only state legislation that conflicts with the national approach. The States usually retain the power to complement congressional legislation, either by regulating details unsupervised by Congress or by imposing requirements that go beyond the national threshold.[18] Most importantly, after Congress pre-empts a field, the States may simply devote their resources elsewhere. This country does not lack for problems demanding legislative attention. PURPA, however, drains the inventive energy of state governmental bodies by requiring them to weigh its detailed standards, enter written findings, and defend their determinations in state court. While engaged in these congressionally mandated tasks, state utility commissions are less able to pursue local proposals for conserving gas and electric power. The States might well prefer that Congress simply impose the standards described in PURPA; this, at least, would leave them free to exercise their power in other areas.

Federal pre-emption is less intrusive than PURPA's approach for a second reason. Local citizens hold their utility commissions accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.[19]

The foregoing remarks suggest that, far from approving a minimally intrusive form of federal regulation, the Court's

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eral Government." Hearings on S. 354 before the Senate Committee on Commerce, 94th Cong., 1st Sess., 503 (1975). In a similar vein, he warned against "lov[ing] the States to their demise." *Id.*, at 507.

[18] In rare instances, Congress so occupies a field that any state regulation is inconsistent with national goals. The Court, however, is reluctant to infer such expansive pre-emption "in the absence of persuasive reasons." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963).

[19] See generally Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L. J. 1196, 1239–1247 (1977); Comment, Redefining the *National*

decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.[20] This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote.[21] That novel idea did not bear national fruit for another 30 years.[22] Wisconsin pioneered unemployment insurance,[23]

League of Cities State Sovereignty Doctrine, 129 U. Pa. L. Rev. 1460, 1477–1478 (1981).

Daniel Elazar, testifying before the Advisory Commission on Intergovernmental Relations in March 1980, commented upon this problem of garbled political responsibility. He suggested that national officials tend to force state governments to administer unpopular programs, thus transferring political liability for those programs to the States. Advisory Commission on Intergovernmental Relations, The Federal Role in the Federal System: The Dynamics of Growth, Hearings on the Federal Role 32 (Oct. 1980). As an example, he cited the President's attempt in 1979 to force state Governors to establish and enforce unpopular gas rationing mechanisms. *Id.*, at 85 (formal statement of Professor Elazar).

[20] See, *e. g.*, *Chandler* v. *Florida*, 449 U. S. 560, 579 (1981); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 441 (1980); *Whalen* v. *Roe*, 429 U. S. 589, 597, and n. 20 (1977); *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting); Hart, *supra* n. 13, at 540, 542; A. Macmahon, The Problems of Federalism: A Survey, in Federalism: Mature and Emergent 3, 10–11 (A. Macmahon ed., 1955); N. Rockefeller, The Future of Federalism 8–9 (1962); Stewart, *supra* n. 19, at 1210; White, *supra* n. 12, at 46–47.

[21] Wyoming's policy followed a practice it had adopted as a Territory. Compare Act of Jan. 21, 1891, ch. 100, § 4, 1890–1891 Wyo. Sess. Laws 394, with Act of Mar. 14, 1890, ch. 80, § 7, 1890 Wyo. Terr. Sess. Laws 158. See generally C. Beard & M. Beard, The Rise of American Civilization 563 (rev. ed. 1937).

[22] The Nineteenth Amendment, ratified in 1920, prohibits abridgment of the right to vote "on account of sex."

[23] See Act of Jan. 28, 1932, ch. 20, 1931–1932 Wis. Laws 57; Act of June 1, 1933, ch. 186, 1933 Wis. Laws 448; Act of June 2, 1933, ch. 194, 1933 Wis. Laws 491; W. Leuchtenburg, Franklin D. Roosevelt and the New Deal, 1932–1940, p. 130 (1963); Rockefeller, *supra* n. 20, at 16.

while Massachusetts initiated minimum wage laws for women and minors.[24] After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation.[25] Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes.[26] Utility regulation itself is a field marked by valuable state invention.[27] PURPA, which commands state agencies to spend their time evaluating federally proposed standards and defending their decisions to adopt or reject those standards, will retard this creative experimentation.

In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy:

> "It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to

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[24] See Act of June 4, 1912, ch. 706, 1912 Mass. Acts 780; R. Morris, Encyclopedia of American History 768 (bicentennial ed. 1976).

[25] See C. Morris & C. Morris, Jr., Morris on Torts 244–245 (2d ed. 1980); Friendly, Federalism: A Foreword, 86 Yale L. J. 1019, 1034 (1977).

[26] Florida, for example, has enacted particularly strict legislation against oil spills. Fla. Stat. §§ 376.011–376.21 (1974 and Supp. 1982). This Court upheld that legislation in *Askew* v. *American Waterways Operators, Inc.*, 411 U. S. 325 (1973).

[27] See *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464, 489 (1950) (Jackson, J., dissenting) ("Long before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences").

> the country at large." 1 A. de Tocqueville, Democracy in America 181 (H. Reeve trans. 1961).[28]

Citizens, however, cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway national legislature. If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.

Finally, our federal system provides a salutary check on governmental power. As Justice Harlan once explained, our ancestors "were suspicious of every form of all-powerful central authority." Harlan, *supra* n. 16, at 944. To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government. Unless we zealously protect these distinctions, we risk upsetting the balance of power that buttresses our basic liberties. In analyzing this brake on governmental power, Justice Harlan noted that "[t]he diffusion of power between federal and state authority . . . takes on added significance as the size of the federal bureaucracy continues to grow." *Ibid.*[29] Today, the Court disregards this warning and permits Congress to kidnap state utility commissions into the national regulatory family. Whatever the merits of our national energy legislation, I am

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[28] See also I. Silone, The School for Dictators 119 (W. Weaver trans. 1963) ("A regime of freedom should receive its lifeblood from the self-government of local institutions. When democracy, driven by some of its baser tendencies, suppresses such autonomies, it is only devouring itself. If in the factory the master's word is law, if bureaucracy takes over the trade union, if the central government's representative runs the city and the province, . . . then you can no longer speak of democracy").

[29] See also Stewart, *supra* n. 19, at 1241–1244 (discussing "political safeguards of federalism"); Rockefeller, *supra* n. 20, at 10.

not ready to surrender this state legislative power to the Federal Energy Regulatory Commission.

II

As explained above, the Court's decision to uphold Titles I and III violates the principles of *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), and threatens the values promoted by our federal system. The Court's result, moreover, is at odds with our constitutional history, which demonstrates that the Framers consciously rejected a system in which the National Legislature would employ state legislative power to achieve national ends.

The principal defect of the Articles of Confederation, 18th-century writers agreed, was that the new National Government lacked the power to compel individual action. Instead, the central government had to rely upon the cooperation of state legislatures to achieve national goals. Thus, Alexander Hamilton explained that "[t]he great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities and as contradistinguished from the individuals of whom they consist." The Federalist No. 15, p. 93 (J. Cooke ed. 1961) (emphasis omitted). He pointed out, for example, that the National Government had "an indefinite discretion to make requisitions for men and money," but "no authority to raise either by regulations extending to the individual citizens of America." *Ibid.*

The Constitution cured this defect by permitting direct contact between the National Government and the individual citizen, a change repeatedly acknowledged by the delegates assembled in Philadelphia. George Mason, for example, declared:

> "Under the existing Confederacy, Congress represent[s] the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be

> changed in the new plan of Government." 1 The Records of the Federal Convention of 1787, p. 133 (M. Farrand ed. 1911) (hereinafter Farrand) (abbreviations expanded in this and subsequent quotations).

Hamilton subsequently explained to the people of New York that the Constitution marked the "difference between a league and a government," because it "extend[ed] the authority of the union to the persons of the citizens,—the only proper objects of government." The Federalist No. 15, *supra*, at 95. Similarly, Charles Pinckney told the South Carolina House of Representatives that "the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present; . . . however they may have differed with respect to the quantum of power, no objection was made to the system itself." 4 Elliot's Debates on the Federal Convention 256 (2d ed. 1863).

The speeches and writings of the Framers suggest why they adopted this means of strengthening the National Government. Mason, for example, told the Convention that because "punishment could not [in the nature of things be executed on] the States collectively," he advocated a National Government that would "directly operate on individuals." 1 Farrand 34. Hamilton predicted that a National Government forced to work through the States would "degenerate into a military despotism" because it would have to maintain a "large army, continually on foot" to enforce its will against the States. The Federalist No. 16, p. 101 (J. Cooke ed. 1961). See also *id.*, at 102; The Federalist No. 15, *supra*, at 95–96.

Thus, the Framers concluded that government by one sovereign through the agency of a second cannot be satisfactory. At one extreme, as under the Articles of Confederation, such a system is simply ineffective. At the other, it requires a degree of military force incompatible with stable government

and civil liberty.[30] For this reason, the Framers concluded that "the execution of the laws of the national government . . . should not require the intervention of the State Legislatures," The Federalist No. 16, *supra*, at 103, and abandoned the Articles of Confederation in favor of direct national legislation.

At the same time that the members of the Constitutional Convention fashioned this principle, they rejected two proposals that would have given the National Legislature power to supervise directly state governments. The first proposal would have authorized Congress "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof." 1 Farrand 21. The delegates never even voted on this suggestion. James Madison moved to postpone it, stating that "the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually." *Id.*, at 54. Several other delegates echoed his concerns,[31] and Madison ultimately reported that "[t]he practicability of making laws, with coercive sanc-

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[30] Henry M. Hart, Jr., agreed that the Framers were well aware "of the delicacy, and the difficulties of enforcement, of affirmative mandates from a federal government to the governments of the member states." Hart, *supra* n. 13, at 515. Until the second half of this century, Congress apparently heeded this wisdom. "Federal law," Hart observed in 1954, "often says to the states, 'Don't do any of these things,' leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, 'Do *this* thing,' leaving no choice but to go ahead and do it." *Ibid.*

[31] Governor Randolph of Virginia, for example, opposed a similar proposal for national coercion on the grounds that it was "impracticable, expensive, [and] cruel to individuals." Instead, he advocated "resort . . . to a national Legislation over individuals." 1 Farrand 256 (emphasis deleted). Mason eloquently argued that "[t]he most jarring elements of nature; fire & water themselves are not more incompatible that *[sic]* such a mixture of civil liberty and military execution." *Id.*, at 339.

tions, for the States as political bodies [has] been exploded on all hands." 2 *id.*, at 9.

The second proposal received more favorable consideration. Virginia's Governor Randolph suggested that Congress should have the power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 *id.*, at 21. On May 31, 1787, the Committee of the Whole approved this proposal without debate. *Id.*, at 61. A week later, Pinckney moved to extend the congressional negative to all state laws "which [Congress] should judge to be improper." *Id.*, at 164. Numerous delegates criticized this attempt to give Congress unbounded control over state lawmaking. Hugh Williamson, for example, thought "the State Legislatures ought to possess independent powers in cases purely local," *id.*, at 171, while Elbridge Gerry thought Pinckney's idea might "enslave the States." *Id.*, at 165. After much debate, the Convention rejected Pinckney's suggestion.

Late in July, the delegates reversed their approval of even Randolph's more moderate congressional veto. Several delegates now concluded that the negative would be "terrible to the States," "unnecessary," and "improper." 2 *id.*, at 27.[32] Omission of the negative, however, left the new system without an effective means of adjusting conflicting state and national laws. To remedy this defect, the delegates adopted the Supremacy Clause, providing that the Federal Constitution, laws, and treaties are "the supreme Law of the Land" and that "the Judges in every State shall be bound

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[32] Thomas Jefferson disapproved of the congressional veto as soon as he heard of it. Writing to Madison from Paris, he declared: "The negative proposed to be given [the national legislators] on all the acts of the several Legislatures is now for the first time suggested to my mind. Prima facie I do not like it." C. Warren, The Making of the Constitution 168 (1937). Notably, Jefferson suggested that "an appeal from the State Judicatures to a Federal Court, in all cases where the Act of Confederation controuled the question, [would] be as effectual a remedy." *Id.*, at 168–169.

thereby." Art. VI, cl. 2. Thus, the Framers substituted judicial review of state laws for congressional control of state legislatures.

While this history demonstrates the Framers' commitment to a strong central government, the means that they adopted to achieve that end are as instructive as the end itself.[33] Under the Articles of Confederation, the National Legislature operated through the States. The Framers could have fortified the central government, while still maintaining the same system, if they had increased Congress' power to demand obedience from state legislatures. In time, this scheme might have relegated the States to mere departments of the National Government, a status the Court appears to endorse today. The Framers, however, eschewed this course, choosing instead to allow Congress to pass laws directly affecting individuals, and rejecting proposals that would have given Congress military or legislative power over state governments. In this way, the Framers established independent state and national sovereigns. The National Government received the power to enact its own laws and to enforce those laws over conflicting state legislation. The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt.[34] This product of

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[33] Experience under the Articles of Confederation taught the Framers that multiple state legislatures, unchecked by any central power, "threat[en] danger not to the harmony only, but to the tranquillity of the Union." *Id.*, at 166 (quoting Madison). My analysis of the Framers' intent does not detract from the proper role of federal power in a federalist system, but merely requires the exercise of that power in a manner that does not destroy state independence.

[34] This Court quickly recognized that Congress' strength derives from its own enumerated powers, not from the ability to direct state legislatures. In *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), the historic decision affirming Congress' power to establish a national bank, Chief Justice Marshall declared: "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; *and on those means alone was it expected to rely for the*

the Constitutional Convention, I believe, is fundamentally inconsistent with a system in which either Congress or a state legislature harnesses the legislative powers of the other sovereign.[35]

III

During his last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:

> "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of

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accomplishment of its ends." *Id.*, at 424 (emphasis added). See also S. Davis, The Federal Principle 114 (1978) (after examining history of Constitutional Convention, "only the principle of *duality* articulated in a single constitutional system of two distinct governments, national and state, each acting in its own right, each acting directly on individuals, and each qualified master of a limited domain of action, stands out as the clearest fact"); Salmon, *supra* n. 13, at 359 (discussing history of Constitutional Convention and concluding that substitution of Supremacy Clause for negative on state laws "evidenced the clear distinction in [the Framers'] minds between the supremacy of the nation, which they approved, and the power of the nation to control the functioning of the states, which they rejected").

[35] After the Convention, several thinkers suggested that the National Government might rely upon state officers to perform some of its tasks. Madison, for example, thought that Congress might rely upon state officials to collect national revenue. The Federalist No. 45, pp. 312–313 (J. Cooke ed. 1961). None of these suggestions, however, went so far as to propose congressional control of state legislative power. The suggestions, moreover, seemed to assume that the States would consent to national use of their officials. See also W. Anderson, The Nation and the States, Rivals or Partners? 86–87 (1957) (noting that First Congress rejected proposals to rely upon state officials to enforce federal law and suggesting that this decision to leave "the states free to work out, and to concentrate their attention and resources upon, their own functions" has become part of our constitutional understanding).

> both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris*, 401 U. S. 37, 44 (1971).

In this case, I firmly believe that a proper "sensitivity to the legitimate interests of both State and National Governments" requires invalidation of Titles I and III of PURPA insofar as they apply to state regulatory authorities. Accordingly, I respectfully dissent from the Court's decision to uphold those portions of the statute.

UNITED STATES *v.* ROSS

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

No. 80-2209. Argued March 1, 1982—Decided June 1, 1982

Acting on information from an informant that a described individual was selling narcotics kept in the trunk of a certain car parked at a specified location, District of Columbia police officers immediately drove to the location, found the car there, and a short while later stopped the car and arrested the driver (respondent), who matched the informant's description. One of the officers opened the car's trunk, found a closed brown paper bag, and after opening the bag, discovered glassine bags containing white powder (later determined to be heroin). The officer then drove the car to headquarters, where another warrantless search of the trunk revealed a zippered leather pouch containing cash. Respondent was subsequently convicted of possession of heroin with intent to distribute—the heroin and currency found in the searches having been introduced in evidence after respondent's pretrial motion to suppress the evidence had been denied. The Court of Appeals reversed, holding that while the officers had probable cause to stop and search respondent's car—including its trunk—without a warrant, they should not have opened either the paper bag or the leather pouch found in the trunk without first obtaining a warrant.

Held: Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. Pp. 804-825.

(a) The "automobile exception" to the Fourth Amendment's warrant requirement established in *Carroll* v. *United States*, 267 U. S. 132, applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. Pp. 804-809.

(b) However, the rationale justifying the automobile exception does not apply so as to permit a warrantless search of any movable container that is believed to be carrying an illicit substance and that is found in a public place—even when the container is placed in a vehicle (not otherwise believed to be carrying contraband). *United States* v. *Chadwick*, 433 U. S. 1; *Arkansas* v. *Sanders*, 442 U. S. 753. Pp. 809-814.

(c) Where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search. The scope of the search is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Pp. 817–824.

(d) The doctrine of *stare decisis* does not preclude rejection here of the holding in *Robbins* v. *California*, 453 U. S. 420, and some of the reasoning in *Arkansas* v. *Sanders*, *supra*. Pp. 824–825.

210 U. S. App. D. C. 342, 655 F. 2d 1159, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., *post*, p. 825, and POWELL, J., *post*, p. 826, filed concurring opinions. WHITE, J., filed a dissenting opinion, *post*, p. 826. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 827.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, *Joshua I. Schwartz*, and *John Fichter De Pue*.

William J. Garber argued the cause for respondent. With him on the brief was *Dennis M. Hart*.*

JUSTICE STEVENS delivered the opinion of the Court.

In *Carroll* v. *United States*, 267 U. S. 132, the Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment. The Court in *Carroll* did not ex-

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**Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., et al., as *amici curiae* urging reversal.

Raymond C. Clevenger III, *John F. Cooney*, *Arthur B. Spitzer*, and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

plicitly address the scope of the search that is permissible. In this case, we consider the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view. We hold that they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be searched."[1]

I

In the evening of November 27, 1978, an informant who had previously proved to be reliable telephoned Detective Marcum of the District of Columbia Police Department and told him that an individual known as "Bandit" was selling narcotics kept in the trunk of a car parked at 439 Ridge Street. The informant stated that he had just observed "Bandit" complete a sale and that "Bandit" had told him that additional narcotics were in the trunk. The informant gave Marcum a detailed description of "Bandit" and stated that the car was a "purplish maroon" Chevrolet Malibu with District of Columbia license plates.

Accompanied by Detective Cassidy and Sergeant Gonzales, Marcum immediately drove to the area and found a maroon Malibu parked in front of 439 Ridge Street. A license check disclosed that the car was registered to Albert Ross; a computer check on Ross revealed that he fit the informant's description and used the alias "Bandit." In two passes through the neighborhood the officers did not observe anyone matching the informant's description. To avoid alerting persons on the street, they left the area.

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[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const., Amdt. 4.

The officers returned five minutes later and observed the maroon Malibu turning off Ridge Street onto Fourth Street. They pulled alongside the Malibu, noticed that the driver matched the informant's description, and stopped the car. Marcum and Cassidy told the driver—later identified as Albert Ross, the respondent in this action—to get out of the vehicle. While they searched Ross, Sergeant Gonzales discovered a bullet on the car's front seat. He searched the interior of the car and found a pistol in the glove compartment. Ross then was arrested and handcuffed. Detective Cassidy took Ross' keys and opened the trunk, where he found a closed brown paper bag. He opened the bag and discovered a number of glassine bags containing a white powder. Cassidy replaced the bag, closed the trunk, and drove the car to headquarters.

At the police station Cassidy thoroughly searched the car. In addition to the "lunch-type" brown paper bag, Cassidy found in the trunk a zippered red leather pouch. He unzipped the pouch and discovered $3,200 in cash. The police laboratory later determined that the powder in the paper bag was heroin. No warrant was obtained.

Ross was charged with possession of heroin with intent to distribute, in violation of 21 U. S. C. § 841(a). Prior to trial, he moved to suppress the heroin found in the paper bag and the currency found in the leather pouch. After an evidentiary hearing, the District Court denied the motion to suppress. The heroin and currency were introduced in evidence at trial and Ross was convicted.

A three-judge panel of the Court of Appeals reversed the conviction. It held that the police had probable cause to stop and search Ross' car and that, under *Carroll* v. *United States*, *supra*, and *Chambers* v. *Maroney*, 399 U. S. 42, the officers lawfully could search the automobile—including its trunk—without a warrant. The court considered separately, however, the warrantless search of the two containers found in the trunk. On the basis of *Arkansas* v. *Sanders*,

442 U. S. 753, the court concluded that the constitutionality of a warrantless search of a container found in an automobile depends on whether the owner possesses a reasonable expectation of privacy in its contents. Applying that test, the court held that the warrantless search of the paper bag was valid but the search of the leather pouch was not. The court remanded for a new trial at which the items taken from the paper bag, but not those from the leather pouch, could be admitted.[2]

The entire Court of Appeals then voted to rehear the case en banc. A majority of the court rejected the panel's conclusion that a distinction of constitutional significance existed between the two containers found in respondent's trunk; it held that the police should not have opened either container without first obtaining a warrant. The court reasoned:

> "No specific, well-delineated exception called to our attention permits the police to dispense with a warrant to open and search 'unworthy' containers. Moreover, we believe that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. For these reasons, and because the Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decision-makers would rank in the luggage line, we hold that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of a small unlocked suitcase or a zippered leather pouch." 210 U. S. App. D. C. 342, 344, 655 F. 2d 1159, 1161 (1981) (footnote omitted).

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[2] The court rejected the Government's argument that the warrantless search of the leather pouch was justified as incident to respondent's arrest. App. to Pet. for Cert. 137a. The Government has not challenged this holding.

The en banc Court of Appeals considered, and rejected, the argument that it was reasonable for the police to open both the paper bag and the leather pouch because they were entitled to conduct a warrantless search of the entire vehicle in which the two containers were found. The majority concluded that this argument was foreclosed by *Sanders*.

Three dissenting judges interpreted *Sanders* differently.[3] Other courts also have read the *Sanders* opinion in different ways.[4] Moreover, disagreement concerning the proper interpretation of *Sanders* was at least partially responsible for the fact that *Robbins* v. *California*, 453 U. S. 420, was decided last Term without a Court opinion.

There is, however, no dispute among judges about the importance of striving for clarification in this area of the law. For countless vehicles are stopped on highways and public

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[3] Judge Tamm, the author of the original panel opinion, reiterated the view that *Sanders* prohibited the warrantless search of the leather pouch but not the search of the paper bag. Judge Robb agreed that this result was compelled by *Sanders*, although he stated that in his opinion "the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room." 210 U. S. App. D. C., at 363, 655 F. 2d, at 1180. Judge MacKinnon concurred with Judge Tamm that *Sanders* did not prohibit the warrantless search of the paper bag. Concerning the leather pouch, he agreed with Judge Wilkey, who dissented on the ground that *Sanders* should not be applied retroactively.

[4] Many courts have held that *Sanders* requires that a warrant be obtained only for personal luggage and other "luggage-type" containers. See, *e. g.*, *United States* v. *Brown*, 635 F. 2d 1207 (CA6 1980); *United States* v. *Jimenez*, 626 F. 2d 39 (CA7 1980). One court has held that *Sanders* does not apply if the police have probable cause to search an entire vehicle and not merely an isolated container within it. Cf. *State* v. *Bible*, 389 So. 2d 42 (La. 1980), vacated and remanded, 453 U. S. 918; *State* v. *Hernandez*, 408 So. 2d 911 (La. 1981); see also 210 U. S. App. D. C., at 363, 655 F. 2d, at 1180 (Robb, J., dissenting).

streets every day, and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle. In every such case a conflict is presented between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement. No single rule of law can resolve every conflict, but our conviction that clarification is feasible led us to grant the Government's petition for certiorari in this case and to invite the parties to address the question whether the decision in *Robbins* should be reconsidered. 454 U. S. 891.

II

We begin with a review of the decision in *Carroll* itself. In the fall of 1921, federal prohibition agents obtained evidence that George Carroll and John Kiro were "bootleggers" who frequently traveled between Grand Rapids and Detroit in an Oldsmobile Roadster.[5] On December 15, 1921, the agents unexpectedly encountered Carroll and Kiro driving west on that route in that car. The officers gave pursuit, stopped the roadster on the highway, and directed Carroll and Kiro to get out of the car.

No contraband was visible in the front seat of the Oldsmobile and the rear portion of the roadster was closed. One of the agents raised the rumble seat but found no liquor. He raised the seat cushion and again found nothing. The officer then struck at the "lazyback" of the seat and noticed that it was "harder than upholstery ordinarily is in those backs."

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[5] On September 29, 1921, Carroll and Kiro met the agents in Grand Rapids and agreed to sell them three cases of whiskey. The sale was not consummated, however, possibly because Carroll learned the agents' true identity. In October, the agents discovered Carroll and Kiro driving the Oldsmobile Roadster on the road to Detroit, which was known as an active center for the introduction of illegal liquor into this country. The agents followed the roadster as far as East Lansing, but there abandoned the chase.

267 U. S., at 174. He tore open the seat cushion and discovered 68 bottles of gin and whiskey concealed inside. No warrant had been obtained for the search.

Carroll and Kiro were convicted of transporting intoxicating liquor in violation of the National Prohibition Act. On review of those convictions, this Court ruled that the warrantless search of the roadster was reasonable within the meaning of the Fourth Amendment. In an extensive opinion written by Chief Justice Taft, the Court held:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149.

The Court explained at length the basis for this rule. The Court noted that historically warrantless searches of vessels, wagons, and carriages—as opposed to fixed premises such as a home or other building—had been considered reasonable by Congress. After reviewing legislation enacted by Congress between 1789 and 1799,[6] the Court stated:

> "Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant be-

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[6] The legislation authorized customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it concealed goods subject to duty. The same legislation required a warrant for searches of dwelling places. 267 U. S., at 150–151.

> tween goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.*, at 151.

The Court reviewed additional legislation passed by Congress[7] and again noted that

> "the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153.

Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods.[8] It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit

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[7] In particular, the Court noted an 1815 statute that permitted customs officers not only to board and search vessels without a warrant "but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law." *Id.*, at 151.

[8] In light of this established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.[9]

In defining the nature of this "exception" to the general rule that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used," *id.*, at 156, the Court in *Carroll* emphasized the importance of the requirement that

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[9] Subsequent cases make clear that the decision in *Carroll* was not based on the fact that the only course available to the police was an immediate search. As Justice Harlan later recognized, although a failure to *seize* a moving automobile believed to contain contraband might deprive officers of the illicit goods, once a vehicle itself has been stopped the exigency does not necessarily justify a warrantless *search*. *Chambers* v. *Maroney*, 399 U. S. 42, 62–64 (opinion of Harlan, J.). The Court in *Chambers*, however—with only Justice Harlan dissenting—refused to adopt a rule that would permit a warrantless seizure but prohibit a warrantless search. The Court held that if police officers have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct an immediate search of the contents of that vehicle. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Id.*, at 52.

The Court also has held that if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded. *Chambers*, *supra; Texas* v. *White*, 423 U. S. 67. These decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile—which often could leave the occupants stranded on the highway—the Court rejected an inflexible rule that would force police officers in every case either to post guard at the vehicle while a warrant is obtained or to tow the vehicle itself to the station. Similarly, if an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street—at no advantage to the occupants, yet possibly at certain cost to the police. The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference.

officers have probable cause to believe that the vehicle contains contraband.

> "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 153–154.

Moreover, the probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers. "'[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgment of the court would make his faith reasonable.'" *Id.*, at 161–162 (quoting *Director General of Railroads* v. *Kastenbaum*, 263 U. S. 25, 28).[10]

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[10] After reviewing the relevant authorities at some length, the Court concluded that the probable-cause requirement was satisfied in the case before it. The Court held that "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief

In short, the exception to the warrant requirement established in *Carroll*—the scope of which we consider in this case—applies only to searches of vehicles that are supported by probable cause.[11] In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.[12]

III

The rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance. That argument,

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that intoxicating liquor was being transported in the automobile which they stopped and searched." 267 U. S., at 162. Cf. *Brinegar* v. *United States*, 338 U. S. 160, 176–177; *Henry* v. *United States*, 361 U. S. 98, 102.

[11] See *Husty* v. *United States*, 282 U. S. 694; *Scher* v. *United States*, 305 U. S. 251; *Brinegar* v. *United States*, *supra; Henry* v. *United States*, *supra; Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216; *Chambers* v. *Maroney*, *supra; Texas* v. *White*, *supra; Colorado* v. *Bannister*, 449 U. S. 1.

Warrantless searches of automobiles have been upheld in a variety of factual contexts quite different from that presented in *Carroll*. Cf. *Cooper* v. *California*, 386 U. S. 58; *Cady* v. *Dombrowski*, 413 U. S. 433; *South Dakota* v. *Opperman*, 428 U. S. 364. Many of these searches do not require a showing of probable cause that the vehicle contains contraband. We are not called upon to—and do not—consider in this case the scope of the warrantless search that is permitted in those cases.

[12] As the Court in *Carroll* concluded:

"We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* [*Weeks* v. *United States*, 232 U. S. 383] and *Amos* [*Amos* v. *United States*, 255 U. S. 313] cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them." 267 U. S., at 156.

however, was squarely rejected in *United States* v. *Chadwick*, 433 U. S. 1.

Chadwick involved the warrantless search of a 200-pound footlocker secured with two padlocks. Federal railroad officials in San Diego became suspicious when they noticed that a brown footlocker loaded onto a train bound for Boston was unusually heavy and leaking talcum powder, a substance often used to mask the odor of marihuana. Narcotics agents met the train in Boston and a trained police dog signaled the presence of a controlled substance inside the footlocker. The agents did not seize the footlocker, however, at this time; they waited until respondent Chadwick arrived and the footlocker was placed in the trunk of Chadwick's automobile. Before the engine was started, the officers arrested Chadwick and his two companions. The agents then removed the footlocker to a secured place, opened it without a warrant, and discovered a large quantity of marihuana.

In a subsequent criminal proceeding, Chadwick claimed that the warrantless search of the footlocker violated the Fourth Amendment. In the District Court, the Government argued that as soon as the footlocker was placed in the automobile a warrantless search was permissible under *Carroll*. The District Court rejected that argument,[13] and the Government did not pursue it on appeal.[14] Rather, the Government contended in this Court that the warrant requirement of the Fourth Amendment applied only to searches of homes and

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[13] The District Court noted:

"In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in [the federal building]. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of an automobile's open trunk." *United States* v. *Chadwick*, 393 F. Supp. 763, 772 (Mass. 1975).

[14] This Court specifically noted: "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile search cases

other "core" areas of privacy. The Court unanimously rejected that contention.[15] Writing for the Court, THE CHIEF JUSTICE stated:

> "[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of respondents' footlocker. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." 433 U. S., at 8–9 (footnote omitted).

The Court in *Chadwick* specifically rejected the argument that the warrantless search was "reasonable" because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile," *id.*, at 13, and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.*, at 13, n. 7. In ruling that the warrantless search of the

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demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analagous to motor vehicles for Fourth Amendment purposes." 433 U. S., at 11–12.

[15] See *id.*, at 17 (BLACKMUN, J., dissenting).

footlocker was unjustified, the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant. Cf. *Ex parte Jackson*, 96 U. S. 727; *United States* v. *Van Leeuwen*, 397 U. S. 249. In sum, the Court in *Chadwick* declined to extend the rationale of the "automobile exception" to permit a warrantless search of any movable container found in a public place.[16]

The facts in *Arkansas* v. *Sanders*, 442 U. S. 753, were similar to those in *Chadwick*. In *Sanders*, a Little Rock police officer received information from a reliable informant that Sanders would arrive at the local airport on a specified flight that afternoon carrying a green suitcase containing marihuana. The officer went to the airport. Sanders arrived on schedule and retrieved a green suitcase from the airline baggage service. Sanders gave the suitcase to a waiting companion, who placed it in the trunk of a taxi. Sanders and his companion drove off in the cab; police officers followed and stopped the taxi several blocks from the airport. The officers opened the trunk, seized the suitcase, and searched it on the scene without a warrant. As predicted, the suitcase contained marihuana.

The Arkansas Supreme Court ruled that the warrantless search of the suitcase was impermissible under the Fourth Amendment, and this Court affirmed. As in *Chadwick*, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of *Carroll* applicable; the police had probable cause to seize the suitcase before it was placed in the trunk of the cab and did not

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[16] The Court concluded that there is a significant difference between the seizure of a sealed package and a subsequent search of its contents; the search of the container in that case was "a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker." *Id.*, at 14, n. 8. A temporary seizure of a package or piece of luggage often may be accomplished without as significant an intrusion upon the individual—and without as great a burden on the police—as in the case of the seizure of an automobile. See n. 9, *supra*.

have probable cause to search the taxi itself.[17] Since the suitcase had been placed in the trunk, no danger existed that its contents could have been secreted elsewhere in the vehicle.[18] As THE CHIEF JUSTICE noted in his opinion concurring in the judgment:

> "Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States* v. *Chadwick*, 433 U. S. 1 (1977). . . .
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> ". . . Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more." 442 U. S., at 766–767.

The Court in *Sanders* did not, however, rest its decision solely on the authority of *Chadwick*. In rejecting the State's

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[17] The Arkansas Supreme Court carefully reviewed the facts of the case and concluded: "The information supplied to the police by the confidential informant is adequate to support the State's claim that the police had probable cause to believe that appellant's green suitcase contained a controlled substance when the police confiscated the suitcase and opened it." *Sanders* v. *State*, 262 Ark. 595, 599, 559 S. W. 2d 704, 706 (1977). The court also noted: "The evidence in this case supports the conclusion that the relationship between the suitcase and the taxicab is coincidental." *Id.*, at 600, n. 2, 559 S. W. 2d, at 706, n. 2.

[18] Moreover, none of the practical difficulties associated with the detention of a vehicle on a public highway that made the immediate search in *Carroll* reasonable could justify an immediate search of the suitcase, since the officers had no interest in detaining the taxi or its driver.

argument that the warrantless search of the suitcase was justified on the ground that it had been taken from an automobile lawfully stopped on the street, the Court broadly suggested that a warrantless search of a container found in an automobile could never be sustained as part of a warrantless search of the automobile itself.[19] The Court did not suggest that it mattered whether probable cause existed to search the entire vehicle. It is clear, however, that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter.

Robbins v. *California*, 453 U. S. 420, however, was a case in which suspicion was not directed at a specific container. In that case the Court for the first time was forced to consider whether police officers who are entitled to conduct a warrantless search of an automobile stopped on a public roadway may open a container found within the vehicle. In the early morning of January 5, 1975, police officers stopped Robbins' station wagon because he was driving erratically. Robbins got out of the car, but later returned to obtain the vehicle's registration papers. When he opened the car door, the officers smelled marihuana smoke. One of the officers searched Robbins and discovered a vial of liquid; in a search of the interior of the car the officer found marihuana. The police officers then opened the tailgate of the station wagon and raised the cover of a recessed luggage compartment. In

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[19] The Court stated that "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U. S., at 764, n. 13. This general rule was limited only by the observation that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." *Ibid.*

the compartment they found two packages wrapped in green opaque plastic. The police unwrapped the packages and discovered a large amount of marihuana in each.

Robbins was charged with various drug offenses and moved to suppress the contents of the plastic packages. The California Court of Appeal held that "[s]earch of the automobile was proper when the officers learned that appellant was smoking marijuana when they stopped him"[20] and that the warrantless search of the packages was justified because "the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents." *People* v. *Robbins*, 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783 (1980).

This Court reversed. Writing for a plurality, Justice Stewart rejected the argument that the outward appearance of the packages precluded Robbins from having a reasonable expectation of privacy in their contents. He also squarely rejected the argument that there is a constitutional distinction between searches of luggage and searches of "less worthy" containers. Justice Stewart reasoned that all containers are equally protected by the Fourth Amendment unless their contents are in plain view. The plurality concluded that the warrantless search was impermissible because *Chadwick* and *Sanders* had established that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." 453 U. S., at 425.

In an opinion concurring in the judgment, JUSTICE POWELL, the author of the Court's opinion in *Sanders*, stated that "[t]he plurality's approach strains the rationales of our prior cases and imposes substantial burdens on law enforcement without vindicating any significant values of privacy." 453

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[20] *People* v. *Robbins*, 103 Cal. App. 3d 34, 39, 162 Cal. Rptr. 780, 782 (1980).

U. S., at 429.[21] He noted that possibly "the controlling question should be the scope of the automobile exception to the warrant requirement," *id.*, at 435, and explained that under that view

> "when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein. See *post*, at 451, and n. 13 (STEVENS, J., dissenting). This analysis is entirely consistent with the holdings in *Chadwick* and *Sanders*, neither of which is an 'automobile case,' because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile." *Ibid.*

The parties in *Robbins* had not pressed that argument, how-

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[21] "While the plurality's blanket warrant requirement does not even purport to protect any privacy interest, it would impose substantial new burdens on law enforcement. Confronted with a cigar box or a Dixie cup in the course of a probable-cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values." 453 U. S., at 433–434 (POWELL, J., concurring in judgment).

The substantial burdens on law enforcement identified by JUSTICE POWELL would, of course, not be affected by the character of the container found during an automobile search. No comparable practical problems arise when the official suspicion is confined to a particular piece of luggage, as in *Chadwick* and *Sanders*. Cf. n. 19, *supra*.

ever, and JUSTICE POWELL concluded that institutional constraints made it inappropriate to reexamine basic doctrine without full adversary presentation. He concurred in the judgment, since it was supported—although not compelled—by the Court's opinion in *Sanders*, and stated that a future case might present a better opportunity for thorough consideration of the basic principles in this troubled area.

That case has arrived. Unlike *Chadwick* and *Sanders*, in this case police officers had probable cause to search respondent's entire vehicle.[22] Unlike *Robbins*, in this case the parties have squarely addressed the question whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within the vehicle. We now address that question. Its answer is determined by the scope of the search that is authorized by the exception to the warrant requirement set forth in *Carroll*.

IV

In *Carroll* itself, the whiskey that the prohibition agents seized was not in plain view. It was discovered only after an officer opened the rumble seat and tore open the upholstery of the lazyback. The Court did not find the scope of the search unreasonable. Having stopped Carroll and Kiro on a public road and subjected them to the indignity of a ve-

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[22] The en banc Court of Appeals stated that "[b]ased on the tip the police received, Ross's car was properly stopped and searched, and the pouch and bag were properly seized." 210 U. S. App. D. C., at 361, 655 F. 2d, at 1168 (footnote omitted). The court explained:

"[W]e believe it clear that the police had ample and reasonable cause to stop Ross and to search his car. The informer had supplied accurate information on prior occasions, and he was an eyewitness to sales of narcotics by Ross. He said he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics." *Id.*, at 361, n. 22, 655 F. 2d, at 1168, n. 22.

The court further noted: "In this case, the informant told the police that Ross had narcotics in the trunk of his car. No specific container was identified." *Id.*, at 359, 655 F. 2d, at 1166.

hicle search—which the Court found to be a reasonable intrusion on their privacy because it was based on probable cause that their vehicle was transporting contraband—prohibition agents were entitled to tear open a portion of the roadster itself. The scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search. Since such a warrant could have authorized the agents to open the rear portion of the roadster and to rip the upholstery in their search for concealed whiskey, the search was constitutionally permissible.

In *Chambers* v. *Maroney* the police found weapons and stolen property "concealed in a compartment under the dashboard." 399 U. S., at 44. No suggestion was made that the scope of the search was impermissible. It would be illogical to assume that the outcome of *Chambers*—or the outcome of *Carroll* itself—would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself.

In its application of *Carroll*, this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile. In *Husty* v. *United States*, 282 U. S. 694, the Court upheld a warrantless seizure of whiskey found during a search of an automobile, some of which was discovered in "whiskey bags" that could have contained other goods.[23] In *Scher* v. *United States*, 305 U. S. 251, federal of-

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[23] At the suppression hearing, defense counsel asked the police officer who had conducted the search: "Isn't it possible to put other goods in a bag that has the resemblance of a whiskey bag?" The officer responded: "I

ficers seized and searched packages of unstamped liquor found in the trunk of an automobile searched without a warrant. As described by a police officer who participated in the search: "I turned the handle and opened the trunk and found the trunk completely filled with packages wrapped in brown paper, and tied with twine; I think somewhere around thirty packages, each one containing six bottles."[24] In these cases it was not contended that police officers needed a warrant to open the whiskey bags or to unwrap the brown paper packages. These decisions nevertheless "have much weight, as they show that this point neither occurred to the bar or the bench." *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 88 (Marshall, C. J.). The fact that no such argument was even made illuminates the profession's understanding of the scope of the search permitted under *Carroll*. Indeed, prior to the decisions in *Chadwick* and *Sanders*, courts routinely had held that containers and packages found during a legitimate warrantless search of an automobile also could be searched without a warrant.[25]

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suppose it is. I did not think of that at that time. I knew it was whiskey, I was sure it was." App., O. T. 1930, No. 477, p. 27.

[24] App., O. T. 1938, No. 49, p. 33. The brief of then Solicitor General Robert Jackson noted that the items searched "were wrapped in very heavy brown wrapping paper with at least two wrappings and with a heavy cord around them cross-wise so that they could readily be lifted." Brief for United States, O. T. 1938, No. 49, p. 6.

[25] See, *e. g.*, *United States* v. *Soriano*, 497 F. 2d 147, 149–150 (CA5 1974) (en banc); *United States* v. *Vento*, 533 F. 2d 838, 867, n. 101 (CA3 1976); *United States* v. *Tramunti*, 513 F. 2d 1087, 1104 (CA2 1975); *United States* v. *Issod*, 508 F. 2d 990, 993 (CA7 1974); *United States* v. *Evans*, 481 F. 2d 990, 994 (CA9 1973); *United States* v. *Bowman*, 487 F. 2d 1229 (CA10 1973). Many courts continued to apply this rule following the decision in *Chadwick*. Cf. *United States* v. *Milhollan*, 599 F. 2d 518, 526–527 (CA3 1979); *United States* v. *Gaultney*, 581 F. 2d 1137, 1144–1145 (CA5 1978); *United States* v. *Finnegan*, 568 F. 2d 637, 640–641 (CA9 1977). In ruling that police could search luggage and other containers found during a legitimate warrantless search of an automobile, courts often assumed that the "automobile exception" of *Carroll* applied whenever a container in an automobile was believed to contain contraband. That view, of course, has since been qualified by *Chadwick* and *Sanders*.

As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history. It is therefore significant that the practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle. Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.[26] The Court in *Carroll* held that "contraband goods *concealed* and illegally transported in an automobile or other vehicle may be searched for without a warrant." 267 U. S., at 153 (emphasis added). As we noted in *Henry* v. *United States*, 361 U. S. 98, 104, the decision in *Carroll* "merely relaxed the requirements for a warrant on grounds of practicability." It neither broadened nor limited the scope of a lawful search based on probable cause.

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of en-

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[26] It is noteworthy that the early legislation on which the Court relied in *Carroll* concerned the enforcement of laws imposing duties on imported merchandise. See nn. 6 and 7, *supra*. Presumably such merchandise was shipped then in containers of various kinds, just as it is today. Since Congress had authorized warrantless searches of vessels and beasts for imported merchandise, it is inconceivable that it intended a customs officer to obtain a warrant for every package discovered during the search; certainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed. During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.

try or opening may be required to complete the search.[27] Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.[28]

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[27] In describing the permissible scope of a search of a home pursuant to a warrant, Professor LaFave notes:

"Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.'" 2 W. LaFave, Search and Seizure 152 (1978) (quoting *Massey* v. *Commonwealth*, 305 S. W. 2d 755, 756 (Ky. 1957)).

[28] The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* and *Chambers*. Cf. nn. 19 and 22, *supra*.

This rule applies equally to all containers, as indeed we believe it must. One point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between "worthy" and "unworthy" containers would be improper.[29] Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other,[30] the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion,[31] so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

As Justice Stewart stated in *Robbins*, the Fourth Amendment provides protection to the owner of every container

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[29] Cf. 453 U. S., at 426–427 (plurality opinion); *id.*, at 436 (BLACKMUN, J., dissenting); *id.*, at 443 (REHNQUIST, J., dissenting); *id.*, at 447 (STEVENS, J., dissenting).

[30] If the distinction is based on the proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy, however, the propriety of a warrantless search necessarily would turn on much more than the fabric of the container. A paper bag stapled shut and marked "private" might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage. The propriety of the warrantless search seemingly would turn on an objective appraisal of all the surrounding circumstances.

[31] " 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!' " *Miller* v. *United States*, 357 U. S. 301, 307 (quoting remarks attributed to William Pitt); cf. *Payton* v. *New York*, 445 U. S. 573, 601, n. 54.

that conceals its contents from plain view. 453 U. S., at 427 (plurality opinion). But the protection afforded by the Amendment varies in different settings. The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. A container carried at the time of arrest often may be searched without a warrant and even without any specific suspicion concerning its contents. A container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual's interest in privacy must give way to the magistrate's official determination of probable cause.

In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however, which—in light of *Carroll*—does not itself require the prior approval of a magistrate. The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.[32]

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[32] In choosing to search without a warrant on their own assessment of probable cause, police officers of course lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional. Cf. *Monroe* v. *Pape*, 365 U. S. 167. Although an officer may establish that he acted in good faith in conducting the search by other evidence, a warrant issued by a magistrate normally suffices to establish it.

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

V

Our decision today is inconsistent with the disposition in *Robbins* v. *California* and with the portion of the opinion in *Arkansas* v. *Sanders* on which the plurality in *Robbins* relied. Nevertheless, the doctrine of *stare decisis* does not preclude this action. Although we have rejected some of the reasoning in *Sanders*, we adhere to our holding in that case; although we reject the precise holding in *Robbins*, there was no Court opinion supporting a single rationale for its judgment, and the reasoning we adopt today was not presented by the parties in that case. Moreover, it is clear that no legitimate reliance interest can be frustrated by our decision today.[33] Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history.

We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey* v. *Arizona*, 437 U. S. 385, 390:

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[33] Any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate.

> "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' *Katz* v. *United States*, 389 U. S. 347, 357 (footnotes omitted)."

The exception recognized in *Carroll* is unquestionably one that is "specifically established and well delineated." We hold that the scope of the warrantless search authorized by that exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

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

It is so ordered.

JUSTICE BLACKMUN, concurring.

My dissents in prior cases have indicated my continuing dissatisfaction and discomfort with the Court's vacillation in what is rightly described as "this troubled area." *Ante*, at 817. See *United States* v. *Chadwick*, 433 U. S. 1, 17 (1977); *Arkansas* v. *Sanders*, 442 U. S. 753, 768 (1979); *Robbins* v. *California*, 453 U. S. 420, 436 (1981).

I adhere to the views expressed in those dissents. It is important, however, not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established. JUSTICE STEVENS' opinion for the Court now accomplishes much in this respect, and it should clarify a good bit of the confusion that has existed. In order to have an authoritative ruling, I join the Court's opinion and judgment.

automobile that they have stopped on the highway,[1] they may search not only the automobile but also any container found inside it, without obtaining a warrant. The scope of the search, we are told, is as broad as a magistrate could authorize in a warrant to search the automobile. The majority makes little attempt to justify this rule in terms of recognized Fourth Amendment values. The Court simply ignores the critical function that a magistrate serves. And although the Court purports to rely on the mobility of an automobile and the impracticability of obtaining a warrant, it never explains why these concerns permit the warrantless search of a *container*, which can easily be seized and immobilized while police are obtaining a warrant.

The new rule adopted by the Court today is completely incompatible with established Fourth Amendment principles, and takes a first step toward an unprecedented "probable cause" exception to the warrant requirement. In my view, under accepted standards, the warrantless search of the containers in this case clearly violates the Fourth Amendment.

A

"[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978), quoting *Katz* v. *United States*, 389 U. S. 347, 357 (1967). The warrant requirement is crucial to protecting Fourth Amendment rights because of the importance of having the probable-cause determination made in the first instance by a neutral and detached magistrate. Time and

[1] The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971).

again, we have emphasized that the warrant requirement provides a number of protections that a *post hoc* judicial evaluation of a policeman's probable cause does not.

The requirement of prior review by a detached and neutral magistrate limits the concentration of power held by executive officers over the individual, and prevents some overbroad or unjustified searches from occurring at all. See *United States* v. *United States District Court*, 407 U. S. 297, 317 (1972); *Abel* v. *United States*, 362 U. S. 217, 252 (1960) (BRENNAN, J., joined by Warren, C. J., and Black and Douglas, JJ., dissenting). Prior review may also "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 565 (1976); see also *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964). Furthermore, even if a magistrate would have authorized the search that the police conducted, the interposition of a magistrate's neutral judgment reassures the public that the orderly process of law has been respected:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, *supra*, at 13–14.

See also *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 323 (1978); *United States* v. *United States District Court*, *supra*, at 321. The safeguards embodied in the warrant requirement apply as forcefully to automobile searches as to any others.

Our cases do recognize a narrow exception to the warrant requirement for certain automobile searches. Throughout our decisions, two major considerations have been advanced to justify the automobile exception to the warrant require-

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Our cases do recognize a narrow exception to the warrant requirement for certain automobile searches. Throughout our decisions, two major considerations have been advanced to justify the automobile exception to the warrant require-

ment. We have upheld only those searches that are actually justified by those considerations.

First, these searches have been justified on the basis of the exigency of the mobility of the automobile. See, *e. g.*, *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Carroll* v. *United States*, 267 U. S. 132 (1925). This "mobility" rationale is something of a misnomer, cf. *Cady* v. *Dombrowski*, 413 U. S. 433, 442–443 (1973), since the police ordinarily can remove the car's occupants and secure the vehicle on the spot. However, the inherent mobility of the vehicle often creates situations in which the police's only alternative to an immediate search may be to release the automobile from their possession.[2] This alternative creates an unacceptably high risk of losing the contents of the vehicle, and is a principal basis for the Court's automobile exception to the warrant requirement. See *Chambers*, *supra*, at 51, n. 9.

In many cases, however, the police will, prior to searching the car, have cause to arrest the occupants and bring them to the station for booking. In this situation, the police can ordinarily seize the automobile and bring it to the station. Because the vehicle is now in the exclusive control of the authorities, any subsequent search cannot be justified by the mobility of the car. Rather, an immediate warrantless search of the vehicle is permitted because of the second major justification for the automobile exception: the diminished expectation of privacy in an automobile.

Because an automobile presents much of its contents in open view to police officers who legitimately stop it on a public way, is used for travel, and is subject to significant gov-

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[2] The fact that the police are able initially to remove the occupants from the car does not remove the justification for an immediate search. If police could not conduct an immediate search of a stopped automobile, they would often be left with the difficult task of deciding what to do with the occupants while a warrant is obtained. In the case of a parked automobile, by contrast, if the automobile is unoccupied, this problem is not presented. See, *e. g.*, *Coolidge* v. *New Hampshire*, *supra*.

ernment regulation, this Court has determined that the intrusion of a warrantless search of an automobile is constitutionally less significant than a warrantless search of more private areas. See *Arkansas* v. *Sanders*, 442 U. S. 753, 761 (1979) (collecting cases). This justification has been invoked for warrantless automobile searches in circumstances where the exigency of mobility was clearly not present. See, *e. g.*, *South Dakota* v. *Opperman*, 428 U. S. 364, 367–368 (1976); *Cady* v. *Dombrowski*, *supra*, at 441–442. By focusing on the defendant's reasonable expectation of privacy, this Court has refused to require a warrant in situations where the process of obtaining such a warrant would be more intrusive than the actual search itself. Cf. *Katz* v. *United States*, *supra*. A defendant may consider the seizure of the car a greater intrusion than an immediate search. See *Chambers*, *supra*, at 51–52. Therefore, even where police *can* bring both the defendant and the automobile to the station safely and can house the car while they seek a warrant, the police are permitted to decide whether instead to conduct an immediate search of the car. In effect, the warrantless search is permissible because a warrant requirement would not provide significant protection of the defendant's Fourth Amendment interests.

B

The majority's rule is flatly inconsistent with these established Fourth Amendment principles concerning the scope of the automobile exception and the importance of the warrant requirement. Historically, the automobile exception has been limited to those situations where its application is compelled by the justifications described above. Today, the majority makes no attempt to base its decision on these justifications. This failure is not surprising, since the traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle.

The practical mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate. See *Sanders*, 442 U. S., at 762–766, and nn. 10, 14. The lesser-expectation-of-privacy rationale also has little force. A container, as opposed to the car itself, does not reflect diminished privacy interests. See *id.*, at 762, 764–765. Moreover, the practical corollary that this Court has recognized—that depriving occupants of the use of a car may be a greater intrusion than an immediate search—is of doubtful relevance here, since the owner of a container will rarely suffer significant inconvenience by being deprived of its use while a warrant is being obtained.

Ultimately, the majority, unable to rely on the justifications underlying the automobile exception, simply creates a new "probable cause" exception to the warrant requirement for automobiles. We have soundly rejected attempts to create such an exception in the past, see *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), and we should do so again today.

In purported reliance on *Carroll* v. *United States*, *supra*, the Court defines the permissible scope of a search by reference to the scope of a probable-cause search that a magistrate could authorize. Under *Carroll*, however, the mobility of an automobile is what is critical to the legality of a warrantless search. Of course, *Carroll* properly confined the search to the probable-cause limits that would also limit a magistrate, but it did not suggest that the search could be as *broad* as a magistrate could authorize upon a warrant. A magistrate could authorize a search encompassing containers, even though the mobility rationale does not justify such a broad search. Indeed, the Court's reasoning might have justified the search of the entire car in *Coolidge* despite the fact that the car was not "mobile" at all. Thus, in blithely suggesting that *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause,"

ante, at 820, the majority assumes what has never been the law: that the scope of the automobile-mobility exception to the warrant requirement is as broad as the scope of a "lawful" probable-cause search of an automobile, *i. e.*, one authorized by a magistrate.

The majority's sleight-of-hand ignores the obvious differences between the function served by a magistrate in making a determination of probable cause and the function of the automobile exception. It is irrelevant to a magistrate's function whether the items subject to search are mobile, may be in danger of destruction, or are impractical to store, or whether an immediate search would be less intrusive than a seizure without a warrant. A magistrate's only concern is whether there is probable cause to search them. Where suspicion has focused not on a particular item but only on a vehicle, home, or office, the magistrate might reasonably authorize a search of closed containers at the location as well. But an officer on the beat who searches an automobile without a warrant is not entitled to conduct a broader search than the exigency obviating the warrant justifies. After all, what justifies the warrantless search is not probable cause alone, but *probable cause coupled with the mobility of the automobile*. Because the scope of a *warrantless* search should depend on the scope of the justification for dispensing with a warrant, the entire premise of the majority's opinion fails to support its conclusion.

The majority's rule masks the startling assumption that a policeman's determination of probable cause is the functional equivalent of the determination of a neutral and detached magistrate. This assumption ignores a major premise of the warrant requirement—the importance of having a neutral and detached magistrate determine whether probable cause exists. See *supra*, at 828–829. The majority's explanation that the scope of the warrantless automobile search will be "limited" to what a magistrate could authorize is thus inconsistent with our cases, which firmly establish that an on-

the-spot determination of probable cause is *never* the same as a decision by a neutral and detached magistrate.

C

Our recent decisions in *United States* v. *Chadwick*, 433 U. S. 1 (1977), *Arkansas* v. *Sanders*, *supra*, and *Robbins* v. *California*, 453 U. S. 420 (1981), clearly affirm that movable containers are different from automobiles for Fourth Amendment purposes. In *Chadwick*, the Court drew a constitutional distinction between luggage and automobiles in terms of substantial differences in expectations of privacy. 433 U. S., at 12. Moreover, the Court held that the mobility of such containers does not justify dispensing with a warrant, since federal agents had seized the luggage and safely transferred it to their custody under their exclusive control. *Sanders* explicitly held that "the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U. S., at 766. And *Robbins* reaffirmed the *Sanders* rationale as applied to wrapped packages found in the unlocked luggage compartment of a vehicle. 453 U. S., at 425.[3]

In light of these considerations, I conclude that any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile. See *Sanders*, 442 U. S., at 763–765, and n. 13; *Chadwick*, *supra*, at 17, n. 1 (BRENNAN, J., concurring). *Chadwick*, as the majority notes, "reaffirmed the general principle that closed packages and containers may not be

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[3] The plurality stated: "[*Chadwick* and *Sanders*] made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." *Robbins* v. *California*, 453 U. S., at 425.

searched without a warrant." *Ante*, at 812. Although there is no need to describe the exact contours of that protection in this dissenting opinion, it is clear enough that closed, opaque containers—regardless of whether they are "worthy" or are always used to store personal items—are ordinarily fully protected. Cf. *Sanders*, *supra*, at 764, n. 13.[4]

Here, because respondent Ross had placed the evidence in question in a closed paper bag, the container could be seized, but not searched, without a warrant. No practical exigencies required the warrantless searches on the street or at the station: Ross had been arrested and was in custody when both searches occurred, and the police succeeded in transporting the bag to the station without inadvertently spilling its contents.[5]

II

In announcing its new rule, the Court purports to rely on earlier automobile search cases, especially *Carroll* v. *United States*. The Court's approach, however, far from being "faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history," *ante*, at 824, is plainly contrary to the letter and the spirit of our prior automobile search cases. Moreover, the new rule produces anomalous and unacceptable consequences.

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[4] This rule may present some line-drawing problems, but no greater than those presented when a movable container is in the arms of a citizen walking down the street. There is no justification for relying on marginal difficulties of definition to reject a warrant requirement in one situation but not the other.

[5] The Government argues that less secure containers such as paper bags can easily spill their contents; thus, no privacy interest of the defendant is protected if police are required to seize the container and bring it to the station. Whatever the force of this argument in other contexts, here police succeeded in reclosing the bag after the initial search and transporting it to the station without incident.

A

The majority's argument that its decision is supported by our decisions in *Carroll* and *Chambers* is misplaced. The Court in *Carroll* upheld a warrantless search of an automobile for contraband on the basis of the impracticability of securing a warrant in cases involving the transportation of contraband goods. The Court did not, however, suggest that obtaining a warrant for the search of an automobile is always impracticable.[6] "In cases where the securing of a warrant is reasonably practicable, *it must be used* . . . . In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." 267 U. S., at 156 (emphasis added).[7] As this Court reaffirmed in *Chambers*, 399 U. S.,

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[6] The Court in *Carroll* v. *United States*, 267 U. S. 132 (1925), seems to have assumed that the police could not arrest the occupants of the automobile, since the offense was a misdemeanor and was not deemed to have been committed in the officers' presence. See 2 W. LaFave, Search and Seizure 511 (1978). Accordingly, police were faced with an exigency often not encountered today in searches of stopped automobiles: in order to *seize* the car pending the securing of a warrant, they would have to leave the occupants stranded.

[7] In *Carroll*, of course, no movable *container* was searched. Although in other early cases containers may in fact have been searched, see *ante*, at 818–819, the parties did not litigate in this Court the question whether containers deserve separate protection.

The Court's suggestion that the absence of such an argument "illuminates the profession's understanding of the scope of the search permitted under *Carroll*," *ante*, at 819, is an unusual approach to constitutional interpretation. I would hesitate to rely upon the "profession's understanding" of the Fourteenth Amendment or of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), in the early part of this century as justification for not granting Negroes constitutional protection. See *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Moreover, for a number of reasons, including the broad scope of the permitted search incident to arrest prior to *Chimel* v. *California*, 395 U. S. 752 (1969), and the uncertain meaning of a "search" prior to *Katz* v. *United States*, 389 U. S. 347 (1967), the profession formerly advanced different arguments against automobile searches than it advances today.

at 50, "[n]either *Carroll, supra,* nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

Notwithstanding the reasoning of these cases, the majority argues that *Carroll* and *Chambers* support its decisions because integral compartments of a car are functionally equivalent to containers found within a car, and because the practical advantages to the police of the *Carroll* doctrine "would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle." *Ante,* at 820. Neither of these arguments is persuasive. First, the Court's argument that allowing warrantless searches of certain integral compartments of the car in *Carroll* and *Chambers,* while protecting movable containers within the car, would be "illogical" and "absurd," *ante,* at 818, ignores the reason why this Court has allowed warrantless searches of automobile compartments. Surely an integral compartment within a car is just as mobile, and presents the same practical problems of safekeeping, as the car itself. This cannot be said of movable containers located within the car. The fact that there may be a high expectation of privacy in both containers and compartments is irrelevant, since the privacy rationale is not, and cannot be, the justification for the warrantless search of compartments.

The Court's second argument, which focuses on the practical advantages to police of the *Carroll* doctrine, fares no better. The practical considerations which concerned the *Carroll* Court involved the difficulty of immobilizing a vehicle while a warrant must be obtained. The Court had no occasion to address whether *containers* present the same practical difficulties as the car itself or integral compartments of the car. They do not. See *supra,* at 832. *Carroll* hardly suggested, as the Court implies, *ante,* at 820, that a warrant-

less search is justified simply because it assists police in obtaining more evidence.

Although it can find no support for its rule in this Court's precedents or in the traditional justifications for the automobile exception, the majority offers another justification. In a footnote, the majority suggests that "practical considerations" militate against securing containers found during an automobile search and taking them to the magistrate. *Ante*, at 821, n. 28. The Court confidently remarks: "[P]rohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle." *Ibid.* The vehicle would have to be seized while a warrant was obtained, a requirement inconsistent with *Carroll* and *Chambers*. *Ante*, at 821, n. 28.

This explanation is unpersuasive. As this Court explained in *Sanders* and as the majority today implicitly concedes, the burden to police departments of seizing a package or personal luggage simply does not compare to the burden of seizing and safeguarding automobiles. *Sanders*, 442 U. S., at 765, n. 14; *ante*, at 811, and n. 16. Other aspects of the Court's explanation are also implausible. The search will not always require a "combing" of the entire vehicle, since police may be looking for a particular item and may discover it promptly. If, instead, they are looking more generally for evidence of a crime, the immediate opening of the container will not protect the defendant's privacy; whether or not it contains contraband, the police will continue to search for new evidence. Finally, the defendant, not the police, should be afforded the choice whether he prefers the immediate opening of his suitcase or other container to the delay incident to seeking a warrant. Cf. *Sanders*, *supra*, at 764, n. 12. The more rea-

sonable presumption, if a presumption is to replace the defendant's consent, is surely that the immediate search of a closed container will be a greater invasion of the defendant's privacy interests than a mere temporary seizure of the container.[8]

B

Finally, the majority's new rule is theoretically unsound and will create anomalous and unwarranted results. These consequences are readily apparent from the Court's attempt to reconcile its new rule with the holdings of *Chadwick* and *Sanders*.[9] The Court suggests that probable cause to search only a container does not justify a warrantless search of an automobile in which it is placed, absent reason to believe that the contents could be secreted elsewhere in the vehicle. This, the majority asserts, is an indication that the new rule is carefully limited to its justification, and is not inconsistent with *Chadwick* and *Sanders*. But why is such a container more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the war-

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[8] Seizures of automobiles can be distinguished because of the greater interest of defendants in continuing possession of their means of transportation; in the case of automobiles, a seizure is more likely to be a greater intrusion than an immediate search. See *Chambers* v. *Maroney*, 399 U. S. 42, 51–52 (1970).

[9] Both cases would appear to fall within the majority's new rule. In *United States* v. *Chadwick*, 433 U. S. 1 (1977), federal agents had probable cause to search a footlocker. Although the footlocker had been placed in the trunk of a car and the occupants were about to depart, the Court refused to rely on the automobile exception to uphold the search. (It is true that the United States did not argue in this Court that the search was justified pursuant to that exception, but the theory was hardly so novel that this Court could not have responsibly relied upon it.) In *Arkansas* v. *Sanders*, 442 U. S. 753 (1979), too, the suitcase was mobile and police had probable cause to search it; it was carried in an automobile for several blocks before the automobile was stopped and the suitcase was seized and searched. Again, however, this Court invalidated the search.

rant requirement, than a container that police discover in a probable-cause search of an entire automobile?[10] This rule plainly has peculiar and unworkable consequences: the Government "must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located." 210 U. S. App. D. C. 342, 384, 655 F. 2d 1159, 1201 (1981) (en banc) (Wilkey, J., dissenting).

Alternatively, the majority may be suggesting that *Chadwick* and *Sanders* may be explained because the connection of the container to the vehicle was incidental in these two cases. That is, because police had pre-existing probable cause to seize and search the containers, they were not entitled to wait until the item was placed in a vehicle to take advantage of the automobile exception. Cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); 2 W. LaFave, Search and Seizure 519–525 (1978). I wholeheartedly agree that police cannot employ a pretext to escape Fourth Amendment prohibitions and cannot rely on an exigency that they could easily have avoided. This interpretation, however, might well be an exception that swallows up the majority's rule. In neither *Chadwick* nor *Sanders* did the Court suggest that the delay of the police was a pretext for taking advantage of the automobile exception. For all that appears, the Government may have had legitimate reasons for not searching as soon as they had probable cause. In any event, asking police to rely

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[10] In a footnote, the Court appears to suggest a more pragmatic rationale for distinguishing *Chadwick* and *Sanders*—that no practical problems comparable to those engendered by a general search of a vehicle would arise if the official suspicion is confined to a particular piece of luggage. *Ante*, at 816, n. 21. This suggestion is illogical. A general search might disclose only a single item worth searching; conversely, pre-existing suspicion might attach to a number of items later placed in a car. Surely the protection of the warrant requirement cannot depend on a numerical count of the items subject to search.

on such an uncertain line in distinguishing between legitimate and illegitimate searches for containers in automobiles hardly indicates that the majority's approach has brought clarification to this area of the law. *Ante*, at 804; see *Robbins*, 453 U. S., at 435 (POWELL, J., concurring in judgment).[11]

III

The Court today ignores the clear distinction that *Chadwick* established between movable containers and automobiles. It also rejects all of the relevant reasoning of *Sanders*[12] and offers a substitute rationale that appears inconsistent with the result. See *supra*, at 832. *Sanders* is therefore effectively overruled. And the Court unambiguously overrules "the disposition" of *Robbins*, *ante*, at 824, though it gingerly avoids stating that it is overruling the case itself.

The only convincing explanation I discern for the majority's broad rule is expediency: it assists police in conducting

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[11] Unless one of these alternative explanations is adopted, the Court's attempt to distinguish the holdings in *Chadwick* and *Sanders* is not only unpersuasive but appears to contradict the Court's own theory. The Court suggests that in each case, the connection of the container to the vehicle was simply coincidental, and notes that the police did not have probable cause to search the entire vehicle. But the police assuredly did have probable cause to search the vehicle *for the container*. The Court states that the scope of the permitted warrantless search is determined only by what a magistrate could authorize. *Ante*, at 823. Once police found that container, according to the Court's own rule, they should have been entitled to search at least the container without a warrant. There was probable cause to search and the car was mobile in each case.

[12] The Court suggests that it rejects "some of the reasoning in *Sanders*." *Ante*, at 824. But the Court in *Sanders* unambiguously stated: "[W]e hold that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." 442 U. S., at 766. The Court today instead adopts the reasoning of the opinion of THE CHIEF JUSTICE, joined by JUSTICE STEVENS, who refused to join the majority opinion because of the breadth of its rationale. *Ibid.*

automobile searches, ensuring that the private containers into which criminal suspects often place goods will no longer be a Fourth Amendment shield. See *ante*, at 820. "When a legitimate search is under way," the Court instructs us, "nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand." *Ante*, at 821. No "nice distinctions" are necessary, however, to comprehend the well-recognized differences between movable containers (which, even after today's decision, would be subject to the warrant requirement if located outside an automobile), and the automobile itself, together with its integral parts. Nor can I pass by the majority's glib assertion that the "prompt and efficient completion of the task at hand" is paramount to the Fourth Amendment interests of our citizens. I had thought it well established that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey* v. *Arizona*, 437 U. S., at 393.[13]

This case will have profound implications for the privacy of citizens traveling in automobiles, as the Court well understands. "For countless vehicles are stopped on highways and public streets every day and our cases demonstrate that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle." *Ante*, at 803–804. A closed paper bag, a toolbox, a knapsack, a suitcase, and an attaché case can alike be searched without the protection of the judgment of a neutral magistrate, based only on the rarely disturbed decision of a police officer that he has probable cause to search for contraband in the vehicle.[14] The Court derives satisfaction from

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[13] Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most "efficient" form of government?

[14] The Court purports to restrict its rule to areas that the police have probable cause to search, as "defined by the object of the search and the

the fact that its rule does not exalt the rights of the wealthy over the rights of the poor. *Ante*, at 822. A rule so broad that all citizens lose vital Fourth Amendment protection is no cause for celebration.

I dissent.

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places in which there is probable cause to believe that it may be found." *Ante*, at 824. I agree, of course, that the probable-cause component of the automobile exception must be strictly construed. I fear, however, that the restriction that the Court emphasizes may have little practical value. See 210 U. S. App. D. C. 342, 351, n. 21, 655 F. 2d 1159, 1168, n. 21 (1981) (en banc). If police open a container within a car and find contraband, they may acquire probable cause to believe that other portions of the car, and other containers within it, will contain contraband. In practice, the Court's rule may amount to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband.

INWOOD LABORATORIES, INC., ET AL. *v.* IVES LABORATORIES, INC.

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

No. 80–2182. Argued February 22, 1982—Decided June 1, 1982*

Respondent manufactured and marketed the patented prescription drug cyclandelate to wholesalers, retail pharmacists, and hospitals in colored capsules under the registered trademark CYCLOSPASMOL. After respondent's patent expired, several generic drug manufacturers, including petitioner manufacturers, began marketing the drug, intentionally copying the appearance of the CYCLOSPASMOL capsules. Respondent then brought an action against petitioner manufacturers and wholesalers in Federal District Court under, *inter alia,* § 32 of the Trademark Act of 1946, alleging that some pharmacists had dispensed generic drugs mislabeled as CYCLOSPASMOL and that petitioners' use of look-alike capsules and catalog entries comparing prices and revealing the colors of generic capsules contributed to the pharmacists' mislabeling. Respondent sought injunctive relief and damages. The District Court entered judgment for petitioners, finding that although the pharmacists had violated § 32, respondent had not made the necessary factual showing that petitioners had intentionally induced the pharmacists to mislabel generic drugs or continued to supply cyclandelate to pharmacists who the petitioners knew or should have known were mislabeling generic drugs. The Court of Appeals reversed, rejecting the District Court's findings and holding that the District Court failed to give sufficient weight to the evidence respondent offered to show a pattern of illegal substitution and mislabeling. After completing its own review of the evidence, the Court of Appeals further held that the evidence was "clearly sufficient to establish a § 32 violation."

Held: The Court of Appeals erred in setting aside the District Court's findings of fact. Pp. 853–858.

(a) In reviewing such findings, the Court of Appeals was bound by the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). P. 855.

(b) By rejecting the findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of

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*Together with No. 81–11, *Darby Drug Co., Inc., et al.* v. *Ives Laboratories, Inc.,* also on certiorari to the same court.

Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the District Court's findings concerning the significance of the instances of mislabeling were not clearly erroneous, they should not have been disturbed. Pp. 855–856.

(c) Moreover, each of the conclusions that the Court of Appeals made in holding that the evidence established a § 32 violation was contrary to the District Court's findings. An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *Real Estate Boards*, 339 U. S. 485, 495. Pp. 856–858.

638 F. 2d 538, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in the result, in which MARSHALL, J., joined, *post*, p. 859. REHNQUIST, J., filed an opinion concurring in the result, *post*, p. 864.

Milton A. Bass argued the cause for petitioners. With him on the briefs for petitioner Inwood Laboratories, Inc., in No. 80–2182 were *Jacob Laufer* and *Steven R. Trost*. *Peter T. Cobrin* filed briefs for petitioner Premo Pharmaceutical Laboratories, Inc., in No. 80–2182. *Robert V. Marrow* filed briefs for petitioners in No. 81–11.

Marie V. Driscoll argued the cause for respondent. With her on the brief were *Gerald W. Griffin*, *Egon E. Berg*, and *Steven J. Baron*.

Jerrold J. Ganzfried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Baxter*, *Deputy Solicitor General Shapiro*, *Barry Grossman*, and *Robert J. Wiggers*.†

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†Briefs of *amici curiae* urging reversal were filed by *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, and *Peter G. Crary*, Assistant Attorney General, for the State of New York; by *Alfred*

JUSTICE O'CONNOR delivered the opinion of the Court.

This action requires us to consider the circumstances under which a manufacturer of a generic drug, designed to duplicate the appearance of a similar drug marketed by a competitor under a registered trademark, can be held vicariously liable for infringement of that trademark by pharmacists who dispense the generic drug.

I

In 1955, respondent Ives Laboratories, Inc. (Ives), received a patent on the drug cyclandelate, a vasodilator used in long-term therapy for peripheral and cerebral vascular diseases. Until its patent expired in 1972, Ives retained the exclusive right to make and sell the drug, which it did under the registered trademark CYCLOSPASMOL.[1] Ives marketed the drug, a white powder, to wholesalers, retail pharmacists, and hospitals in colored gelatin capsules. Ives arbitrarily se-

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Miller for the American Association of Retired Persons et al.; and by *Milton A. Bass*, *Jacob Laufer*, *I. Scott Bass*, and *Steven R. Trost* for the National Association of Pharmaceutical Manufacturers, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Gerald W. Gorman* for the American Academy of Family Physicians; by *Michael R. Sonnenreich*, *Michael X. Morrell*, and *William H. Kenety* for Medicine in the Public Interest; and by *Joel E. Hoffman*, *Jerry D. Anker*, *Daniel L. Koffsky*, and *Louis G. Santucci* for the Pharmaceutical Manufacturers Association.

Alfred B. Engelberg filed a brief for the Generic Pharmaceutical Industry Association as *amicus curiae*.

[1] Under the Trademark Act of 1946 (Lanham Act), 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.*, the term "trade-mark" includes "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." 15 U. S. C. § 1127. A "registered mark" is one registered in the United States Patent and Trademark Office under the terms of the Lanham Act "or under the Act of March 3, 1881, or the Act of February 20, 1905, or the Act of March 19, 1920." *Ibid.*

lected a blue capsule, imprinted with "Ives 4124," for its 200 mg dosage and a combination blue-red capsule, imprinted with "Ives 4148," for its 400 mg dosage.

After Ives' patent expired, several generic drug manufacturers, including petitioners Premo Pharmaceutical Laboratories, Inc., Inwood Laboratories, Inc., and MD Pharmaceutical Co., Inc. (collectively the generic manufacturers), began marketing cyclandelate.[2] They intentionally copied the appearance of the CYCLOSPASMOL capsules, selling cyclandelate in 200 mg and 400 mg capsules in colors identical to those selected by Ives.[3]

The marketing methods used by Ives reflect normal industry practice. Because cyclandelate can be obtained only by prescription, Ives does not direct its advertising to the ultimate consumer. Instead, Ives' representatives pay personal visits to physicians, to whom they distribute product literature and "starter samples." Ives initially directed these efforts toward convincing physicians that CYCLOSPASMOL is superior to other vasodilators. Now that its patent has expired and generic manufacturers have entered the market, Ives concentrates on convincing physicians to indicate on prescriptions that a generic drug cannot be substituted for CYCLOSPASMOL.[4]

The generic manufacturers also follow a normal industry practice by promoting their products primarily by distribu-

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[2] The generic manufacturers purchase cyclandelate and empty capsules and assemble the product for sale to wholesalers and hospitals. The petitioner wholesalers, Darby Drug Co., Inc., Rugby Laboratories, Inc., and Sherry Pharmaceutical Co., Inc., in turn, sell to other wholesalers, physicians, and pharmacies.

[3] Initially, the generic manufacturers did not place any identifying mark on their capsules. After Ives initiated this action, Premo imprinted "Premo" on its capsules and Inwood imprinted "Inwood 258."

[4] Since the early 1970's, most States have enacted laws allowing pharmacists to substitute generic drugs for brand name drugs under certain conditions. See generally Note, Consumer Protection and Prescription

tion of catalogs to wholesalers, hospitals, and retail pharmacies, rather than by contacting physicians directly. The catalogs truthfully describe generic cyclandelate as "equivalent" or "comparable" to CYCLOSPASMOL.[5] In addition, some of the catalogs include price comparisons of the generic drug and CYCLOSPASMOL and some refer to the color of the generic capsules. The generic products reach wholesalers, hospitals, and pharmacists in bulk containers which correctly indicate the manufacturer of the product contained therein.

A pharmacist, regardless of whether he is dispensing CYCLOSPASMOL or a generic drug, removes the capsules from the container in which he receives them and dispenses them to the consumer in the pharmacist's own bottle with his

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Drugs: The Generic Drug Substitution Laws, 67 Ky. L. J. 384 (1978–1979). The New York statutes involved in this action are typical of these generic substitution laws. New York law requires that prescription forms contain two lines, one of which a prescribing physician must sign. N. Y. Educ. Law § 6810 (McKinney Supp. 1981–1982). If the physician signs over the words "substitution permissible," substitution is mandatory if a substitute generic drug is on an approved list, N. Y. Educ. Law § 6816–a (McKinney Supp. 1981–1982); N. Y. Pub. Health Law § 206.1(*o*) (McKinney Supp. 1981–1982), and permissible if another generic drug is available. Unless the physician directs otherwise, the pharmacist must indicate the name of the generic manufacturer and the strength of the drug dispensed on the label. N. Y. Educ. Law § 6816–a(1)(c). In addition, the prescription form must specifically state that, unless the physician signs above the line "dispense as written," the prescription will be filled generically. § 6810(6)(a).

If a pharmacist mislabels a drug or improperly substitutes, he is guilty of a misdemeanor and subject to a fine, §§ 6811, 6815, 6816, and to revocation of his license. § 6808.

[5] Ives conceded that CYCLOSPASMOL and the petitioners' generic equivalents are bioequivalent and have the same bioavailability. See 455 F. Supp. 939, 942 (EDNY 1978), and 488 F. Supp. 394, 396 (EDNY 1980). Bioavailability is an absolute term which measures both the rate and the amount of a drug which reaches the general circulation from a defined dosage. Drugs are "bioequivalent" if, when administered in equal amounts to the same individual, they reach general circulation at the same relative rate and to the same relative extent. Remington's Pharmaceutical Sciences 1368 (15th ed. 1975).

own label attached. Hence, the final consumer sees no identifying marks other than those on the capsules themselves.

II

A

Ives instituted this action in the United States District Court for the Eastern District of New York under §§ 32 and 43(a) of the Trademark Act of 1946 (Lanham Act), 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.*, and under New York's unfair competition law, N. Y. Gen. Bus. Law § 368–d (McKinney 1968).[6]

Ives' claim under § 32, 60 Stat. 437, as amended, 15 U. S. C. § 1114,[7] derived from its allegation that some pharmacists had dispensed generic drugs mislabeled as CYCLOSPASMOL.[8]

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[6] The state law claim was not discussed in the decision under review, and no further reference will be made to it here.

[7] Section 32 of the Lanham Act, 60 Stat. 437, as amended, 15 U. S. C. § 1114, provides in part:

"(1) Any person who shall, without the consent of the registrant—

"(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

"(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,

"shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) of this section, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake or to deceive."

[8] The claim involved two types of infringements. The first was "direct" infringement, in which druggists allegedly filled CYCLOSPASMOL pre-

Ives contended that the generic manufacturers' use of look-alike capsules and of catalog entries comparing prices and revealing the colors of the generic capsules induced pharmacists illegally to substitute a generic drug for CYCLOSPASMOL and to mislabel the substitute drug CYCLOSPASMOL. Although Ives did not allege that the petitioners themselves applied the Ives trademark to the drug products they produced and distributed, it did allege that the petitioners contributed to the infringing activities of pharmacists who mislabeled generic cyclandelate.

Ives' claim under § 43(a), 60 Stat. 441, 15 U. S. C. § 1125(a),[9] alleged that the petitioners falsely designated the origin of their products by copying the capsule colors used by Ives and by promoting the generic products as equivalent to CYCLOSPASMOL. In support of its claim, Ives argued that the colors of its capsules were not functional[10] and that

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scriptions marked "dispense as written" with a generic drug and mislabeled the product as CYCLOSPASMOL. The second, "intermediate" infringement, occurred when pharmacists, although authorized by the prescriptions to substitute, allegedly mislabeled a generic drug as CYCLOSPASMOL. The one retail pharmacy originally named as a defendant consented to entry of a decree enjoining it from repeating such actions. 455 F. Supp., at 942.

[9] Section 43(a) of the Lanham Act, 60 Stat. 441, 15 U. S. C. § 1125(a), provides:

"(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

[10] In general terms, a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.

they had developed a secondary meaning for the consumers.[11]

Contending that pharmacists would continue to mislabel generic drugs as CYCLOSPASMOL so long as imitative products were available, Ives asked that the court enjoin the petitioners from marketing cyclandelate capsules in the same colors and form as Ives uses for CYCLOSPASMOL. In addition, Ives sought damages pursuant to § 35 of the Lanham Act, 60 Stat. 439, as amended, 15 U. S. C. § 1117.

B

The District Court denied Ives' request for an order preliminarily enjoining the petitioners from selling generic drugs identical in appearance to those produced by Ives. 455 F. Supp. 939 (1978). Referring to the claim based upon § 32, the District Court stated that, while the "knowing and deliberate instigation" by the petitioners of mislabeling by pharmacists would justify holding the petitioners as well as the pharmacists liable for trademark infringement, Ives had made no showing sufficiently to justify preliminary relief. *Id.*, at 945. Ives had not established that the petitioners conspired with the pharmacists or suggested that they disregard physicians' prescriptions.

The Court of Appeals for the Second Circuit affirmed. 601 F. 2d 631 (1979). To assist the District Court in the upcoming trial on the merits, the appellate court defined the elements of a claim based upon § 32 in some detail. Relying primarily upon *Coca-Cola Co.* v. *Snow Crest Beverages, Inc.*, 64 F. Supp. 980 (Mass. 1946), aff'd, 162 F. 2d 280 (CA1), cert. denied, 332 U. S. 809 (1947), the court stated that the petitioners would be liable under § 32 either if they suggested, even by implication, that retailers fill bottles with generic cyclandelate and label the bottle with Ives' trademark or if

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See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 232 (1964); *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 122 (1938).

[11] To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself. See *Kellogg Co.* v. *National Biscuit Co.*, *supra*, at 118.

the petitioners continued to sell cyclandelate to retailers whom they knew or had reason to know were engaging in infringing practices. 601 F. 2d, at 636.

C

After a bench trial on remand, the District Court entered judgment for the petitioners. 488 F. Supp. 394 (1980). Applying the test approved by the Court of Appeals to the claim based upon § 32, the District Court found that the petitioners had not suggested, even by implication, that pharmacists should dispense generic drugs incorrectly identified as CYCLOSPASMOL.[12]

In reaching that conclusion, the court first looked for direct evidence that the petitioners intentionally induced trademark infringement. Since the petitioners' representatives do not make personal visits to physicians and pharmacists, the petitioners were not in a position directly to suggest improper drug substitutions. Cf. *William R. Warner & Co.* v. *Eli Lilly & Co.*, 265 U. S. 526, 530–531 (1924); *Smith, Kline & French Laboratories* v. *Clark & Clark*, 157 F. 2d 725, 731 (CA3), cert. denied, 329 U. S. 796 (1946). Therefore, the court concluded, improper suggestions, if any, must have come from catalogs and promotional materials. The court determined, however, that those materials could not "fairly be read" to suggest trademark infringement. 488 F. Supp., at 397.

The trial court next considered evidence of actual instances of mislabeling by pharmacists, since frequent improper substitutions of a generic drug for CYCLOSPASMOL could provide circumstantial evidence that the petitioners, merely by making available imitative drugs in conjunction with comparative price advertising, implicitly had suggested that pharmacists substitute improperly. After reviewing the evi-

[12] The District Court also found that the petitioners did not continue to provide drugs to retailers whom they knew or should have known were engaging in trademark infringement. 488 F. Supp., at 397. The Court of Appeals did not discuss that finding, and we do not address it.

dence of incidents of mislabeling, the District Court concluded that such incidents occurred too infrequently to justify the inference that the petitioners' catalogs and use of imitative colors had "impliedly invited" druggists to mislabel. *Ibid.* Moreover, to the extent mislabeling had occurred, the court found it resulted from pharmacists' misunderstanding of the requirements of the New York Drug Substitution Law, rather than from deliberate attempts to pass off generic cyclandelate as CYCLOSPASMOL. *Ibid.*

The District Court also found that Ives failed to establish its claim based upon § 43(a). In reaching its conclusion, the court found that the blue and blue-red colors were functional to patients as well as to doctors and hospitals: many elderly patients associate color with therapeutic effect; some patients commingle medications in a container and rely on color to differentiate one from another; colors are of some, if limited, help in identifying drugs in emergency situations; and use of the same color for brand name drugs and their generic equivalents helps avoid confusion on the part of those responsible for dispensing drugs. *Id.*, at 398–399. In addition, because Ives had failed to show that the colors indicated the drug's origin, the court found that the colors had not acquired a secondary meaning. *Id.*, at 399.

Without expressly stating that the District Court's findings were clearly erroneous, and for reasons which we discuss below, the Court of Appeals concluded that the petitioners violated § 32. 638 F. 2d 538 (1981). The Court of Appeals did not reach Ives' other claims. We granted certiorari, 454 U. S. 891 (1981), and now reverse the judgment of the Court of Appeals.

III

A

As the lower courts correctly discerned, liability for trademark infringement can extend beyond those who actually mislabel goods with the mark of another. Even if a manufacturer does not directly control others in the chain of distribu-

tion, it can be held responsible for their infringing activities under certain circumstances. Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.[13] See *William R. Warner & Co.* v. *Eli Lilly & Co.*, *supra; Coca-Cola Co.* v. *Snow Crest Beverages, Inc.*, *supra.*

It is undisputed that those pharmacists who mislabeled generic drugs with Ives' registered trademark violated § 32.[14]

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[13] JUSTICE WHITE, in his opinion concurring in the result, voices his concern that we may have "silently acquiesce[d] in a significant change in the test for contributory infringement." *Post*, at 861. His concern derives from his perception that the Court of Appeals abandoned the standard enunciated by Judge Friendly in its first opinion, a standard which both we and JUSTICE WHITE approve, *post*, at 859–860. The Court of Appeals, however, expressly premised its second opinion on "the governing legal principles . . . set forth in Judge Friendly's opinion upon the earlier appeal, 601 F. 2d 631 (2d Cir. 1979)," and explicitly claimed to have rendered its second decision by "[a]pplying those principles . . . ." 638 F. 2d 538, 542 (1981).

JUSTICE WHITE's concern is based on a comment by the Court of Appeals that the generic manufacturers "could reasonably anticipate" illegal substitution of their drugs. *Id.*, at 543. If the Court of Appeals had relied upon that statement to define the controlling legal standard, the court indeed would have applied a "watered down" and incorrect standard. As we read the Court of Appeals' opinion, however, that statement was intended merely to buttress the court's conclusion that the legal test for contributory infringement, as earlier defined, had been met. See *infra*, at 856–857.

[14] Such blatant trademark infringement inhibits competition and subverts both goals of the Lanham Act. By applying a trademark to goods produced by one other than the trademark's owner, the infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain. See S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946). At the same time, the infringer deprives consumers of their ability to distinguish among the goods of competing manufacturers. See H. R. Rep. No. 944, 76th Cong., 1st Sess., 3 (1939).

However, whether these petitioners were liable for the pharmacists' infringing acts depended upon whether, in fact, the petitioners intentionally induced the pharmacists to mislabel generic drugs or, in fact, continued to supply cyclandelate to pharmacists whom the petitioners knew were mislabeling generic drugs. The District Court concluded that Ives made neither of those factual showings.

B

In reviewing the factual findings of the District Court, the Court of Appeals was bound by the "clearly erroneous" standard of Rule 52(a), Federal Rules of Civil Procedure. *Pullman-Standard* v. *Swint*, *ante*, p. 273. That Rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). Because of the deference due the trial judge, unless an appellate court is left with the "definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), it must accept the trial court's findings.[15]

IV

In reversing the District Court's judgment, the Court of Appeals initially held that the trial court failed to give sufficient weight to the evidence Ives offered to show a "pattern of illegal substitution and mislabeling in New York. . . ."[16]

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[15] Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard. *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 194, n. 9 (1963). However, in this instance the District Court applied correct legal principles when it adopted the precise test developed by the Court of Appeals. Compare 601 F. 2d 631, 636 (1979), with 488 F. Supp., at 397.

[16] As the opinions from the lower courts reveal, more than one inference can be drawn from the evidence presented. Prior to trial, test shoppers

638 F. 2d, at 543. By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the trial court's findings concerning the significance of the instances of mislabeling were not clearly erroneous, they should not have been disturbed.

Next, after completing its own review of the evidence, the Court of Appeals concluded that the evidence was "clearly sufficient to establish a § 32 violation." *Ibid.* In reaching its conclusion, the Court of Appeals was influenced by several factors. First, it thought the petitioners reasonably could have anticipated misconduct by a substantial number of the pharmacists who were provided imitative, lower priced products which, if substituted for the higher priced brand name without passing on savings to consumers, could provide an economic advantage to the pharmacists. *Ibid.*[17] Second, it

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hired by Ives gave CYCLOSPASMOL prescriptions on which the "substitution permissible" line was signed to 83 New York pharmacists. Forty-eight of the pharmacists dispensed CYCLOSPASMOL; the rest dispensed a generic drug. Ten of the thirty-five pharmacists who dispensed a generic drug included the word CYCLOSPASMOL on the label, although 5 of those 10 also included some form of the word "generic." Nine of the ten told the consumer of the substitution. Only 1 of the 10 charged the brand name price for the generic drug. 488 F. Supp., at 397.

The District Court concluded that that evidence did not justify the inference that the petitioners' catalogs invite pharmacists to mislabel. *Ibid.* The Court of Appeals, emphasizing that 10 of the 35 druggists who dispensed a generic drug mislabeled it as CYCLOSPASMOL, found a pattern of substitution and mislabeling. 638 F. 2d, at 543. The dissenting judge on the appellate panel, emphasizing that only 1 of 83 pharmacists attempted an illegal substitution and reaped a profit made possible by the color imitation, concluded the facts supported the District Court's finding that mislabeling resulted from confusion about the substitution laws rather than from profit considerations. *Id.*, at 546.

On the basis of the record before us, the inferences drawn by the District Court are not, as a matter of law, unreasonable.

[17] The Court of Appeals cited no evidence to support its conclusion, which apparently rests upon the assumption that a pharmacist who has been pro-

disagreed with the trial court's finding that the mislabeling which did occur reflected confusion about state law requirements. *Id.*, at 544.[18] Third, it concluded that illegal substitution and mislabeling in New York are neither *de minimis* nor inadvertent. *Ibid.*[19] Finally, the Court of Appeals indicated it was further influenced by the fact that the petitioners did not offer "any persuasive evidence of a legitimate reason unrelated to CYCLOSPASMOL" for producing an imitative product. *Ibid.*[20]

Each of those conclusions is contrary to the findings of the District Court. An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a

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vided an imitative generic drug will be unable to resist the temptation to profit from illegal activity. We find no support in the record for such a far-reaching conclusion. Moreover, the assumption is inconsistent with the District Court's finding that only a "few instances," rather than a substantial number, of mislabelings occurred. 488 F. Supp., at 397.

[18] The Court of Appeals characterized the District Court's finding as resting on "a short and casual exchange with a witness . . . ." 638 F. 2d, at 544. The District Court, however, stated that its conclusion that pharmacists did not understand the drug substitution law rested upon the fact that, in numerous instances, a pharmacist told a consumer that state law prohibited filling prescriptions with generic products, even though the consumer had presented a prescription allowing generic substitution. 488 F. Supp., at 397–398.

[19] In reaching that conclusion, the Court of Appeals took judicial notice of the fact that, in May 1980, six indictments were handed down in New York City charging pharmacists with substituting cyclandelate for CYCLOSPASMOL. We note that the evidence of which the Court of Appeals took judicial notice not only involved no convictions but also reflected knowledge that was not available when the District Court rendered its decision. Moreover, even if the District Court failed to consider relevant evidence, which would have been an error of law, the Court of Appeals, rather than make its own factual determination, should have remanded for further proceedings to allow the trial court to consider the evidence. See *Pullman-Standard* v. *Swint*, *ante*, at 291–292.

[20] The Court of Appeals reached that conclusion despite the District Court's express finding that, for purposes of § 43(a), the capsule colors

more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *Real Estate Boards*, 339 U. S. 485, 495 (1950).

V

The Court of Appeals erred in setting aside findings of fact that were not clearly erroneous. Accordingly, the judgment of the Court of Appeals that the petitioners violated § 32 of the Lanham Act is reversed.

Although the District Court also dismissed Ives' claims alleging that the petitioners violated § 43(a) of the Lanham Act and the state unfair competition law, the Court of Appeals did not address those claims. Because § 43(a) prohibits a broader range of practices than does § 32, as may the state unfair competition law, the District Court's decision dismissing Ives' claims based upon those statutes must be independ-

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were functional. See *supra*, at 853. As the dissent below noted, the Court of Appeals' majority either disregarded the District Court's finding of functionality, see 638 F. 2d, at 545, n. 1 (Mulligan, J., dissenting), or implicitly rejected that finding as not "persuasive." See *id.*, at 547.

While the precise basis for the Court of Appeals' ruling on this issue is unclear, it is clear that the Court of Appeals erred. The appellate court was not entitled simply to disregard the District Court's finding of functionality. While the doctrine of functionality is most directly related to the question of whether a defendant has violated § 43(a) of the Lanham Act, see generally Note, The Problem of Functional Features: Trade Dress Infringement Under Section 43(a) of the Lanham Act, 82 Colum. L. Rev. 77 (1982), a finding of functionality may also be relevant to an action involving § 32. By establishing to the District Court's satisfaction that uniform capsule colors served a functional purpose, the petitioners offered a legitimate reason for producing an imitative product.

Nor was the Court of Appeals entitled simply to dismiss the District Court's finding of functionality as not "persuasive." If the District Court erred as a matter of law, the Court of Appeals should have identified the District Court's legal error. If the Court of Appeals disagreed with the District Court's factual findings, it should not have dismissed them without finding them clearly erroneous.

ently reviewed. Therefore, we remand to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, concurring in the result.

We granted certiorari in these cases in order to review the legal standard employed by the Second Circuit in finding that a generic drug manufacturer is vicariously liable for trademark infringement committed by pharmacists who dispense the generic drug. The Court implicitly endorses the legal standard purportedly employed by the Court of Appeals, *ante*, at 853–854, but finds that the court erred in setting aside factual findings that were not clearly erroneous. The question whether the Court of Appeals had misapplied the clearly-erroneous rule, however, was not presented in the petitions for certiorari. This was conceded at oral argument.[1] Tr. of Oral Arg. 69. Our Rule 21.1(a) states that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." The majority suggests no reason for ignoring our own Rule. Furthermore, if the issue presented in the petitions for certiorari had been whether the clearly-erroneous standard, although properly invoked, was erroneously applied, it is doubtful in my mind that this fact-bound issue would have warranted certiorari. I nevertheless concur in reversal because I believe that the Court of Appeals has watered down to an impermissible extent the standard for finding a violation of § 32 of the Lanham Act, 15 U. S. C. § 1114.

In its first opinion in this litigation, the Court of Appeals indicated that a "manufacturer or wholesaler would be liable

[1] The third question in petitioner Darby Drug Co.'s petition embraced the claim that the Court of Appeals had failed to observe Rule 52(a) in overturning the District Judge's finding of functionality. As discussed below, I agree with the Court's invocation of Rule 52 with respect to this aspect of the decision below.

under § 32 if he suggested, even if only by implication, that a retailer fill a bottle with the generic capsules and apply Ives' mark to the label, or continued to sell capsules containing the generic drug which facilitated this to a druggist whom he knew or had reason to know was engaging in the practices just described." 601 F. 2d 631, 636 (1979) *(Ives II)*. The District Court applied this test but concluded that no violation of § 32 had been shown. On appeal after trial, a majority of the Second Circuit found defendants liable for contributory infringement by revising and expanding the doctrine of contributory trademark infringement. 638 F. 2d 538 (1981) *(Ives IV)*:

> "By using capsules of identical color, size, and shape, together with a catalog describing their appearance and listing comparable prices of CYCLOSPASMOL and generic cyclandelate, appellees *could reasonably anticipate* that their generic drug product would by a substantial number of druggists be substituted illegally . . . . This amounted to a suggestion, at least by implication, that the druggists take advantage of the opportunity to engage in such misconduct." *Id.*, at 543 (emphasis added).

Ives II required a showing that petitioners intended illegal substitution or knowingly continued to supply pharmacists palming off generic cyclandelate as CYCLOSPASMOL; *Ives IV* was satisfied merely by the failure to "reasonably anticipate" that illegal substitution by some pharmacists was likely. In my view, this is an erroneous construction of the statutory law governing trademark protection.

William R. Warner & Co. v. *Eli Lilly & Co.*, 265 U. S. 526 (1924), made clear that a finding of contributory infringement requires proof of either an intent to induce illegal substitution or continued sales to particular customers whom the manufacturer knows or should know are engaged in improper palming off. In that case, it was shown that the manufacturer's salesmen actively induced, either in direct terms or by insinuation, the filling of requests for Coco-Quinine with

Quin-Coco. "The wrong was in designedly enabling the dealers to palm off the preparation as that of the respondent."[2] *Id.*, at 530. *Coca-Cola Co.* v. *Snow Crest Beverages, Inc.*, 64 F. Supp. 980, 989 (Mass. 1946), aff'd, 162 F. 2d 280 (CA1), cert. denied, 332 U. S. 809 (1947), the case upon which the Court of Appeals relied in *Ives II*, stands for this very proposition. There was no contributory infringement in Snow Crest's manufacture of a product identical in appearance to that of Coca-Cola. Judge Wyzanski observed that

> "any man of common sense knows that in any line of business . . . there are some unscrupulous persons, who, when it is to their financial advantage to do so, will palm off on customers a different product from that ordered by the customer." 64 F. Supp., at 988–989.

These cases reflect the general consensus. 2 J. McCarthy, Trademarks and Unfair Competition § 25:2 (1973) ("[T]he supplier's duty does not go so far as to require him to refuse to sell to dealers who merely *might* pass off its goods"). The mere fact that a generic drug company can anticipate that some illegal substitution will occur to some unspecified extent, and by some unknown pharmacists, should not by itself be a predicate for contributory liability. I thus am inclined to believe that the Court silently acquiesces in a significant change in the test for contributory infringement.

Diluting the requirement for establishing a prima facie case of contributory trademark infringement is particularly unjustified in the generic drugs field. Preventing the use of generic drugs of the same color to which customers had become accustomed in their prior use of the brand name product interferes with the important state policy, expressed in New York and 47 other States, of promoting the substitution of

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[2] Although *Warner* and other cases were decided before § 32 was enacted, the purpose of the Lanham Act was to codify and unify the common law of unfair competition and trademark protection. S. Rep. No. 1333, 79th Cong., 2d Sess. (1946). There is no suggestion that Congress intended to depart from *Warner* and other contemporary precedents.

generic formulations. See Warner, Consumer Protection and Prescription Drugs: The Generic Drug Substitution Laws, 67 Ky. L. J. 384 (1978–1979).

The Court of Appeals concluded that there was no "persuasive evidence of a legitimate reason" for petitioners to use imitative colors. The District Court, however, had expressly found that for purposes of § 43(a), the capsule colors were functional. With respect to functionality, I fully agree with the Court that the Court of Appeals erred in setting aside factual findings without finding that they were clearly erroneous. The District Court found that capsule color was functional in several respects: patient anxiety and confusion were likely if accustomed medicine were dispensed in a different color; capsule colors assist patients in identifying the correct pill to take; standard colors help physicians identify the drug involved in case of overdose.[3] Clearly, the Court of Appeals could not reject these findings merely because it viewed the evidence as less persuasive than did the District Court. Rule 52(a) imposes a stricter standard.

Finally, although the Court states that a "finding of functionality may also be relevant to an action involving § 32," it does not explicate the relationship of functionality in a § 32 case. It is my view that a finding of functionality offers a complete affirmative defense to a contributory in-

[3] "The reality is that for every link in the distributive chain (from producer to ultimate consumer) the color and shape of drugs dispensed by prescription do perform a function. For each of them, color or shape may be a convenient shorthand code by which to identify the drug and its milligram dosage so that mistakes can be avoided in the interests of pharmaceutical precaution and patient safety. For the patient-user, of course, the constancy of color and shape may be as psychologically reassuring and therefore as medically beneficial as the drug itself; in addition, they also serve to identify the drug for his ingestion . . . ."

"[I]f the generic producer is constrained by § 43(a), trademark law, or the law of unfair competition to adopt a substantially different color . . . the therapeutic value of his generic drug might be seriously impaired and confusion at the pharmacist level could be compounded beyond redemption." 3 R. Callmann, Unfair Competition, Trademarks and Monopolies § 82.1(m), pp. 217, 213 (Supp. 1981).

fringement claim predicated solely on the reproduction of a functional attribute of the product. A functional characteristic is "an important ingredient in the commercial success of the product," 601 F. 2d, at 643, and, after expiration of a patent, it is no more the property of the originator than the product itself. It makes no more sense to base contributory infringement upon the copying of functional colors than on the petitioners' decision to use the same formulation of the drug, or even to market the generic substitute in the first place. To be sure, the very existence of generic drugs "facilitates" illegal substitution. But Ives no longer has a patent for cyclandelate, "and the defendants have a right to reproduce it as nearly as they can." *Saxlehner* v. *Wagner*, 216 U. S. 375, 380 (1910) (Holmes, J.). Reproduction of a functional attribute is legitimate competitive activity.

I am also mindful that functionality is a defense to a suit under § 43(a) of the Lanham Act alleging damages from a competitor's "false designation of origin" on a good.[4] The use of a product or package design that is so similar to that of another producer that it is likely to confuse purchasers as to the product's source may constitute "false designation of origin" within the meaning of the Act.[5] As the Court of Appeals noted in *Ives II*, § 43(a) "goes beyond § 32 in making certain types of unfair competition federal statutory torts," 601 F. 2d, at 641. Section 43(a) offers the direct protection of Ives' interest in this case, and it is not surprising that the alleged

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[4] See, *e. g .*, *International Order of Job's Daughters* v. *Lindeburg & Co.*, 633 F. 2d 912, 917 (CA9 1980), cert. denied, 452 U. S. 941 (1981); *Keebler Co.* v. *Rovira Biscuit Corp.*, 624 F. 2d 366, 378 (CA1 1980). See generally Note, The Problem of Functional Features: Trade Dress Infringement Under Section 43(a) of the Lanham Act, 82 Colum. L. Rev. 77, 81 (1982) ("Over the past three years the rule that functionality of a copied feature bars relief in section 43(a) claims for trade dress infringement or product imitation has become the plurality view").

[5] See, *e. g.*, *Truck Equip. Serv. Co.* v. *Fruehauf Corp.*, 536 F. 2d 1210 (CA8), cert. denied, 429 U. S. 861 (1976); *Warner Bros., Inc.* v. *Gay Toys, Inc.*, 658 F. 2d 76 (CA2 1981). See also Note, 82 Colum. L. Rev., *supra*, at 78–80.

§ 43(a) violation was the primary claim in this litigation, as it has been in other cases of this genre. It would be anomalous for the imitation of a functional feature to constitute contributory infringement for purposes of § 32, while the same activity is not a "false designation of origin" under § 43(a).[6]

I would reverse the decision of the Court of Appeals and remand for review of the District Court's findings consistent with the principles stated above.

JUSTICE REHNQUIST, concurring in the result.

I agree that the judgment of the Court of Appeals should be reversed. That court set aside factual findings of the District Court without having found them to be clearly erroneous as required by Rule 52(a) of the Federal Rules of Civil Procedure. I disagree, however, with the Court's determining for itself that the findings of the District Court were not clearly erroneous. I think in the usual case this is a question best decided by the courts of appeals, who have a good deal more experience with the application of this principle than we do, and I see no reason to make an exception in this case.

I also assume, correctly I hope, that the Court's discussion of appellate review of trial court findings in bench trials, *ante*, at 855, is limited to cases in which the appellate court has not found the trial court findings to be "clearly erroneous." *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), upon which the Court relies, establishes the authority of a reviewing court to make its own findings, contrary to those of the trial court, where it has determined the latter to be "clearly erroneous."

I agree with the Court that these cases should be remanded to the Court of Appeals to review the District Court's dismissal of respondent's claims under § 43(a) of the Lanham Act and its state-law claims.

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[6] This is not to suggest that the copying of a functional feature protects a defendant from § 32 liability predicated on active inducement of trademark infringement or protects a defendant who has also reproduced nonfunctional features.

UNITED STATES v. LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE)

ON BILL OF COMPLAINT

No. 9, Orig. Decided March 17, 1975, and April 28, 1980—Decree entered March 17, 1975—Supplemental decree entered June 16, 1975—Final decree entered June 22, 1981—Order entered June 1, 1982.

Order entered.

Opinion reported: 446 U. S. 253; decree reported: 420 U. S. 529; supplemental decree reported: 422 U. S. 13; final decree reported: 452 U. S. 726.

ORDER

Pursuant to this Court's Final Decree herein entered on June 22, 1981, 452 U. S. 726, the United States and the State of Louisiana filed their Final Accountings, and, subsequently, each party filed Objections to the Accounting of the other. By an Order entered on January 11, 1982, 454 U. S. 1135, the Court referred the said Objections to its Special Master. The parties have now agreed upon these matters, have submitted to the Special Master a proposed Order, and the Special Master, with the concurrence of both parties, has recommended its entry by the Court.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED:

1. The Final Report of the Special Master is received and ordered filed.

2. The objections to accountings previously filed are sustained to the extent recommended in the Report of the Special Master.

3. All accountings required by the Court's Decree of June 22, 1981, have been made and, as supplemented by the ruling on the objections thereto, are now approved.

4. The United States is directed forthwith to pay over to the State of Louisiana the outstanding sum of $3,251,609.76.

5. After the payment directed by paragraph 4 above, neither party shall be accountable to the other for any further

payment in respect of the matters in controversy in these proceedings between the United States and the State of Louisiana.

6. Upon receipt by the State of Louisiana of the payment directed by paragraph 4, above, the Interim Agreement of October 12, 1956, shall be deemed terminated for all purposes and all sums remaining in the impounded fund account established pursuant to that Agreement are unconditionally released to the United States.

7. The account submitted by the Special Master is approved and the balance owing to him shall be paid in equal shares by the United States and the State of Louisiana.

8. The Special Master is discharged in this case insofar as the proceedings involve the controversy between the United States and the State of Louisiana.

JUSTICE MARSHALL took no part in the consideration or decision of this order.

CALIFORNIA v. NEVADA

ON BILL OF COMPLAINT

No. 73, Orig. Decided June 10, 1980—Decree entered June 1, 1982

Decree entered.

Opinion reported: 447 U. S. 125.

The Report of the Special Master is received and ordered filed.

DECREE

For the purpose of giving effect to the opinion of this Court announced on June 10, 1980, 447 U. S. 125, and the stipulation of the parties entered into on February 5, 1982, and approved by the Special Master:

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. That the location of the boundary between the States of California and Nevada is as hereafter specified:

Beginning at the Initial Point on the California-Nevada boundary as established under authority of the Act of June 10, 1872, 17 Stat. 358, by Allexey W. Von Schmidt in 1872 as an eight (8) inch square wood post set in a large mound of stone at the intersection to the 42nd parallel of north latitude along the southern boundary of the State of Oregon and the 120th degree of longitude west from Greenwich, each as reported by him; thence running southerly along said 1872 boundary as surveyed and marked by Allexey W. Von Schmidt to a cast iron monument designated as Von Schmidt Milepost 191 on said boundary; thence S 00°09′15″.21 W along a line directed toward a standard National Geodetic Survey brass marker cemented in a granite formation and stamped "VS 120, 1981", located at the geographic position of: Latitude 38°53′51″.59866 Longitude 120°00′20″.93116, a distance of 80,191.63 feet to an intersection in Lake Tahoe with a line extending between two points, the first of which is a standard National Geodetic Survey brass marker cemented

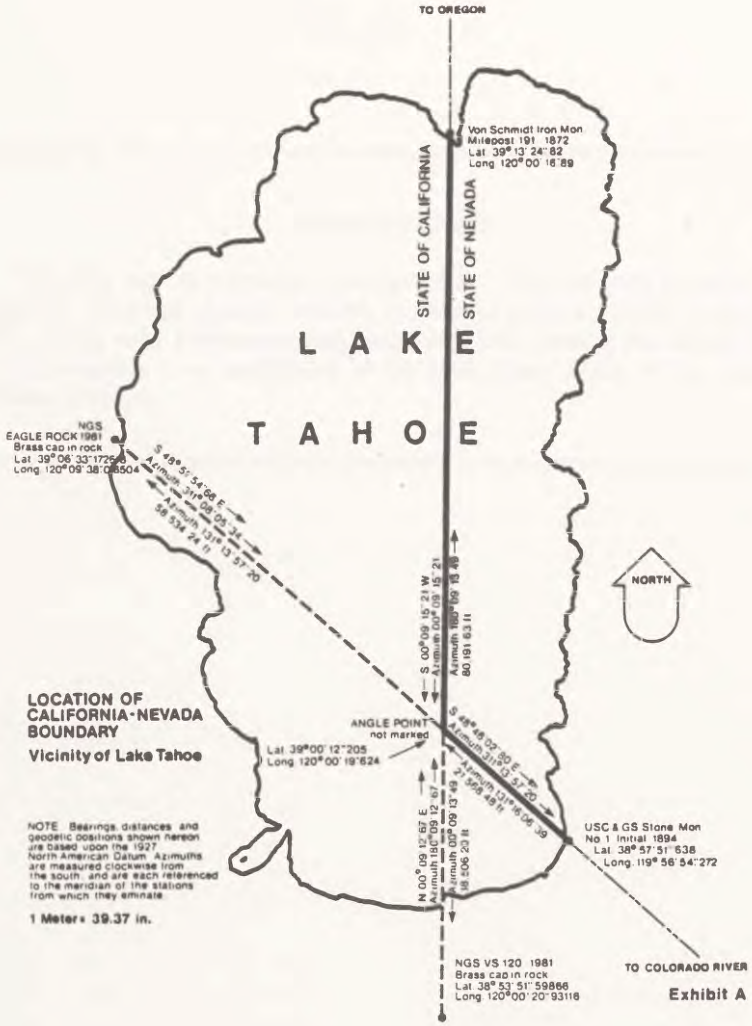
in granite and stamped "EAGLE ROCK, 1981," which has a geographic position of: Latitude 39°06′33″.17268, Longitude 120°09′38″.06504, and the second being a granite stone with copper bolt identified as No. 1 (Initial 1894), being the first monumented point on the California-Nevada Oblique 1893–1899 Boundary survey as determined and marked by the U. S. Coast and Geodetic Survey; thence from said intersection point in Lake Tahoe S 48°46′02″.80 E, 21,568.48 feet to said Monument No. 1 (Initial 1894); thence proceeding southeasterly along the oblique California-Nevada boundary line as surveyed and marked by the U. S. Coast and Geodetic Survey under authority of the Act of August 5, 1892, 27 Stat. 357, during the period 1893–1899, to Point No. 1 described in the Interstate Compact Defining the Boundary Between the States of Arizona and California executed on March 12, 1963, being a point common to Point No. 1 described in the Interstate Compact Defining A Portion of the Arizona-Nevada Boundary On The Colorado River, executed February 6, 1960. Bearings, distances, and geographic positions used hereinbefore are based upon the 1927 North American Datum and are denoted on the attached map, Exhibit A, which is incorporated herein by reference.

2. That the intersection of the two lines described herein shall form the only angle point of the true California-Nevada state boundary within the waters of Lake Tahoe, which angle point shall be considered as satisfying the definition of the intersection of the 120th meridian west of Greenwich with the 39th parallel of north latitude as prescribed in the constitutions of California and Nevada.

3. That the necessary expenses incurred by the Special Master incident to this litigation and all other proper expenses incurred jointly by the parties shall be equally borne by the parties.

4. That, except as provided in paragraph 3 herein, each party shall bear its own expenses.

5. That any unexpended funds contributed by the parties to the Special Master for necessary expenses be returned to the parties in proportion to their contributions.



Reporter's Note

The next page is purposely numbered 901. The numbers between 869 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 MARCH 29 THROUGH JUNE 1, 1982

MARCH 29, 1982

Dismissal Under Rule 53

No. 81–1564. KONIAG, INC. *v.* STRATMAN ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 656 F. 2d 1321.

Affirmed on Appeal

No. 81–1000. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* UNITED STATES. Affirmed on appeal from C. A. 9th Cir. Reported below: 650 F. 2d 1127.

Appeal Dismissed

No. 81–1505. CAMELLIA CORP. *v.* CORNELL. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 248 Ga. 449, 283 S. E. 2d 264.

Miscellaneous Orders

No. A–755. YATES *v.* UNITED STATES COAST GUARD ET AL. Application for injunction, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–783. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL. *v.* DAGGETT ET AL. D. C. N. J. Motions of appellees to vacate the stay entered by JUSTICE BRENNAN on March 15, 1982 [455 U. S. 1303], and requests to expedite docketing of the appeal denied.

No. A–791. CARPENTER *v.* JAMERSON, SHERIFF. Application to continue the stay entered by the Supreme Court of Ohio, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–786. TERRAZAS ET AL. *v.* CLEMENTS, GOVERNOR OF TEXAS, ET AL. Application for stay of the order of the United States District Court for the Northern District of Texas, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE POWELL took no part in the consideration or decision of this application.

No. A–826. QUEENSGATE INVESTMENT CO., DBA HOLIDAY INN *v.* LIQUOR CONTROL COMMISSION OF OHIO. Sup. Ct. Ohio. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. A–828 (81–395). UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SADLOWSKI ET AL. C. A. D. C. Cir. [Certiorari granted, 454 U. S. 962.] Application of petitioner for leave to file a reply brief in excess of the page limitations, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–248. IN RE DISBARMENT OF HOLOBER. Disbarment entered. [For earlier order herein, see 454 U. S. 936.]

No. D–249. IN RE DISBARMENT OF BEATTY. Disbarment entered. [For earlier order herein, see 454 U. S. 937.]

No. D–255. IN RE DISBARMENT OF HOLMAN. Disbarment entered. [For earlier order herein, see 455 U. S. 902.]

No. D–261. IN RE DISBARMENT OF HAMMERSMITH. It is ordered that Robert K. Hammersmith, of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–262. IN RE DISBARMENT OF AUWAERTER. It is ordered that John F. Auwaerter, of Sylvania, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–263. IN RE DISBARMENT OF KITCHEN. It is ordered that John W. Kitchen, of Toledo, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–264. IN RE DISBARMENT OF EILBERG. It is ordered that Joshua Eilberg, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–1952. 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 petitioners for leave to file reply brief out of time granted.

No. 81–184. UNITED STATES *v.* SECURITY INDUSTRIAL BANK ET AL. C. A. 10th Cir. [Probable jurisdiction noted, 454 U. S. 1122.] Motion of Security Industrial Bank for divided argument and for additional time for oral argument 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 respondent for divided argument to permit American Federation of Labor and Congress of Industrial Organizations to present oral argument as *amicus curiae* denied.

No. 81–497. SUMMIT VALLEY INDUSTRIES, INC. *v.* LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA. C. A. 9th Cir. [Certiorari granted, 454 U. S. 1079.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 81–1731. SCHATZLE *v.* KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. D. C. W. D. Mo. Motion of appellant to expedite consideration of the appeal denied.

No. 81–5321. ENMUND *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, 454 U. S. 939.] Motion of respondent to strike portions of petitioner's reply brief denied.

No. 81–6187. IN RE BOYER. Petition for writ of mandamus denied.

No. 81–6192. IN RE HANSON. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 81–1370. ENERGY RESERVES GROUP, INC. *v.* KANSAS POWER & LIGHT CO. Appeal from Sup. Ct. Kan. Motion of State Corporation Commission of Kansas for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Reported below: 230 Kan. 176, 630 P. 2d 1142.

Certiorari Granted

No. 81–1095. MORRIS, WARDEN *v.* SLAPPY. C. A. 9th Cir. Certiorari granted. Reported below: 649 F. 2d 718.

No. 81–1476. UNITED STATES *v.* RODGERS ET AL.; and UNITED STATES *v.* INGRAM ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 649 F. 2d 1117 (first case); 649 F. 2d 1128 (second case).

Certiorari Denied. (See also No. 81–1505, *supra.*)

No. 80–2128. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* HENSLEY. C. A. D. C. Cir. Certiorari denied. Reported below: 210 U. S. App. D. C. 151, 655 F. 2d 264.

No. 81–547. DIAZ ET AL. *v.* BEYER ET UX. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. Reported below: 611 S. W. 2d 726.

No. 81-1001. RIVENBURGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 81-1115. SOUTHWESTERN BAPTIST THEOLOGICAL SEMINARY *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 651 F. 2d 277.

No. 81-1191. WIGGINS BROTHERS, INC., ET AL. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 667 F. 2d 77.

No. 81-1205. NITROCHEM, INC. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 215 U. S. App. D. C. 1, 665 F. 2d 1304.

No. 81-1219. GOODSTEIN ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 1068.

No. 81-1236. GARNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 834.

No. 81-1242. GILLILAND ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 709.

No. 81-1260. ALLNUTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 901.

No. 81-1264. FOGG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 652 F. 2d 551.

No. 81-1382. ATKINSON *v.* ATKINSON, AKA GOELZ. Sup. Ct. Ill. Certiorari denied. Reported below: 87 Ill. 2d 174, 429 N. E. 2d 465.

No. 81-1402. O'GRADY ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81-1433. REIMNITZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 946, 423 N. E. 2d 934.

No. 81-1446. HUNTINGTON MEMORIAL HOSPITAL *v.* MISSIRLIAN. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 546.

No. 81-1447. LOETERMAN ET AL. *v.* TOWN OF BROOKLINE ET AL. C. A. 1st Cir. Certiorari before judgment denied.

No. 81-1450. MICHELIN TIRE CORP. *v.* COULTER. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 622 S. W. 2d 421.

No. 81-1452. FORDEES CORP. *v.* VULCAN, INC. C. A. 6th Cir. Certiorari denied. Reported below: 658 F. 2d 1106.

No. 81-1456. MARIN *v.* MYERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 57.

No. 81-1471. IMMER *v.* PUERTO RICO MARITIME SHIPPING AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81-1474. COLE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 81-1475. TAYLOR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 222 Va. 816, 284 S. E. 2d 833.

No. 81-1477. WELLS *v.* WHITE, GOVERNOR OF ARKANSAS, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 197, 623 S. W. 2d 187.

No. 81-1484. ALLISON ET AL. *v.* CONTINENTAL GROUP, INC. Sup. Ct. La. Certiorari denied. Reported below: 404 So. 2d 428.

No. 81–1519. DARWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 663 F. 2d 106.

No. 81–1523. STEWART ET AL. *v.* SOCIALIST WORKERS PARTY ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–1539. BLOCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 1086.

No. 81–1541. BALLENGER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 406 So. 2d 995.

No. 81–1576. SNISKY, T/A PANTHER VALLEY COIN EXCHANGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81–1579. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81–1601. IRWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 661 F. 2d 1063.

No. 81–1603. SALAZAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 562.

No. 81–5623. JOHNSON *v.* FOGG, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 653 F. 2d 750.

No. 81–5836. IN RE LINGER. Sup. Ct. Ohio. Certiorari denied.

No. 81–5894. LEE *v.* GILSTRAP, CHIEF OF POLICE, WAYNE COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 999.

No. 81–5907. ELLIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 981, 418 N. E. 2d 88.

No. 81–5949. MORENO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–5980. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 621 S. W. 2d 613.

No. 81–6163. YOUNG *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1225.

No. 81–6166. BRENT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 49 Md. App. 605, 434 A. 2d 1030.

No. 81–6167. AFRICA *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 662 F. 2d 1025.

No. 81–6175. NELSON *v.* ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1329.

No. 81–6176. OWENS *v.* MILLER. C. A. 3d Cir. Certiorari denied.

No. 81–6180. LINDSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1318.

No. 81–6182. BAKER *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–6186. BRENNIN *v.* KIRBY, COMMISSIONER OF THE SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 396, 436 N. Y. S. 2d 896.

No. 81–6190. SZIJARTO *v.* SINOW. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6194. TURNER *v.* ENGLE. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1331.

No. 81-6197. ALLEN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 304 N. W. 2d 260.

No. 81-6203. STATON *v.* WAINWRIGHT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 686.

No. 81-6209. SCOTT *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 662 F. 2d 428.

No. 81-6226. CHANG *v.* TEXAS YOUTH COUNCIL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 104.

No. 81-6256. PAYNE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 623 S. W. 2d 867.

No. 81-6263. HORTON *v.* COMPTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-6288. O'BRIEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1221.

No. 81-6290. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 668 F. 2d 258.

No. 81-6292. KING *v.* CARLSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6293. KING *v.* CARLSON ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6305. CANDA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 81-6312. GONSALVES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 668 F. 2d 73.

No. 81-6319. ANTONELLI *v.* CHICAGO POLICE DEPARTMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1334.

No. 81–417. WAINWRIGHT, CORRECTIONS SECRETARY *v.* PEREZ. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 627 F. 2d 762 and 640 F. 2d 596.

No. 81–1469. TENNESSEE *v.* WEBB. Sup. Ct. Tenn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 625 S. W. 2d 259.

No. 81–1516. ATKINS, CHAIRMAN, MISSOURI BOARD OF PROBATION AND PAROLE, ET AL. *v.* ELDRIDGE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 665 F. 2d 228.

No. 81–1295. SHEARSON HAYDEN STONE, INC., ET AL. *v.* HOPE ET AL. Ct. App. Cal., 1st App. Dist. Motion of New York Stock Exchange, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 122 Cal. App. 3d 147, 175 Cal. Rptr. 851.

No. 81–1517. HILDEBRAND *v.* BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY ET AL. C. A. 6th Cir. Motion of Lansing Michigan Branch of the American Civil Liberties Union of Michigan et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 662 F. 2d 439.

No. 81–6158. VANDERBILT *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 81–6172. CHRISTOPHER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–6158, 629 S. W. 2d 709; No. 81–6172, 407 So. 2d 198.

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. 81–963. FRIENDLY RETIREMENT CENTER, INC. *v.* COLLING, SUCCESSOR TRUSTEE, 455 U. S. 940;

No. 81–5508. SOUNESS *v.* VETERANS ADMINISTRATION, 454 U. S. 1088;

No. 81–5978. CREASY *v.* VIRGINIA, 455 U. S. 957;

No. 81–5998. SMITH *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 455 U. S. 958; and

No. 81–6000. RHODES *v.* UNITED STATES NAVY ET AL., 455 U. S. 958. Petitions for rehearing denied.

No. 81–921. KESSINGER ET AL. *v.* KENTUCKY, 455 U. S. 920; and

No. 81–5560. JOHNSON *v.* CONNECTICUT, 454 U. S. 1101. Motions for leave to file petitions for rehearing denied.

APRIL 5, 1982

Appeals Dismissed

No. 80–5227. MAFFEY *v.* OREGON EX REL. JUVENILE DEPARTMENT OF KLAMATH COUNTY. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 45 Ore. App. 2, 607 P. 2d 232.

No. 81–1034. NEW MEXICO EX REL. ROCK *v.* STOWERS. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A–799 (81–1719). PETRUSCH, DBA B & L DISTRIBUTION CENTER *v.* TEAMSTERS LOCAL 317, SYRACUSE, NEW YORK, ET AL. C. A. 2d Cir. Application for injunction, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–818. CONWAY *v.* UNITED STATES. C. A. 9th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–829. DIVISION 732, AMALGAMATED TRANSIT UNION *v.* METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY. C. A. 11th Cir. Application for stay, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. D–250. IN RE DISBARMENT OF DONOVAN. Disbarment entered. [For earlier order herein, see 454 U. S. 937.]

No. D–254. IN RE DISBARMENT OF WENCKE. Disbarment entered. [For earlier order herein, see 454 U. S. 1075.]

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 45 days. Reply briefs, if any, to such Exceptions may be filed within 30 days. JUSTICE MARSHALL and JUSTICE O'CONNOR took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 444 U. S. 1009.]

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. Motion for leave to file bill of complaint granted. Defendant is allowed 60 days within which to answer.

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 the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–1404. BRISCOE ET AL. *v.* LAHUE ET AL. C. A. 7th Cir. [Certiorari granted, 455 U. S. 1016.] Motion of petitioner Carlisle W. Briscoe for leave to proceed further herein *in forma pauperis* granted.

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 respondents to apportion advancement of funds for printing of the joint appendix denied.

No. 81–878. LARKIN ET AL. *v.* GRENDEL'S DEN, INC. C. A. 1st Cir. [Probable jurisdiction noted, 454 U. S. 1140.] Motion of Paul W. Johnson, Esquire, to permit Gerald J. Caruso, Esquire, to present oral argument *pro hac vice* granted.

No. 81–920. VERLINDEN B. V. *v.* CENTRAL BANK OF NIGERIA. C. A. 2d Cir. [Certiorari granted, 454 U. S. 1140.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Request for additional time for oral argument denied.

No. 81–1770. ORWOLL ET AL. *v.* LACOMB ET AL. D. C. Minn. Motion of Minnesota State Senate for leave to file a brief as *amicus curiae* granted. Motion of appellants to expedite consideration of the appeal denied. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 81–6218. IN RE JACKSON; and

No. 81–6317. IN RE SHELBY. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 81–1489. XEROX CORP. *v.* COUNTY OF HARRIS, TEXAS, ET AL. Appeal from Ct. App. Tex., 1st Sup. Jud. Dist. Probable jurisdiction noted. Reported below: 619 S. W. 2d 402.

Certiorari Granted

No. 81–1181. LOCKHEED AIRCRAFT CORP. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 215 U. S. App. D. C. 27, 665 F. 2d 1330.

No. 81–1506. FEDERAL ELECTION COMMISSION ET AL. *v.* NATIONAL RIGHT TO WORK COMMITTEE ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 214 U. S. App. D. C. 215, 665 F. 2d 371.

No. 81–680. HERMAN & MACLEAN *v.* HUDDLESTON ET AL.; and

No. 81–1076. HUDDLESTON ET AL. *v.* HERMAN & MACLEAN ET AL. C. A. 5th Cir. Certiorari in No. 81–680 granted. Certiorari in No. 81–1076 granted limited to Question 1 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 640 F. 2d 534.

No. 81–1214. MISSOURI *v.* HUNTER. Ct. App. Mo., Western Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 622 S. W. 2d 374.

No. 81–1493. GILLETTE CO. *v.* MINER. Sup. Ct. Ill. Motion of National Association of Independent Insurers et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 87 Ill. 2d 7, 428 N. E. 2d 478.

Certiorari Denied. (See also Nos. 80–5227 and 81–1034, *supra.*)

No. 81–826. AMERICAN COMMERCIAL LINES, INC. *v.* GRIFFITH ET AL.; OCEANIC NAVIGATION CORP. ET AL. *v.* SARAUW; and SILVER BULK SHIPPING, LTD. *v.* MCCARTHY. C. A. 3d Cir. Certiorari denied. Reported below: 657 F. 2d 25 (first case); 655 F. 2d 526 (second case); 661 F. 2d 298 (third case).

No. 81–1231. BEDFORD ASSOCIATES ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 1300.

No. 81-1238. CASHELL *v.* UNITED STATES;
No. 81-1253. SATTERWHITE *v.* UNITED STATES;
No. 81-1333. WELCH *v.* UNITED STATES; and
No. 81-6062. COCHRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 1039.

No. 81-1254. ATHENA PRODUCTS, LTD. *v.* UNITED STATES POSTAL SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 654 F. 2d 362.

No. 81-1288. BRUNSWICK CORP. ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 971.

No. 81-1302. MONTEDISON S.P.A. *v.* PHILLIPS PETROLEUM CO. ET AL.; and
No. 81-1303. STANDARD OIL CO. (INDIANA) *v.* PHILLIPS PETROLEUM CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 664 F. 2d 356.

No. 81-1338. ARROW TRANSPORTATION CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 392.

No. 81-1441. BRONSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 920.

No. 81-1454. CIANCI ET AL. *v.* DIVISION OF LIQUOR CONTROL, DEPARTMENT OF BUSINESS REGULATION. Super. Ct. Conn., Hartford Jud. Dist. Certiorari denied.

No. 81-1468. COASTAL PETROLEUM CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 701, 524 F. 2d 1206; and 228 Ct. Cl. 864.

No. 81-1502. MURNANE *v.* AMERICAN AIRLINES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 215 U. S. App. D. C. 55, 667 F. 2d 98.

No. 81–1504. BECKSTROM *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–1520. BAUTISTA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–1527. HALL *v.* HALL. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 266, 623 S. W. 2d 833.

No. 81–1532. OLIVER *v.* AMINOIL, USA, INC. C. A. 5th Cir. Certiorari denied. Reported below: 662 F. 2d 349.

No. 81–1540. TANGREN ET AL. *v.* WACKENHUT SERVICES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 2d 705.

No. 81–1559. VILLALTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 662 F. 2d 1205.

No. 81–1584. FRANGELLA MUSHROOM FARMS, INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 578.

No. 81–1599. MAHROOM *v.* MARSH, SECRETARY OF THE ARMY OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1031.

No. 81–1608. COVEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 662 F. 2d 162.

No. 81–1628. REILLY *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81–1638. ALBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 105.

No. 81–1648. ANDERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1302.

No. 81–1652. RIDEN *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 697.

No. 81–5849. POUSSON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–5897. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1091.

No. 81–6038. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 656 F. 2d 378.

No. 81–6079. LOCKLEAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 914.

No. 81–6094. MCKEE *v.* HARRIS. C. A. 2d Cir. Certiorari denied. Reported below: 649 F. 2d 927.

No. 81–6130. SIMER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 655.

No. 81–6144. SALMAN *v.* SWANSON, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1053.

No. 81–6191. CONNER *v.* ANDERSON, WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 916.

No. 81–6200. PELCZARSKI *v.* SULLIVAN ET AL. C. A. 1st Cir. Certiorari denied.

No. 81–6204. NORWOOD *v.* WOODARD. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1315.

No. 81–6207. TYLER *v.* TYLER. Ct. App. Wis. Certiorari denied. Reported below: 105 Wis. 2d 765, 318 N. W. 2d 23.

No. 81–6210. TAYLOR *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY. Sup. Ct. La. Certiorari denied. Reported below: 409 So. 2d 656.

No. 81–6215. DRYSDALE *v.* KEITH. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 920.

No. 81-6211. TRIMMER *v.* VAN BOMEL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 82 App. Div. 2d 1023, 441 N. Y. S. 2d 762.

No. 81-6229. WIGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 1325.

No. 81-6239. HOWELL *v.* TANNER, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 650 F. 2d 610.

No. 81-6250. PENNINGTON *v.* HOUSEWRIGHT, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 666 F. 2d 329.

No. 81-6295. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1332.

No. 81-6303. TAYLOR ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 521.

No. 81-6310. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 438 A. 2d 444.

No. 81-6313. MANGIAMELI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 1172.

No. 81-6321. LEE *v.* UNITED STATES; and
No. 81-6328. NANCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 666 F. 2d 353.

No. 81-6324. CONROY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81-6343. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1310.

No. 81–6325. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 95.

No. 81–6345. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 924.

No. 81–6347. GOLDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 671 F. 2d 369.

No. 81–6350. ROSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 346.

No. 81–6351. GRAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–1210. RAULERSON *v.* HOWELL. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 650 F. 2d 610.

No. 81–6016. CHANEY *v.* OKLAHOMA. Ct. Crim. App. Okla.; and

No. 81–6224. GODFREY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 81–6224, 248 Ga. 616, 284 S. E. 2d 422.

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. 81–5930. WHITELAW *v.* MWP LIMITED PARTNERSHIP, 455 U. S. 955;

No. 81–5955. DIXON *v.* MACDOUGALL, 455 U. S. 955;

No. 81–6067. MCCOLPIN *v.* BARNES, 455 U. S. 1004; and

No. 81–6099. WILLIAMS *v.* CARMEN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL., 455 U. S. 992. Petitions for rehearing denied.

No. 81–271. CALIFORNIA EX REL. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL., 454 U. S. 90. Motion for leave to file petition for rehearing denied.

APRIL 6, 1982

Dismissal Under Rule 53

No. 81–1592. TRAVELERS EXPRESS CO., INC. *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 664 F. 2d 691.

APRIL 9, 1982

Dismissal Under Rule 53

No. 81–6213. IN RE ARTWAY. Petition for writ of mandamus dismissed under this Court's Rule 53.

APRIL 19, 1982

Dismissal Under Rule 53

No. 81–1729. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 672 F. 2d 292.

Appeals Dismissed

No. 81–1594. RAFTER *v.* HIGGINS ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 N. Y. 2d 1025.

No. 81–1621. BILFORD ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Reported below: 405 So. 2d 973.

No. 81–1642. BEST INVESTMENT CO. *v.* CITY OF DALLAS ET AL. Appeal from D. C. N. D. Tex. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 80–5861. WILLIAMS *v.* LUCKY. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Mills* v. *Habluetzel*, *ante*, p. 91. Reported below: 599 S. W. 2d 108.

No. 80–6701. ROSS *v.* REED ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Engle* v. *Isaac*, *ante*, p. 107, and *United States* v. *Frady*, *ante*, p. 152. Reported below: 660 F. 2d 492.

No. 81–1056. WASHINGTON *v.* MYERS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Engle* v. *Isaac*, *ante*, p. 107, and *United States* v. *Frady*, *ante*, p. 152. Reported below: 646 F. 2d 355.

Miscellaneous Orders

No. A–852 (81–1867). COHEN *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Application for continuation of stay, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

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.] Motion of the Solicitor General for leave to file a supplemental brief as *amicus curiae* denied.

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 file a supplemental brief as *amicus curiae* denied.

No. 81–1. GOLDSBORO CHRISTIAN SCHOOLS, INC. *v.* UNITED STATES; and

No. 81–3. BOB JONES UNIVERSITY *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 454 U. S. 892.] (1) Motion of National Association for the Advancement of Colored People et al. for leave to intervene as parties respondent and for leave to participate in oral argument denied. (2) Alternative request to file a brief as *amici curiae* granted. (3) Motion of Laurence H. Tribe et al. for leave to file a brief as *amici curiae* granted. (4) Motion of Agencies of the United Church of Christ for leave to file a brief as *amicus curiae* granted. (5) Motion of Lawyers' Committee for Civil Rights Under Law et al. for leave to file a supplemental brief as *amici curiae* granted. (6) Motion of North Carolina Association of Black Lawyers for leave to file a brief as *amicus curiae* granted. (7) Motion of the Solicitor General for leave to file a brief on the merits out of time granted. (8) Motion of the Solicitor General for leave to file a motion for divided argument out of time granted. (9) Motion of petitioner in No. 81–3 for an order directing respondent to act with respect to respondent's memorandum filed January 8, 1982, denied. (10) Motions of petitioners for summary reversal denied. (11) William T. Coleman, Jr., Esquire, of Washington, D. C., a member of the Bar of this Court, is invited to brief and argue these cases as *amicus curiae* in support of the judgments below.

No. 81–184. UNITED STATES *v.* SECURITY INDUSTRIAL BANK ET AL. C. A. 10th Cir. [Probable jurisdiction noted, 454 U. S. 1122.] Motion of appellee Beneficial Finance of Kansas, Inc., to schedule oral argument during April 1982 session denied.

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.] Motions of petitioners for divided argument and for additional time for oral argument granted. Ten additional minutes are allotted for that purpose.

No. 81–300. FORD MOTOR CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. [Certiorari granted, 454 U. S. 1030.] Motion of the Solicitor General to permit David A. Strauss, Esquire, to present oral argument *pro hac vice* 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, 455 U. S. 917.] Motion of Michigan et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied. 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 petitioners to schedule oral argument during April 1982 session denied. Motion of Philip L. Barnum et al. for leave to file a brief as *amici curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 81–1180. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* NEW BANNER INSTITUTE, INC. C. A. 4th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–1476. UNITED STATES *v.* RODGERS ET AL.; and UNITED STATES *v.* INGRAM ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 904.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81-1591. CHASE MANHATTAN BANK, N.A. *v.* VISHIPCO LINE ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81-1860. J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. 81-1874. SENTINEL GOVERNMENT SECURITIES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 81-6277. IN RE DE VINCENT; and

No. 81-6342. IN RE GREEN. Petitions for writs of mandamus denied.

No. 81-1483. IN RE WILLIAMS ET AL. Motion of FLAG, Inc., for leave to file a brief as *amicus curiae* granted. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 81-1578. KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. *v.* DELTA AIR LINES, INC., ET AL.; KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS *v.* BURROUGHS CORP.; and KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. Appeals from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 650 F. 2d 1287 and 666 F. 2d 21 (first case); 666 F. 2d 27 (second case); 666 F. 2d 26 (third case).

Certiorari Granted

No. 81-1196. SMITH *v.* WADE. C. A. 8th Cir. Certiorari granted. Reported below: 663 F. 2d 778.

No. 81–1273. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* MERCK & CO., INC.; and

No. 81–1472. MERCK & CO., INC. *v.* BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 214 U. S. App. D. C. 418, 665 F. 2d 1236.

No. 81–1304. NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS *v.* UNITED STATES POSTAL SERVICE ET AL.; and

No. 81–1381. UNITED PARCEL SERVICE OF AMERICA, INC. *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 663 F. 2d 1186.

Certiorari Denied. (See also No. 81–1594, *supra.*)

No. 81–1014. O'BRIEN *v.* UNITED STATES;

No. 81–1296. BROWN *v.* UNITED STATES; and

No. 81–1408. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–1086. THOMAS, SHERIFF *v.* BARRETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 2d 1193.

No. 81–1113. ODOM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 403 So. 2d 936.

No. 81–1132. KELLY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 404 So. 2d 239.

No. 81–1200. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 653 F. 2d 196.

No. 81–1216. SILLER BROS., INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 76, 655 F. 2d 1039.

No. 81–1220. SCHMEDT *v.* DE BACA ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–1225. SANDINI *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 395 So. 2d 1178.

No. 81–1227. HUBBARD ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 215 U. S. App. D. C. 206, 668 F. 2d 1238.

No. 81–1256. NEW MEXICO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 647 F. 2d 104.

No. 81–1275. FOUNDING CHURCH OF SCIENTOLOGY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 215 U. S. App. D. C. 74, 667 F. 2d 117.

No. 81–1300. REX *v.* CIA. PERVANA DE VAPORES, S.A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 660 F. 2d 61.

No. 81–1317. CITY OF PARMA, OHIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 562 and 669 F. 2d 1100.

No. 81–1365. BRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1051.

No. 81–1376. 400 E. BALTIMORE STREET, INC. *v.* MARYLAND. Crim. Ct. Baltimore City, Md. Certiorari denied.

No. 81–1388. PRINCESS SEA INDUSTRIES ET AL. *v.* NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 97 Nev. 534, 635 P. 2d 281.

No. 81–1413. PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 699.

No. 81–1428. GRAND LABORATORIES, INC. *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 660 F. 2d 1288.

No. 81–1434. FRANK *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 388, 424 N. E. 2d 799.

No. 81–1455. HOWARD *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–1481. LAMB *v.* EQUIFAX SERVICES, INC. Ct. App. Ky. Certiorari denied. Reported below: 621 S. W. 2d 28.

No. 81–1492. STANDARD DRYWALL, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 156.

No. 81–1535. FACTORS ETC., INC., ET AL. *v.* PRO ARTS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 278.

No. 81–1545. RKO GENERAL, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 216 U. S. App. D. C. 57, 670 F. 2d 215.

No. 81–1550. MELICHAR *v.* OST. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 300.

No. 81–1554. CLARK ET AL. *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 1033.

No. 81–1555. CITY OF ALLEN PARK *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1028.

No. 81–1556. NAREL *v.* LIBURDI, WARDEN. Sup. Ct. Conn. Certiorari denied. Reported below: 185 Conn. 562, 441 A. 2d 177.

No. 81–1560. VIGORITO *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 81–1562. ADKINSON *v.* CAMPBELL, DIRECTOR, DIVISION OF CORRECTIONS OF ALASKA. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 503.

No. 81–1566. MANITOWOC ENGINEERING CO. *v.* TERRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 398.

No. 81–1569. ROGERS, PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN, ET AL. *v.* WHITE. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 1055.

No. 81–1570. HARLOW ET AL. *v.* SARGENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 872.

No. 81–1572. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS *v.* ALLEN. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 2d 745.

No. 81–1573. MCSHANE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81–1575. RICE *v.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 336.

No. 81–1582. QUINN *v.* BURLINGTON NORTHERN INC. PENSION PLAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 675.

No. 81–1597. KILCOYNE *v.* MORGAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 664 F. 2d 940.

No. 81–1647. BRODERICK ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 660 F. 2d 532.

No. 81-1654. McCORD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 765, 285 S. E. 2d 724.

No. 81-1655. BALDWIN *v.* MINNESOTA COMMISSIONER OF REVENUE. Sup. Ct. Minn. Certiorari denied. Reported below: 309 N. W. 2d 750.

No. 81-1657. TOMY CORP., A SUBSIDIARY OF TOMY KOGYO, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1032.

No. 81-1680. ANDERSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 504.

No. 81-1696. HAWKINS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 2d 1050.

No. 81-1702. VOORHIES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 2d 30.

No. 81-1705. HELGESEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 669 F. 2d 69.

No. 81-1709. HAWAIIAN AIRLINES, INC. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-1712. MARTINO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 699.

No. 81-1713. MARQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-1722. DRAPER *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 705.

No. 81-1725. LEBOVITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 669 F. 2d 894.

No. 81–1727. MARCHESE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81–1740. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 656 F. 2d 153.

No. 81–1743. SCHROEDER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 699.

No. 81–1759. FLYNN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 1296.

No. 81–5839. HAYES *v.* HARRIS. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 900.

No. 81–5857. ABEITA *v.* GUTIERREZ ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–5873. INNIS *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied.* Reported below: —— R. I. ——, 433 A. 2d 646.

No. 81–5940. CALVERT *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 310 N. W. 2d 185.

No. 81–5957. CHOUINARD *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 96 N. M. 658, 634 P. 2d 680.

No. 81–5979. GRIFFIN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 622 S. W. 2d 214.

No. 81–5984. BUSTILLOS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–5989. CAMPBELL ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 942.]

No. 81-5990. HAMPTON *v.* WATERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1310.

No. 81-5996. MCLAUGHLIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81-6014. EVERY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 409 So. 2d 611.

No. 81-6015. CAMPBELL *v.* GUNN, SHERIFF OF BELL COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 100.

No. 81-6019. CHAKA *v.* BOARD OF DIRECTORS, BUR OAK LIBRARY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-6027. MONOSSO *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 103 Wis. 2d 368, 308 N. W. 2d 891.

No. 81-6036. TURNER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 623 S. W. 2d 4.

No. 81-6054. CHAMBERS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 81-6061. BOWMAN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 103 Wis. 2d 687, 309 N. W. 2d 888.

No. 81-6072. HOWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 504.

No. 81-6216. BROWN *v.* ENGLE. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1217.

No. 81-6221. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81-6227. BURRELL *v.* UNION CORRECTIONAL INSTITUTE, RAIFORD, FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 290.

No. 81–6230. SAUNDERS *v.* WEINER. C. A. 3d Cir. Certiorari denied.

No. 81–6231. TUBBS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 81–6236. PAYNE *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 541.

No. 81–6238. DOUGLAS *v.* LONG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 747.

No. 81–6241. BUTCHER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6242. HALL *v.* NEW YORK CITY TRANSIT AUTHORITY. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 698, 431 N. E. 2d 307.

No. 81–6244. GLASS, AKA HABERLAND *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 495 Pa. 405, 434 A. 2d 707.

No. 81–6246. STREETER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 406 So. 2d 1024.

No. 81–6247. NASH *v.* MORRIS, WARDEN, UTAH STATE PRISON, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6248. WILLIAMS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 81–6252. WILLIAMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 304 N. C. 394, 284 S. E. 2d 437.

No. 81–6253. TARVER *v.* HOWARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 81–6254. STEDMAN *v.* PARSONS, DIRECTOR OF CLASSIFICATION, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6260. BOBO *v.* ITT, CONTINENTAL BAKING CO. C. A. 5th Cir. Certiorari denied. Reported below: 662 F. 2d 340.

No. 81-6261. CHAKA *v.* LEIGHTON ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-6264. THOMAS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6265. NZONGOLA *v.* NZONGOLA. Ct. App. D. C. Certiorari denied.

No. 81-6266. NZONGOLA *v.* NZONGOLA. Super. Ct. Ga., Fulton County. Certiorari denied.

No. 81-6268. MECHLER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 622 S. W. 2d 136.

No. 81-6269. POUNCY *v.* HUTTO. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1315.

No. 81-6270. STINNETT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 81-6274. LACKEY, AKA JERNIGAN *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1221.

No. 81-6275. OMERNICK *v.* CAROW ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81-6276. JACKSON *v.* O'LONE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1299.

No. 81-6278. HARTFORD *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 130 Ariz. 422, 636 P. 2d 1204.

No. 81-6281. APPLEBY *v.* WTIC-FM RADIO STATION ET AL. C. A. 1st Cir. Certiorari denied.

No. 81-6282. HEJL *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 1273.

No. 81–6283. VALENZANO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 81–6284. WIDNER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 68 Ohio St. 2d 188, 429 N. E. 2d 1065.

No. 81–6286. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1331.

No. 81–6287. BEASLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–6298. HARRISON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–6332. GRANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 924.

No. 81–6354. BERRY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 408 So. 2d 548.

No. 81–6359. MARTIN-TRIGONA *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 94 Ill. App. 3d 519, 418 N. E. 2d 763.

No. 81–6371. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 95.

No. 81–6378. HALBERT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 489.

No. 81–6384. BLEDSOE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 669 F. 2d 446.

No. 81–6389. MCCOLLOM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 56.

No. 81–6394. GREEN *v.* WARDEN, U. S. PENITENTIARY, EL RENO, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6395. GOLDBLATT *v.* VOGEL ET AL. C. A. 11th Cir. Certiorari denied.

No. 81–6400. CARAPELLA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 1029.

No. 81–6401. GREEN *v.* WILKERSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6405. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–6406. HAYWARD *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 659 F. 2d 857.

No. 81–6409. LINTON *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 105.

No. 81–6410. TOLLIVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 1005.

No. 81–6411. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–6416. WEBSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 174 and 669 F. 2d 185.

No. 81–6426. VETETO *v.* DIRECTOR, UNITED STATES BUREAU OF PRISONS, SOUTHEAST REGIONAL OFFICE. C. A. 11th Cir. Certiorari denied. Reported below: 668 F. 2d 535.

No. 81–6431. BRITT ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 438 A. 2d 444.

No. 80–6863. TYLER *v.* PHELPS, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 643 F. 2d 1095.

No. 81–989. DALLAS COUNTY, TEXAS, ET AL. *v.* BARRETT ET AL. C. A. 5th Cir. Motion of County Judges and Commissioners Association of Texas for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 649 F. 2d 1193.

No. 81–990. DALLAS COUNTY, TEXAS, ET AL. *v.* COLLINS ET AL. C. A. 5th Cir. Motion of County Judges and Commissioners Association of Texas for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 649 F. 2d 1203.

No. 81–1359. COTTON PETROLEUM CORP. *v.* EDWARDS, SECRETARY OF ENERGY, ET AL. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 154.

No. 81–1380. NORTHSIDE REALTY ASSOCIATES, INC., ET AL. *v.* UNITED STATES; and

No. 81–1405. BROWNING-FERRIS INDUSTRIES OF GEORGIA, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. Motion of American Civil Liberties Union of Georgia for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 659 F. 2d 590.

No. 81–1385. PEPSI-COLA DISTRIBUTING COMPANY OF KNOXVILLE, TENNESSEE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 646 F. 2d 1173.

No. 81–1391. THREE J FARMS, INC., ET AL. *v.* PLAINTIFFS' STEERING COMMITTEE ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 1332.

No. 81–1568. LIEBERMAN *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 660 F. 2d 1185.

No. 81–5952. MCKINNEY *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 657 F. 2d 740.

No. 81–1583. MEAD CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 1330.

No. 81–1616. TOYOTA MOTOR CO., LTD., ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Motion of National Business Systems, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 667 F. 2d 504.

No. 81–1626. GREEN ET AL. *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari and to consolidate this case with No. 81–1, *Goldsboro Christian Schools, Inc.* v. *United States*, and No. 81–3, *Bob Jones University* v. *United States* [certiorari granted, 454 U. S. 892], denied. Certiorari before judgment denied.

No. 81–1667. ANDERSON, WARDEN *v.* CONNER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 672 F. 2d 916.

No. 81–6112. FENDLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 663 F. 2d 1079.

No. 81–6081. CERVI *v.* GEORGIA. Sup. Ct. Ga.;

No. 81–6156. WHITE *v.* TEXAS. Ct. Crim. App. Tex.;

No. 81–6174. FRANKLIN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81–6235. THOMPSON *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 81–6245. SINGLETON *v.* ARKANSAS. Sup. Ct. Ark.; and

No. 81–6353. BASSETT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 81–6081, 248 Ga. 325, 282 S. E. 2d 629; No. 81–6156, 629 S. W. 2d 701; No. 81–6235, 278 S. C. 1, 292 S. E. 2d 581; No. 81–6245, 274 Ark. 126, 623 S. W. 2d 180; No. 81–6353, 222 Va. 844, 284 S. E. 2d 844.

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. 81–152. WEIT ET AL. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL., 455 U. S. 988. Petition for rehearing denied. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 81–1724. UPHAM ET AL. *v.* SEAMON ET AL., *ante*, p. 37. Application for stay of the order of the United States District Court for the Eastern District of Texas, entered April 5, 1982, and motion to recall the judgment issued April 1, 1982, denied. Petition for rehearing denied.

No. 81–5905. LOWE *v.* NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, 455 U. S. 953. Motion for leave to file petition for rehearing denied.

No. 80–1239. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL., 455 U. S. 457;

No. 80–1527. LUMMIS, TEMPORARY ADMINISTRATOR, ET AL. *v.* LOS ANGELES AIRWAYS, INC., 455 U. S. 988;

No. 81–291. ILLINOIS *v.* BOCHNIAK, 455 U. S. 938;

No. 81–933. GREEN *v.* OHIO, 455 U. S. 976;

No. 81–1022. PRESS-ENTERPRISE CO. ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, 455 U. S. 982;

No. 81–1148. BUTLER ET AL. *v.* UNITED STATES, 455 U. S. 945;

No. 81–1206. CHILDERS *v.* ILLINOIS, 455 U. S. 947;

No. 81–1221. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP., 455 U. S. 948;

No. 81–1237. ANGELILLI *v.* UNITED STATES, 455 U. S. 945;

No. 81–1269. AVEDISIAN *v.* HUBBARD ET AL., 455 U. S. 949;

No. 81–1364. EATON *v.* DRAKE UNIVERSITY ET AL., 455 U. S. 990;

No. 81–1412. CONNOR *v.* PHILLIPS, ADMINISTRATOR, ET AL., 455 U. S. 991;

No. 81–5838. CLARK *v.* MUNICIPAL EMPLOYEES CREDIT UNION OF BALTIMORE, INC., 455 U. S. 951;

No. 81–5844. BOWEN *v.* ZANT, WARDEN, 455 U. S. 983;

No. 81–5935. GREEN *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, 455 U. S. 983;

No. 81–5970. TAFERO *v.* FLORIDA, 455 U. S. 983;

No. 81–6008. THAYER *v.* PUERTO RICO, 455 U. S. 958;

No. 81–6025. LEVY *v.* HIGH'S DAIRY STORES ET AL., 455 U. S. 1003; and

No. 81–6070. LEBRIGHT *v.* CHRISTIAN, UNITED STATES DISTRICT JUDGE, ET AL., 455 U. S. 1023. Petitions for rehearing denied.

No. 80–951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL., 455 U. S. 385. Petition for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

APRIL 23, 1982

Miscellaneous Order

No. A–889. BINGAMAN ET AL. *v.* KING, GOVERNOR OF NEW MEXICO, ET AL. It is ordered that the order of the United States District Court for the District of New Mexico, in consolidated cases Nos. 82–67–M, 82–84–C, 82–180–C, 82–219–JB, and 82–246–JB, entered on April 13, 1982, be, and the same is hereby, stayed to the extent that that order applies to primary elections other than for state legislative offices, pending the timely filing and disposition by this Court of an appeal. This order shall have no effect on the orders of the United States District Court for the District of New Mexico in the cases set forth above entered on April 5 and April 8, 1982, enjoining the primary filing deadline for New Mexico state legislative election and adjudging the New Mexico apportionment plan unconstitutional.

APRIL 26, 1982

Appeals Dismissed

No. 81–1310. RAGNO *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of jurisdiction. Reported below: 403 So. 2d 1097.

No. 81–1426. BUCHEIT *v.* LAUDENBERGER ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 496 Pa. 52, 436 A. 2d 147.

No. 81–1609. HELTON ET AL. *v.* CITY OF BURKBURNETT. Appeal from Ct. Civ. App. Tex., 2d Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 619 S. W. 2d 23.

No. 81–1631. SHELDON *v.* SHELDON. Appeal from Ct. App. Cal., 4th App. Dist. Motion of appellee for damages and double costs denied. Appeal dismissed for want of substantial federal question. Reported below: 124 Cal. App. 3d 371, 177 Cal. Rptr. 380.

No. 81–1641. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* BURTON ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 30 Cal. 3d 638, 639 P. 2d 939.

Certiorari Granted—Vacated and Remanded

No. 81–1319. WHITE, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN *v.* THOMPSON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Frady*, *ante*, p. 152. Reported below: 661 F. 2d 103.

Miscellaneous Orders

No. — - ——. WEST VIRGINIA *v.* SECRETARY OF EDUCATION, UNITED STATES DEPARTMENT OF EDUCATION. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A–773. CRUMPACKER *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–861. MIZELL, WARDEN *v.* WELSH. C. A. 7th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. 80–1690. AMERICAN MEDICAL ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION, 455 U. S. 676. Motion of American Dental Association for leave to file a brief as *amicus curiae* in support of petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

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 Grace Brethren Church et al. for leave to file a supplemental brief after argument granted.

No. 81–55. NEW YORK *v.* FERBER. Ct. App. N. Y. [Certiorari granted, 454 U. S. 1052.] Motion of American Booksellers Association, Inc., et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 81–1095. MORRIS, WARDEN *v.* SLAPPY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 904.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Michael B. Bassi, Esquire, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 81–1222. UNITED STATES *v.* GENERIX DRUG CORP. ET AL. C. A. 11th Cir. [Certiorari granted, 455 U. S. 988.] Motions of Generic Pharmaceutical Industry Association, Medicine in the Public Interest, The Proprietary Association, and Pharmaceutical Manufacturers Association for leave to file briefs as *amici curiae* granted.

No. 81–5873. INNIS *v.* RHODE ISLAND. Sup. Ct. R. I. The order entered April 19, 1982 [*ante*, p. 930], denying the petition for writ of certiorari is amended to read as follows: Certiorari denied. JUSTICE MARSHALL would grant certiorari.

No. 81–6316. IN RE REMBERT. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 81–1613. MEMPHIS BANK & TRUST CO. *v.* GARNER, SHELBY COUNTY TRUSTEE, ET AL. Appeal from Sup. Ct. Tenn. Probable jurisdiction noted. Reported below: 624 S. W. 2d 551.

Certiorari Granted

No. 81–1120. UNITED STATES ET AL. *v.* RYLANDER ET AL. C. A. 9th Cir. Motion of respondent Richard W. Rylander, Sr., for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 656 F. 2d 1313.

Certiorari Denied. (See also No. 81–1641, *supra.*)

No. 81–875. ALABAMA HOSPITAL ASSN. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 228 Ct. Cl. 176, 656 F. 2d 606.

No. 81–905. LAZZARA *v.* UNITED STATES;
No. 81–956. FARINA *v.* UNITED STATES;
No. 81–1458. RUSSELLO *v.* UNITED STATES;
No. 81–5700. MACALUSO *v.* UNITED STATES;
No. 81–5716. SCIONTI *v.* UNITED STATES;
No. 81–5748. MORGADO *v.* UNITED STATES;
No. 81–5820. FISHER *v.* UNITED STATES;
No. 81–5826. YOUNG *v.* UNITED STATES; and
No. 81–5865. PALERMO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 648 F. 2d 367.

No. 81–1185. STEVENSON *v.* GRENTEC, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 652 F. 2d 20.

No. 81–1281. SANCHEZ *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 966.

No. 81–1308. MCMURTRY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 1204, 420 N. E. 2d 1211.

No. 81-1339. ELLSWORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 957.

No. 81-1379. CEAT S.P.A., PNEUMATICI *v.* BRYANT. Sup. Ct. Ala. Certiorari denied. Reported below: 406 So. 2d 376.

No. 81-1409. RAYMER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 660 F. 2d 1136.

No. 81-1411. PHELPS *v.* KANSAS SUPREME COURT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 662 F. 2d 649.

No. 81-1425. PUBLIC UTILITIES COMMISSION OF COLORADO *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 1, 660 F. 2d 821.

No. 81-1432. LEVENSON ET AL. *v.* UNITED STATES; and
No. 81-1507. FEINBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81-1449. LOGE ET VIR *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 2d 1268.

No. 81-1538. THAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 855.

No. 81-1571. HALL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 2d 1073.

No. 81-1593. INCORPORATED TRUSTEES OF THE GOSPEL WORKER SOCIETY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 360, 672 F. 2d 894.

No. 81-1602. WATKINS *v.* PENTZIEN, INC. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 604.

No. 81-1604. CHIA *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1051.

No. 81-1606. REGAN *v.* CONROY, CHIEF OF POLICE OF THE VILLAGE OF SCHAUMBURG. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 99 Ill. App. 3d 52, 425 N. E. 2d 37.

No. 81-1607. HUSTED *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 97 Ill. App. 3d 160, 422 N. E. 2d 962.

No. 81-1610. EDWARDS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 406 So. 2d 1331.

No. 81-1612. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* BROTHERHOOD OF RAILROAD SIGNALMEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 665 F. 2d 987.

No. 81-1620. VINEBERG ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 125 Cal. App. 3d 127, 177 Cal. Rptr. 819.

No. 81-1624. BAKER ET AL. *v.* AMSTED INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 2d 1245.

No. 81-1633. THE GAP STORES, INC. *v.* SAILOR MUSIC ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 84.

No. 81-1634. W. B. GIBSON CO. *v.* DUBROOK, INC. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1299.

No. 81-1640. LUBIN ET UX. *v.* EDINBURGH INSURANCE CO., LTD. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1314.

No. 81-1645. ILLINOIS BELL TELEPHONE CO. *v.* GETTO. Sup. Ct. Ill. Certiorari denied. Reported below: 86 Ill. 2d 39, 426 N. E. 2d 844.

No. 81-1646. KITCH *v.* DELANO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 663 F. 2d 990.

No. 81-1650. CITY OF CINCINNATI *v.* JONES ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 81-1656. BOWERS *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 369.

No. 81-1676. JERGUSON *v.* BLUE DOT INVESTMENT, INC. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 31.

No. 81-1737. MINIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 134.

No. 81-1764. VEATCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 674 F. 2d 1217.

No. 81-1768. BOSS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-1773. CALHOUN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 923.

No. 81-1783. HEBEL ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 995.

No. 81-1789. GILBERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 94.

No. 81-1796. COWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 669 F. 2d 180.

No. 81-6045. SHAFFNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1334.

No. 81-6142. RODRIGUEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 1201, 427 N. E. 2d 1052.

No. 81-6145. MUHAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 658 F. 2d 249.

No. 81-6161. AGURS *v.* KELLER, REGIONAL PAROLE COMMISSIONER, U. S. PAROLE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 916.

No. 81-6271. BARHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 521.

No. 81-6297. MCCOLPIN *v.* EIKELBLOOM ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6299. SMITH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 416 So. 2d 1122.

No. 81-6300. OLIVER *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 81-6307. DRAPER ET AL. *v.* PRESCOTT, TOWN CLERK OF GREENFIELD, MASSACHUSETTS, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 384 Mass. 444, 425 N. E. 2d 333.

No. 81-6308. THOMAS *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6311. ATHERTON *v.* ATHERTON. Sup. Ct. Va. Certiorari denied.

No. 81-6314. MARTIN *v.* WYRICK, WARDEN, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 704.

No. 81-6315. MEDLEY *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1313.

No. 81-6318. ARTWAY *v.* KRAMER, JUDGE, BURLINGTON COUNTY COURT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 684.

No. 81-6320. WHITE *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81-6322. WILSON *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 182.

No. 81-6326. LAMOUNTAIN *v.* RAINES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1031.

No. 81-6327. BROWN *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 666 F. 2d 782.

No. 81-6334. LAMANTIA *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 81-6335. JERALD *v.* O'ROURKE. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 940.

No. 81-6336. DENTLY *v.* IRVIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1335.

No. 81-6337. DEWITT *v.* MANSON, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 801.

No. 81-6339. BIRDEN *v.* SMITH. C. A. 2d Cir. Certiorari denied.

No. 81-6341. PLOTKIN *v.* GRUMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 493.

No. 81-6349. MCZEAL *v.* MAGGIO ET AL. C. A. 5th Cir. Certiorari denied.

No. 81-6362. SMITH *v.* COHEN. C. A. 11th Cir. Certiorari denied.

No. 81–6390. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 932.

No. 81–6398. GAINES *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–6418. WARD *v.* MACDOUGALL ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–6442. STRAGER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–6443. PARCELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81–6451. TOLERTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 669 F. 2d 652.

No. 81–6452. MAYO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–6455. FLOWERS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 81–6465. MCBEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1302.

No. 81–907. MARTINO *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner to strike brief in opposition denied. Certiorari denied. Reported below: 648 F. 2d 367.

No. 81–1291. MARYLAND *v.* BRYANT. Ct. Sp. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 49 Md. App. 272, 431 A. 2d 714.

No. 81–1659. WATKINS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* WASHINGTON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 655 F. 2d 1346 and 662 F. 2d 1116.

No. 81–6243. JONES *v.* LEIDINGER ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant certiorari. Reported below: 672 F. 2d 910.

No. 81–6301. BALDWIN *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY, ET AL. C. A. 5th Cir.; and

No. 81–6304. COLLINS *v.* ZANT, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 81–6301, 653 F. 2d 942.

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. 81–1239. STEPHENS ET AL. *v.* BLACK ET UX., 455 U. S. 1008;

No. 81–1329. BOLLOTIN *v.* SCHWARTZ ET AL., 455 U. S. 1001;

No. 81–6055. HERNANDEZ *v.* DEPARTMENT OF LABOR AND HUMAN RESOURCES ET AL., 455 U. S. 996;

No. 81–6083. JURAS *v.* AMAN COLLECTION SERVICE, INC., 455 U. S. 1024;

No. 81–6106. IVEY *v.* ALASKA, 455 U. S. 1010;

No. 81–6147. HALL *v.* THOMAS, 455 U. S. 1026; and

No. 81–6208. STOUTE *v.* UNITED STATES ET AL., 455 U. S. 1027. Petitions for rehearing denied.

No. 80–1681. VILLAGE OF HOFFMAN ESTATES ET AL. *v.* THE FLIPSIDE, HOFFMAN ESTATES, INC., 455 U. S. 489; and

No. 81–415. CASBAH, INC., ET AL. *v.* THONE, GOVERNOR OF NEBRASKA, ET AL., 455 U. S. 1005. Petitions for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

No. 81–1012. INSURANCE COMPANY OF NORTH AMERICA *v.* KEENE CORP. ET AL., 455 U. S. 1007;

No. 81–1197. HARTFORD ACCIDENT & INDEMNITY CO. *v.* KEENE CORP. ET AL., 455 U. S. 1007;

No. 81–1298. AETNA CASUALTY & SURETY CO. *v.* KEENE CORP. ET AL., 455 U. S. 1007; and

No. 81–1328. LIBERTY MUTUAL INSURANCE CO. *v.* KEENE CORP. ET AL., 455 U. S. 1007. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 81–1141. RIBOTSKY *v.* UNITED STATES, 455 U. S. 910. Motion for leave to file petition for rehearing denied.

No. 81–1500. IN RE CHING YEE, 455 U. S. 1015. Petition for rehearing and all other relief denied.

APRIL 28, 1982

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Civil Procedure, see *post*, p. 1015; amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1023; and amendments to the Rules and Forms Governing Proceedings in the United States District Courts under 28 U. S. C. §§ 2254 and 2255, see *post*, p. 1033.)

MAY 3, 1982

Affirmed on Appeal

No. 80–1207. RUSK, MAYOR OF ALBUQUERQUE, ET AL. *v.* ESPINOSA ET AL. Affirmed on appeal from C. A. 10th Cir. JUSTICE REHNQUIST and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 634 F. 2d 477.

Appeals Dismissed

No. 81–1351. SMITH *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of jurisdiction. Reported below: 402 So. 2d 1360.

No. 81–1259. WESTERN MARYLAND RAILWAY CO. *v.* ROSE, TAX COMMISSIONER OF WEST VIRGINIA; and

No. 81–1267. UNION-MECHLING CORP. *v.* ROSE, TAX COMMISSIONER OF WEST VIRGINIA. Appeals from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE POWELL would note probable jurisdiction and set cases for oral argument. Reported below: —— W. Va. ——, 282 S. E. 2d 240.

No. 81–1671. AU *v.* KELLY ET AL., TRUSTEES, DBA FINANCIAL PLAZA OF THE PACIFIC. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 2 Haw. App. 534, 634 P. 2d 619.

No. 81–1753. BALASH *v.* NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 N. Y. 2d 847, 428 N. E. 2d 393.

No. 81–1681. JACOB BROTHERS, INC., ET AL. *v.* DELEON. Appeal from App. Sess., Super. Ct. Conn., dismissed for want of substantial federal question. Reported below: 38 Conn. Supp. 331, 446 A. 2d 831.

Certiorari Granted—Vacated and Remanded

No. 80–2117. LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint*, *ante*, p. 273. Reported below: 634 F. 2d 929.

No. 81–310. BERGMAN, WARDEN *v.* BURTON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rose* v. *Lundy*, 455 U. S. 509 (1982). Reported below: 649 F. 2d 428.

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

In *Rose* v. *Lundy*, 455 U. S. 509, the Court wrote:

> "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.)" *Id.*, at 520.

Today, however, the Court interprets *Rose* as requiring further proceedings that can serve no purpose other than to "complicate and delay" the ultimate termination of this litigation.

In 1975 the respondent was convicted in a Michigan state court of assault with intent to commit murder and was sentenced to life imprisonment. His conviction was affirmed by the Michigan Court of Appeals in 1977 and the Michigan Supreme Court denied leave to appeal.

In 1980 the respondent sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan on two grounds: (1) that the trial court's instructions to the jury deprived him of due process of law; and (2) that he was denied the effective assistance of counsel. The District Court found no merit to the first claim and refused to consider the second because the respondent had not exhausted his state remedies as required by 28 U. S. C. § 2254(b).

The Court of Appeals reversed, holding that the instructions were improper under *Sandstrom* v. *Montana*, 442 U. S.

510, and that even though trial counsel had not objected to the erroneous instruction, *Wainwright* v. *Sykes*, 433 U. S. 72, did not foreclose relief because the Michigan Court of Appeals had reviewed the asserted errors in the trial court's jury charge and rejected the respondent's claims on the merits. The Sixth Circuit did not address the respondent's unexhausted claim of ineffective assistance of counsel.

The Warden's petition for certiorari in this Court raises the *Wainwright* v. *Sykes* issue and three questions concerning *Sandstrom* v. *Montana*.[1] The petition makes no reference to the unexhausted claim. Ignoring the four questions presented by the Warden, the Court grants his petition, vacates the judgment of the Court of Appeals, and remands for reconsideration in the light of *Rose* v. *Lundy*.

Under *Rose* v. *Lundy*—if I read the Court's opinion correctly—after the case gets back to the District Court, that court must dismiss the habeas corpus petition that is now a part of the record.[2] Thereafter, the respondent immediately will be entitled to resubmit a petition eliminating the unexhausted claim and confining his claim to relief to the issue

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[1] The questions presented for review read as follows:

"I. Where no timely objection was made to the state court's jury instructions as required by state law, the state appellate courts arguably relied on the failure to object in affirming the conviction and neither cause for the failure to object nor actual prejudice has been shown, is this state prison inmate barred from challenging the state court's jury instructions in federal habeas corpus proceedings under the doctrine of *Wainwright* v *Sykes*, 4[3]3 US 72 (1977)?

"II. Should *Sandstrom* v *Montana*, 442 US 510 (1979) be applied retroactively to a 1975 state court conviction?

"III. If *Sandstrom* is to be applied retroactively, do the state court's jury instructions in this case violate the *Sandstrom* doctrine?

"IV. If the state court's jury instructions in this case violate *Sandstrom*, is the violation nevertheless harmless beyond a reasonable doubt under the doctrine of *Chapman* v *California*, 386 US 18 (1967)?" Pet. for Cert. i.

[2] "[W]e hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose* v. *Lundy*, 455 U. S., at 522.

that has already been resolved in his favor by the Court of Appeals.[3] It seems reasonable to assume that the District Court will grant the relief mandated by the Court of Appeals, that the District Court order will then be promptly appealed by the Warden, and that the Court of Appeals thereafter will decide both the *Wainwright* v. *Sykes* issue and the three *Sandstrom* questions precisely as it decided them in the opinion that this Court today is vacating. It seems equally likely that the Warden will remain dissatisfied with that ruling and then once again file a petition for certiorari, at which time the Court can then determine whether to review the questions that are now presented.

The predictable consequences of the order the Court enters today illustrate the fact that the rule of *Rose* v. *Lundy* merely complicates and delays the termination of habeas corpus litigation.[4] It disserves the interest of busy federal judges as well as the interest of deserving litigants.

I respectfully dissent.

No. 81–1029. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* TERRELL ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint*, *ante*, p. 273. Reported below: 644 F. 2d 1112.

No. 81–1666. GRANT *v.* WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION ET AL. Sup. Ct. Wash. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Larson* v. *Valente*, *ante*, p. 228. Reported below: 96 Wash. 2d 454, 635 P. 2d 1071.

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[3] "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." *Id.*, at 520.

[4] Nothing in the Court's opinion in *Rose* v. *Lundy*, or in anything the Court has written since, justifies the Court's reaching out on its own initiative to apply its new rule to previously decided cases.

Miscellaneous Orders

No. A–891. BENJAMIN S. *v.* KURIANSKY, DEPUTY ATTORNEY GENERAL OF NEW YORK. Ct. App. N. Y. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–897. COASTAL PETROLEUM CO. *v.* MOBIL OIL CORP.; and

No. A–913. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF FLORIDA *v.* MOBIL OIL CORP. C. A. 11th Cir. Applications for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–906. ANDERSON ET AL. *v.* FLATEAU ET AL. Application for stay of the order of the United States District Court for the Southern District of New York, entered March 26, 1982, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–265. IN RE DISBARMENT OF GRANT. It is ordered that Arthur H. Grant, of Chicago, Ill., 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–266. IN RE DISBARMENT OF FELDMAN. It is ordered that Herman Feldman, of Chicago, Ill., 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–267. IN RE DISBARMENT OF DEFAZIO. It is ordered that Charles DeFazio III, of Newark, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–256. IN RE DISBARMENT OF DEFRANCIS. Disbarment entered. [For earlier order herein, see 455 U. S. 902.]

No. D–268. IN RE DISBARMENT OF CYPHERS. It is ordered that Phillip L. Cyphers, of Pasadena, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–269. IN RE DISBARMENT OF BROWN. It is ordered that Callis N. Brown, of Teaneck, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–270. IN RE DISBARMENT OF MORITZ. It is ordered that Andrew Bruce Moritz, of San Diego, 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. D–271. IN RE DISBARMENT OF WAJERT. It is ordered that John M. Wajert, of Phoenixville, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–272. IN RE DISBARMENT OF LANGKAM. It is ordered that Leonard Langkam, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 27, Orig. OHIO *v.* KENTUCKY; and

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Report of the Special Master on the motion of Dorothy Cole et al. for leave to intervene is received and ordered filed. Motion of Dorothy Cole et al. for leave to intervene denied. [For earlier order herein, see, *e. g.*, 454 U. S. 1076.]

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 for leave to file a supplemental brief after argument granted. 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 respondents for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Request of respondents for divided 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.] Case restored to calendar for reargument. JUSTICE STEVENS took no part in the consideration or decision of this order.

No. 81–680. HERMAN & MACLEAN *v.* HUDDLESTON ET AL.; and

No. 81–1076. HUDDLESTON ET AL. *v.* HERMAN & MACLEAN ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 914.] Motion of Ralph E. Huddleston et al. for leave to enlarge question presented for review denied.

No. 81–1222. UNITED STATES *v.* GENERIX DRUG CORP. ET AL. C. A. 11th Cir. [Certiorari granted, 455 U. S. 988.] Respondents' suggestion of mootness rejected.

No. 81–827. JEFFERSON COUNTY PHARMACEUTICAL ASSN., INC. *v.* ABBOTT LABORATORIES ET AL. C. A. 5th Cir. [Certiorari granted, 455 U. S. 999.] Motion of American Pharmaceutical Association 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. 81–1320. KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. *v.* LAWSON. C. A. 9th Cir. [Probable jurisdiction noted, 455 U. S. 999.] Motion of the parties to dispense with printing the joint appendix denied. Motion of Appellate Committee of the California District Attorneys Association for leave to file a brief as *amicus curiae* granted.

No. 81–1672. PENNZOIL CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81–6323. GAINES *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner to dismiss the petition for writ of certiorari denied. Motion of court-appointed counsel to order a hearing to determine the competency of petitioner to file a motion to dismiss his petition denied.

No. 81–6458. NAJAR *v.* OMAN ET UX. Ct. App. Tex., 3d Sup. Jud. Dist. Motion of Texas for leave to intervene as a party respondent granted.

No. 81–6365. IN RE HOOVER; and

No. 81–6432. IN RE BRISCOE. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 81–1551. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ROSOFSKY. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. Reported below: 523 F. Supp. 1180.

No. 81–523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Appeal from Ct. App. Cal., 1st App. Dist. Probable jurisdiction noted. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 117 Cal. App. 3d 988, 173 Cal. Rptr. 121.

Certiorari Granted

No. 81–1032. UNITED STATES *v.* SELLS ENGINEERING, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 642 F. 2d 1184.

No. 81–1536. COMMISSIONER OF INTERNAL REVENUE *v.* TUFTS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 651 F. 2d 1058.

No. 81–1635. ANDERSON ET AL. *v.* CELEBREZZE, SECRETARY OF STATE OF OHIO. C. A. 6th Cir. Certiorari granted. Reported below: 664 F. 2d 554.

Certiorari Denied. (See also Nos. 81–1671 and 81–1753, *supra.*)

No. 81–160. MISSISSIPPI ET AL. *v.* PHILLIPS ET AL.; and No. 81–181. JOINT LEGISLATIVE COMMITTEE FOR PERFORMANCE, EVALUATION, AND EXPENDITURE REVIEW OF MISSISSIPPI ET AL. *v.* PHILLIPS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 1014.

No. 81–1024. SALAZAR *v.* SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 942.

No. 81–1257. MILLER *v.* WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 623.

No. 81–1427. LEAF ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 740.

No. 81–1464. CANN ET AL. *v.* FORD MOTOR CO. C. A. 2d Cir. Certiorari denied. Reported below: 658 F. 2d 54.

No. 81–1467. UNVERT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 656 F. 2d 483.

No. 81–1480. BOWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81–1501. LACEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 661 F. 2d 1021.

No. 81–1522. PEACHTREE CITY *v.* H & H OPERATIONS, INC. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 500, 283 S. E. 2d 867.

No. 81–1558. COCHRANE & BRESNAHAN *v.* SMITH, GUARDIAN AD LITEM. C. A. 5th Cir. Certiorari denied. Reported below: 656 F. 2d 161.

No. 81–1632. HONDA MOTOR CO., LTD. *v.* HAUSCHILD. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81–1639. MOUNT VERNON MEMORIAL PARK ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 1358.

No. 81–1663. KIBLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 2d 452.

No. 81–1668. PINE BELT LAND CO. ET AL. *v.* MISSISSIPPI STATE HIGHWAY COMMISSION ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 406 So. 2d 329.

No. 81–1669. SCHIAVO BROTHERS, INC. *v.* UNITED STATES GYPSUM CO. C. A. 3d Cir. Certiorari denied. Reported below: 668 F. 2d 172.

No. 81–1670. BANKERS TRUST CO. ET AL. *v.* BP OIL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 2d 103.

No. 81–1678. WEAVER ET AL. *v.* MARTIN, ADMINISTRATOR. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1013.

No. 81–1690. GERALDO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 68 Ohio St. 2d 120, 429 N. E. 2d 141.

No. 81–1691. CHEATHAM *v.* FLORIDA; and
No. 81–1693. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 81–1694. GRIFFITH *v.* CLAWSON, FORMERLY KNOWN AS GRIFFITH. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 81–1695. YELLOW FORWARDING CO. *v.* ATLANTIC CONTAINER LINE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 350.

No. 81–1697. EDWARD W. MINTE CO., INC., ET AL. *v.* MURPHY. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 911.

No. 81–1704. HATCH ET UX. *v.* MADSEN, SUPERINTENDENT OF BANKS OF ARIZONA, RECEIVER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1053.

No. 81–1716. VAUGHN *v.* HINCHY, WITTE, WOOD, ANDERSON & HODGES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 81–1779. WALGREN *v.* UNITED STATES;
No. 81–1780. BAGNARIOL *v.* UNITED STATES; and
No. 81–1840. GALLAGHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 877.

No. 81–1806. BARNES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 426.

No. 81–1837. FREEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–6030. WHITE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 622 S. W. 2d 939.

No. 81–6101. PISANO *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 636 P. 2d 358.

No. 81–6164. RIPPLINGER ET AL. *v.* KIDDER COUNTY SOCIAL SERVICE BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 703.

No. 81–6196. APACHITO ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 664 F. 2d 229.

No. 81–6237. G. B. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 36, 430 N. E. 2d 1096.

No. 81–6291. GLENN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 95.

No. 81–6346. BROOKSHER *v.* HARREL ET AL. C. A. 10th Cir. Certiorari denied.

No. 81–6358. WALKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 625 S. W. 2d 740.

No. 81–6360. RICHARDSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 400 So. 2d 1375.

No. 81–6364. MEDVED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 2d 1045.

No. 81–6366. ABU-BAKR *v.* REED ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6367. MCCRARY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 81–6369. WILLIAMS *v.* EVERETT, DIRECTOR, ARKANSAS DEPARTMENT OF LABOR. Ct. App. Ark. Certiorari denied. Reported below: 4 Ark. App. xxi.

No. 81-6370. SALMAN *v.* SWANSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 923.

No. 81-6372. WADE *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 81-6376. WEBB *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 81-6377. SEAGLE *v.* NORTH CAROLINA. Super. Ct. N. C., Durham County. Certiorari denied.

No. 81-6421. WESTOVER *v.* RICHENBERGER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1056.

No. 81-6469. MILLER *v.* UNITED STATES; and
No. 81-6477. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 991.

No. 81-6476. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1335.

No. 81-6479. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 669 F. 2d 609.

No. 81-6483. PACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81-6498. GUERRERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 667 F. 2d 862.

No. 81-221. UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN *v.* SEARS ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 645 F. 2d 1365.

No. 81-1488. ALASKA MARINE TRUCKING, A DIVISION OF LYNDEN TRANSPORT, INC. *v.* CARNATION CO. Ct. App. Wash. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 30 Wash. App. 144, 633 P. 2d 105.

No. 81–1437. NORTHERN STATES POWER CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 663 F. 2d 55.

No. 81–1521. DAVIS *v.* UNITED AIR LINES, INC. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 662 F. 2d 120.

No. 81–1698. BATTAGLIA *v.* UNION COUNTY WELFARE BOARD ET AL. Sup. Ct. N. J. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 88 N. J. 48, 438 A. 2d 530.

No. 81–6110. PORTER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 81–6205. BASS *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 81–6352. HANCE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County. Certiorari denied. Reported below: No. 81–6110, 623 S. W. 2d 374; No. 81–6205, 622 S. W. 2d 101.

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. 80–6680. MCELROY *v.* UNITED STATES, 455 U. S. 642;
No. 81–660. ADDISON SAVMOR, INC. *v.* UNITED STATES, 454 U. S. 1144;
No. 81–1116. O. HOMMEL CO. *v.* FERRO CORP., 455 U. S. 1017;
No. 81–1382. ATKINSON *v.* ATKINSON, AKA GOELZ, *ante*, p. 905; and
No. 81–6151. CUNNINGHAM *v.* GEORGIA, 455 U. S. 1038.
Petitions for rehearing denied.

No. 80–1690. AMERICAN MEDICAL ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION, 455 U. S. 676. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

MAY 17, 1982

Dismissals Under Rule 53

No. 81–1733. DREDGE GENERAL G. L. GILLESPIE ET AL. *v.* MERCHANTS NATIONAL BANK OF MOBILE ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 663 F. 2d 1338.

No. 81–1066. BANCO DE CREDITO RURAL ARGENTINO, S.A. *v.* BANQUE ARABE ET INTERNATIONALE D'INVESTISSEMENT. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed under this Court's Rule 53. Reported below: 81 App. Div. 2d 1047, 440 N. Y. S. 2d 803.

Affirmed on Appeal

No. 81–1731. SCHATZLE *v.* KIRKPATRICK, SECRETARY OF STATE OF MISSOURI, ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 541 F. Supp. 922.

JUSTICE REHNQUIST, concurring.

Appellant in this case requests that we overrule *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969). But here the District Court did not invalidate a reapportionment plan duly adopted by the state legislature; it merely adopted a plan of its own when the legislature was unable to reach agreement. This case, therefore, does not require that we address appellant's suggestion respecting *Kirkpatrick* v. *Preisler, supra.*

No. 81–1770. ORWOLL ET AL. *v.* LACOMB ET AL. Affirmed on appeal from D. C. Minn. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 541 F. Supp. 145.

Appeals Dismissed

No. 79-6584. IN RE TRAPP ET AL. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Reported below: 593 S. W. 2d 193.

No. 81-1738. FIRST NATIONAL BANK OF SAINT PAUL *v.* MINNESOTA, BY LORD, ITS TREASURER. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Reported below: 313 N. W. 2d 390.

No. 81-1614. ROSENBERG ET AL. *v.* JOHNS-MANVILLE SALES CORP. ET AL.; and

No. 81-1615. STEINHARDT, EXECUTRIX *v.* JOHNS-MANVILLE CORP. ET AL. Appeals from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of these cases. Reported below: 54 N. Y. 2d 1008, 430 N. E. 2d 1297.

No. 81-1700. GILLILAND *v.* CITY OF PALMDALE; and GILLILAND ET AL. *v.* COUNTY OF LOS ANGELES. Appeals from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 126 Cal. App. 3d 610, 179 Cal. Rptr. 73 (second case).

No. 81-6202. ADDISON ET AL. *v.* CITY OF CHESTER. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. Reported below: 277 S. C. 179, 284 S. E. 2d 579.

No. 81-6424. BACIK *v.* PENNSYLVANIA. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. Reported below: 61 Pa. Commw. 552, 434 A. 2d 860.

No. 81–1752. HOWARD *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, COLORADO, ET AL. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 640 P. 2d 1128.

Vacated and Remanded on Appeal

No. 81–1649. CITY OF PARMA, OHIO, ET AL. *v.* RECORD REVOLUTION, NO. 6, INC., ET AL. Appeal from C. A. 6th Cir. Judgment vacated and case remanded for further consideration in light of *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489 (1982). JUSTICE STEVENS took no part in the consideration or decision of this case.

Certiorari Granted—Vacated and Remanded

No. 80–1542. RIVERS, EXECUTOR, ET AL. *v.* ROSENTHAL & CO. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran, ante*, p. 353. Reported below: 634 F. 2d 774.

No. 81–1118. INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL–CIO, LOCAL 342, ET AL. *v.* TERRELL ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint, ante*, p. 273. Reported below: 644 F. 2d 1112.

No. 81–1750. WASHINGTON *v.* GIBSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Engle* v. *Isaac, ante*, p. 107, and *United States* v. *Frady, ante*, p. 152. Reported below: 665 F. 2d 863.

No. 81–1800. WHITE-WILSON MEDICAL CLINIC, INC. *v.* ROBBINS. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pullman-Standard* v. *Swint*, *ante*, p. 273. Reported below: 660 F. 2d 1064.

Miscellaneous Orders

No. — - ——. RITTER *v.* BOARD OF COMMISSIONERS OF ADAMS COUNTY PUBLIC HOSPITAL DISTRICT NO. 1. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A–916. IN RE DREFKE. D. C. W. D. Mo. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A–929 (81–1871). MECO, INC. *v.* SINNETTE, JUDGE, BOYD CIRCUIT COURT, DIVISION II, ET AL. Sup. Ct. Ky. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–264. IN RE DISBARMENT OF EILBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 903.]

No. 81–523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, *ante*, p. 960.] Motions of National Association of Manufacturers, Committee on State Taxation of the Council of State Chambers of Commerce, EMI, Limited, and Canadian Imperial Bank of Commerce et al. for leave to file briefs as *amici curiae* granted. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 81–1784. AMERICAN CYANAMID CO. *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION ET AL. C. A. D. C. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81–1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

Probable Jurisdiction Noted or Postponed

No. 81–969. WASHINGTON ET AL. *v.* UNITED STATES. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 654 F. 2d 570.

No. 81–1590. BOLGER ET AL. *v.* YOUNGS DRUG PRODUCTS CORP. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 526 F. Supp. 823.

No. 81–1020. EXXON CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA, ET AL.; and

No. 81–1268. EXCHANGE OIL & GAS CORP. ET AL. *v.* EAGERTON, COMMISSIONER OF REVENUE OF ALABAMA. Appeals from Sup. Ct. Ala. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 404 So. 2d 1.

No. 81–1756. LEHR *v.* ROBERTSON ET AL. Appeal from Ct. App. N. Y. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 54 N. Y. 2d 417, 430 N. E. 2d 896.

Certiorari Granted

No. 81–1284. EICKE *v.* EICKE. Ct. App. La., 3d Cir. Certiorari granted. Reported below: 399 So. 2d 1231.

No. 81–1627. SHEPARD *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 215 U. S. App. D. C. 373, 669 F. 2d 759.

No. 81–1453. SOUTH DAKOTA *v.* NEVILLE. Sup. Ct. S. D. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 312 N. W. 2d 723.

No. 81–1463. UNITED STATES *v.* HASTING ET AL. C. A. 7th Cir. Motions of respondents Kevin Wendell Anderson, Gable Gibson, Gregory Lamont Williams, Kelvin Hasting, and Napoleon Stewart for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 660 F. 2d 301.

No. 81–1618. WEYERHAEUSER CO. ET AL. *v.* LYMAN LAMB CO. ET AL.; and

No. 81–1619. GEORGIA-PACIFIC CORP. *v.* LYMAN LAMB CO. ET AL. C. A. 5th Cir. Motions of Chamber of Commerce of the United States, Business Roundtable, and National Association of Manufacturers for leave to file briefs as *amici curiae* granted. Motion of Bowie-Sims-Prange, Inc., et al. for leave to file a brief as *amici curiae* in No. 81–1618 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE WHITE and JUSTICE O'CONNOR took no part in the consideration or decision of these motions and these petitions. Reported below: 655 F. 2d 627.

No. 81–1810. NARANJO ET AL. *v.* CORRIZ. C. A. 10th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 667 F. 2d 892.

Certiorari Denied. (See also Nos. 81–1614, 81–1615, and 81–1752, *supra.*)

No. 81–155. BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER EDUCATION ET AL. *v.* MISSISSIPPI COUNCIL ON HUMAN RELATIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 1014.

No. 81–510. FLORIDA STATE UNIVERSITY ET AL. *v.* JOSHI. C. A. 5th Cir. Certiorari denied. Reported below: 646 F. 2d 981.

No. 81–1050. TAPP *v.* LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 383.

No. 81–1069. TERRELL ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 2d 1112.

No. 81–1184. CHATHAM VENTURES, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 11th Cir. Certiorari denied. Reported below: 651 F. 2d 355.

No. 81–1306. MATHERNE *v.* TERREBONNE PARISH POLICE JURY. Sup. Ct. La. Certiorari denied. Reported below: 405 So. 2d 314.

No. 81–1346. JAFFEE ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 2d 1226.

No. 81–1361. WEST VIRGINIA EX REL. AIR POLLUTION CONTROL COMMISSION *v.* GORSUCH, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.; and

No. 81–1524. PENNSYLVANIA *v.* GORSUCH, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: No. 81–1361, 672 F. 2d 904; No. 81–1524, 672 F. 2d 902.

No. 81–1372. CITY OF ATLANTA *v.* OWEN ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 248 Ga. 299, 282 S. E. 2d 906.

No. 81–1393. FLORIDA MARBLE POLISHERS HEALTH & WELFARE TRUST FUND ET AL. *v.* EDWIN M. GREEN, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 653 F. 2d 972.

No. 81–1439. BLINKEN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 291 Md. 297, 435 A. 2d 86.

No. 81–1498. CAVALIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 426.

No. 81–1533. MERCHANTS REFRIGERATING COMPANY OF CALIFORNIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 116.

No. 81–1543. SOUTHWEST SUNSITES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 711.

No. 81–1544. LIQUOR SALESMEN'S UNION OF THE STATE OF NEW YORK, LOCAL 2, DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS INTERNATIONAL UNION, AFL–CIO *v.* CHARMER INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 664 F. 2d 318.

No. 81–1547. CITY OF PLEASANT GROVE ET AL. *v.* WHEELER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 99.

No. 81–1549. MASTRANGELO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 662 F. 2d 946.

No. 81–1553. MONTEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1331.

No. 81–1586. TORRES ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 663 F. 2d 1019.

No. 81–1565. VSL CORP. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–1596. MITCHELL ENERGY CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 662 F. 2d 1111.

No. 81–1684. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 217 U. S. App. D. C. 360, 672 F. 2d 894.

No. 81–1706. BALSLEY *v.* GULLEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 2d 325.

No. 81–1707. SKELTON ET AL. *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 311.

No. 81–1710. OHIO VALLEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, LOCAL NO. 1787 *v.* PEASE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1044.

No. 81–1711. MCNEW *v.* BANK OF MOUNT VERNON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1329.

No. 81–1719. PETRUSCH, DBA B & L DISTRIBUTION CENTER *v.* TEAMSTERS LOCAL 317, SYRACUSE, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 667 F. 2d 297.

No. 81–1720. SAVASTANO, ADMINISTRATRIX *v.* BOARD OF EDUCATION, KINGS PARK SCHOOL DISTRICT NO. 5, COUNTY OF SUFFOLK, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 2d 1049, 439 N. Y. S. 2d 227.

No. 81–1721. ALFORD ET AL. *v.* CITY OF LUBBOCK, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 2d 1263.

No. 81–1723. PANDIL *v.* ILLINOIS CENTRAL GULF RAILROAD CO. Ct. App. Iowa. Certiorari denied. Reported below: 312 N. W. 2d 139.

No. 81–1726. SIGER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 496 Pa. 396, 437 A. 2d 932.

No. 81–1734. MONTAG *v.* OUTBOARD MARINE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1300.

No. 81–1741. COURIER-JOURNAL ET AL. *v.* MCCALL. Sup. Ct. Ky. Certiorari denied. Reported below: 623 S. W. 2d 882.

No. 81–1745. TRIFA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 662 F. 2d 447.

No. 81–1751. GAY ET AL. *v.* P. K. LINDSAY CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 666 F. 2d 710.

No. 81–1754. OXMAN ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 496 Pa. 534, 437 A. 2d 1169.

No. 81–1758. SHEET METAL WORKERS' INTERNATIONAL ASSN., AFL–CIO *v.* MOBILE MECHANICAL CONTRACTORS ASSN., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 481.

No. 81–1762. WOODS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 408 So. 2d 555.

No. 81–1765. TOWNSHIP OF DOYLESTOWN *v.* AD WORLD, INC. C. A. 3d Cir. Certiorari denied. Reported below: 672 F. 2d 1136.

No. 81–1766. UNITED TECHNOLOGIES CORP. *v.* FIACCO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 492.

No. 81–1767. SABET ET AL. *v.* REPUBLIC NATIONAL BANK OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81–1771. CITY OF BEACHWOOD, OHIO *v.* CENTRAL MOTORS, INC., ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 81–1775. DOUGLAS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 411 So. 2d 393.

No. 81–1786. NORTH RIVER INSURANCE CO. *v.* SCALI, MCCABE, SLOVES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81–1788. OPTION ADVISORY SERVICE, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81–1790. BRIDGEPORT EDUCATION ASSN. *v.* CITY OF BRIDGEPORT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 424.

No. 81–1792. MCINNIS *v.* DISTRICT GRIEVANCE COMMITTEE FOR DISTRICT 12–B OF THE STATE BAR OF TEXAS. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 618 S. W. 2d 389.

No. 81–1795. SMITH INTERNATIONAL, INC. *v.* HUGHES TOOL CO. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 2d 1373.

No. 81–1812. FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. C., INC. *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 216 U. S. App. D. C. 339, 670 F. 2d 1158.

No. 81–1816. CANHAM *v.* OBERLIN COLLEGE. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 2d 1057.

No. 81–1823. MAECOM S.A., GENEVA, ET AL. *v.* ANGLOMAR BULKCARRIERS, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 423.

No. 81–1825. CROSSMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 607.

No. 81–1841. CONWAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 81–1850. KNYFF ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 2d 729.

No. 81–1874. SENTINEL GOVERNMENT SECURITIES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 81–1877. BRUMMITT *v.* UNITED STATES; and SCARBOROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 521 (first case); 664 F. 2d 286 (second case).

No. 81–1898. BREWER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81–1902. TANAKA *v.* CREDITORS' COMMITTEE #1 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 951.

No. 81–1912. HUBER & ANTILLA CONSTRUCTION *v.* CARPENTERS LOCAL 470, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 2d 1013.

No. 81–1914. PEARSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–1927. FOSTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-1937. BOOTH ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 673 F. 2d 27.

No. 81-1952. ROWE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 531.

No. 81-1957. PENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 668 F. 2d 625.

No. 81-1981. COTTON BELT INSURANCE CO., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 20.

No. 81-6078. TAYLOR *v.* MINNEAPOLIS PUBLIC SCHOOLS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 2d 293.

No. 81-6090. SMITH *v.* HOUSEWRIGHT, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 667 F. 2d 689.

No. 81-6126. VANCE *v.* HEDRICK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 659 F. 2d 447.

No. 81-6222. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 943.

No. 81-6249. CULHANE *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 491.

No. 81-6258. CANTRELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81-6329. WOOTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81-6344. GIBSON *v.* UNITED STATES;
No. 81-6373. WILLIAMS *v.* UNITED STATES; and
No. 81-6379. HASTING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 2d 301.

No. 81–6348. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–6374. BOSTON *v.* DIFANIS. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 2d 1049.

No. 81–6387. BARBEE *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1305.

No. 81–6392. ZARCONE *v.* PERRY ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 782, 431 N. E. 2d 974.

No. 81–6393. AHMED *v.* EIKERENKOETTER. Ct. App. D. C. Certiorari denied.

No. 81–6397. ARROYO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 567, 431 N. E. 2d 271.

No. 81–6399. KOOP ET AL. *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 314 N. W. 2d 384.

No. 81–6402. HYPPOLITE *v.* ABC ET AL. C. A. 11th Cir. Certiorari denied.

No. 81–6403. CHASE *v.* MAGGIO ET AL. Sup. Ct. La. Certiorari denied. Reported below: 410 So. 2d 1138.

No. 81–6412. MCLAUGHLIN ET AL. *v.* CITY OF LAGRANGE, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 2d 1385.

No. 81–6413. BELASCO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 125 Cal. App. 3d 974, 178 Cal. Rptr. 461.

No. 81–6414. DAVIS *v.* PARRATT, WARDEN, NEBRASKA STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 451.

No. 81-6417. REED *v.* WEBSTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 665 F. 2d 1053.

No. 81-6420. CARTER *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 637 F. 2d 449.

No. 81-6427. ROOTS *v.* WAINWRIGHT ET AL. C. A. 11th Cir. Certiorari denied.

No. 81-6428. KINES ET AL. *v.* BUTTERWORTH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 669 F. 2d 6.

No. 81-6429. FORSTON *v.* ORANGE UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 81-6430. GROFF *v.* TOWNSHIP OF ELIZABETH, LANCASTER COUNTY, PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 62 Pa. Commw. 46, 434 A. 2d 917.

No. 81-6433. BRIAN LEE W. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 125 Cal. App. 3d 590, 178 Cal. Rptr. 159.

No. 81-6434. LEWIS *v.* ENGLE. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No. 81-6436. PENN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 497 Pa. 232, 439 A. 2d 1154.

No. 81-6438. BEACH *v.* KAPNER, JUDGE, FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 659 F. 2d 1078.

No. 81-6439. RICHARDS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 59 App. Div. 2d 656, 398 N. Y. S. 2d 351.

No. 81-6440. PASCHAL *v.* FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF EMPLOYMENT SECURITY, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 405 So. 2d 1020.

No. 81-6441. WATSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 81-6446. DAVID LYNN C. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-6447. AH LO ET AL. *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: 2 Haw. App. 462, 634 P. 2d 421.

No. 81-6449. JOHNSON *v.* ADAMS. Sup. Ct. N. H. Certiorari denied.

No. 81-6450. HOLSEY *v.* MCCAULEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 2d 1040.

No. 81-6456. SAYERS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 412 So. 2d 479.

No. 81-6457. SINCLAIR *v.* HUNTER, CHAIRMAN, LOUISIANA BOARD OF PARDONS. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 183.

No. 81-6467. MCDONALD *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 179.

No. 81-6487. MOORE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 230 Ct. Cl. 819.

No. 81-6501. DUDLEY *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-6504. MAXWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81-6507. BOYDEN *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 81-6508. ZAMBITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-6510. PETERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81-6514. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS. C. A. D. C. Cir. Certiorari denied.

No. 81-6515. NICKERSON *v.* WRIGHT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1314.

No. 81-6523. STRINICH *v.* CLAIRTON SCHOOL DISTRICT. Sup. Ct. Pa. Certiorari denied. Reported below: 494 Pa. 297, 431 A. 2d 267.

No. 81-6526. BOWLES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 218 U. S. App. D. C. 162, 673 F. 2d 553.

No. 81-6539. FINCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 670 F. 2d 1356.

No. 81-6541. IN RE BAIRD. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 432.

No. 81-6542. HEGWOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1334.

No. 81-6550. AVON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 2d 505.

No. 81-6564. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 F. 2d 46.

No. 81-6567. LONDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–6589. RHODES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 F. 2d 695.

No. 81–6590. BENAVIDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 668 F. 2d 533.

No. 81–6596. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 594.

No. 81–1448. RAYMOND INTERNATIONAL, INC. *v.* BAKER. C. A. 5th Cir. Motion of petitioner to strike portions of respondent's brief denied. Certiorari denied. Reported below: 656 F. 2d 173.

No. 81–1479. GULF OIL CORP. ET AL. *v.* PETROL STOPS NORTHWEST ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 81–1746. PUREX CORP. *v.* PROCTER & GAMBLE CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 664 F. 2d 1105.

No. 81–1563. SACRAMENTO BEE, PUBLISHED BY MCCLATCHY NEWSPAPERS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 656 F. 2d 477.

No. 81–1665. DYKEMA ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 666 F. 2d 1096.

No. 81–1730. HALL ET AL. *v.* BLAKE ET AL. C. A. 1st Cir. Motion of respondents Albert Blake, Ralph Hamm, and Patrick Rahilly for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 668 F. 2d 52.

No. 81–1769. FEDERATED PUBLICATIONS, INC. *v.* SWEDBERG. Sup. Ct. Wash. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 96 Wash. 2d 13, 633 P. 2d 74.

No. 81–5379. SIRECI *v.* FLORIDA. Sup. Ct. Fla.;

No. 81–5562. GILREATH *v.* GEORGIA. Sup. Ct. Ga.;

No. 81–5784. COMBS *v.* FLORIDA. Sup. Ct. Fla.;

No. 81–5848. GILBERT ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 81–5944. MESSER *v.* FLORIDA. Sup. Ct. Fla.;

No. 81–6338. FAIR *v.* ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 81–6385. ORTIZ *v.* ARIZONA. Sup. Ct. Ariz.;

No. 81–6435. MOORE *v.* NEBRASKA. Sup. Ct. Neb.; and

No. 81–6437. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–5379, 399 So. 2d 964; No. 81–5562, 247 Ga. 814, 279 S. E. 2d 650; No. 81–5784, 403 So. 2d 418; No. 81–5848, 277 S. C. 53, 283 S. E. 2d 179; No. 81–5944, 403 So. 2d 341; No. 81–6385, 131 Ariz. 195, 639 P. 2d 1020; No. 81–6435, 210 Neb. 457, 316 N. W. 2d 33; No. 81–6437, 407 So. 2d 894.

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. 81–824. JACKS *v.* DUCKWORTH, WARDEN, 454 U. S. 1147; and

No. 81–5418. PAPP *v.* JAGO, 454 U. S. 1035. Motions for leave to file petitions for rehearing denied.

No. 80–2092. SCM CORP. *v.* XEROX CORP., 455 U. S. 1016;

No. 81–363. KARR *v.* KARR, 455 U. S. 1016;

No. 81–417. WAINWRIGHT, CORRECTIONS SECRETARY *v.* PEREZ, *ante*, p. 910;

No. 81–547. DIAZ ET AL. *v.* BEYER ET UX., *ante*, p. 904;

No. 81–1000. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* UNITED STATES, *ante*, p. 901;

No. 81–1343. ROSENBAUM *v.* ROSENBAUM, 455 U. S. 1018;

No. 81–1419. MADISON *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL., 455 U. S. 1020;

No. 81–1471. IMMER *v.* PUERTO RICO MARITIME SHIPPING AUTHORITY ET AL., *ante*, p. 906;

No. 81–1542. MAZALESKI *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., 455 U. S. 1022;

No. 81–5897. WILSON *v.* UNITED STATES, *ante*, p. 917;

No. 81–6132. HAMILTON *v.* MAYS ET AL., 455 U. S. 1025; and

No. 81–6395. GOLDBLATT *v.* VOGEL ET AL., *ante*, p. 934. Petitions for rehearing denied.

MAY 24, 1982

Affirmed on Appeal

No. 81–1814. LAKE CARRIERS' ASSN. ET AL. *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL. Affirmed on appeal from D. C. E. D. Mich. Reported below: 527 F. Supp. 1114.

Appeals Dismissed

No. 81–1785. HUNTER *v.* NEW YORK STATE DEPARTMENT OF CIVIL SERVICE. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 55 N. Y. 2d 1036, 434 N. E. 2d 1082.

No. 81–1855. RED OWL STORES, INC. *v.* COMMISSIONER OF AGRICULTURE. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 310 N. W. 2d 99.

Vacated and Remanded on Appeal

No. 81–1787. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL. *v.* SULLIVAN. Appeal from D. C. N. D. Ill. Judgment vacated and case remanded with instructions to dismiss the cause as moot.

Certiorari Granted—Vacated and Remanded

No. 80–1023. BELL, SECRETARY OF EDUCATION, ET AL. *v.* DOUGHERTY COUNTY SCHOOL SYSTEM. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *North Haven Board of Education* v. *Bell, ante*, p. 512. Reported below: 622 F. 2d 735.

Vacated and Remanded After Certiorari Granted

No. 80–493. UNITED STATES DEPARTMENT OF EDUCATION *v.* SEATTLE UNIVERSITY. C. A. 9th Cir. [Certiorari granted, 449 U. S. 1009.] Motion of American Civil Liberties Union Women's Rights Project et al. for leave to file a brief as *amici curiae* granted. Judgment vacated and case remanded for further consideration in light of *North Haven Board of Education* v. *Bell, ante*, p. 512.

Miscellaneous Orders

No. A–950. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF FLORIDA *v.* AMERICAN CYANAMID CO. C. A. 11th Cir. Application to recall and stay the mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–258. IN RE DISBARMENT OF ROOT. Disbarment entered. [For earlier order herein, see 455 U. S. 1012.]

No. D–259. IN RE DISBARMENT OF COVEN. Disbarment entered. [For earlier order herein, see 455 U. S. 1012.]

No. D–273. IN RE DISBARMENT OF MICUN. It is ordered that Richard P. Micun, of Evergreen Park, Ill., 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. 81–827. JEFFERSON COUNTY PHARMACEUTICAL ASSN., INC. *v.* ABBOTT LABORATORIES ET AL. C. A. 5th Cir. [Certiorari granted, 455 U. S. 999.] Motion of respondent Board of Trustees of the University of Alabama for divided argument and for additional time for oral argument denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 81–1271. FALLS CITY INDUSTRIES, INC. *v.* VANCO BEVERAGE, INC. C. A. 7th Cir. [Certiorari granted, 455 U. S. 988.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–1958. ARIZONA ELECTRIC POWER COOPERATIVE, INC. *v.* MID-LOUISIANA GAS CO. ET AL. C. A. 5th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 81–6464. IN RE ESTES. Petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 81–1574. LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL. *v.* JONES. Appeal from Ct. App. Ga. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 159 Ga. App. 693, 285 S. E. 2d 30.

No. 81–185. SIMOPOULOS *v.* VIRGINIA. Appeal from Sup. Ct. Va. Probable jurisdiction noted. Reported below: 221 Va. 1059, 277 S. E. 2d 194.

Certiorari Granted

No. 81–1636. FLORIDA *v.* BRADY ET AL. Sup. Ct. Fla. Certiorari granted. Reported below: 406 So. 2d 1093.

No. 81–1686. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* WESTERN NUCLEAR, INC. C. A. 10th Cir. Certiorari granted. Reported below: 664 F. 2d 234.

No. 81–746. CITY OF AKRON *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.; and

No. 81–1172. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL. *v.* CITY OF AKRON ET AL. C. A. 6th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 651 F. 2d 1198.

No. 81–1255. PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. *v.* ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL.; and

No. 81–1623. ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 664 F. 2d 687.

No. 81–1494. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NEAL. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 646 F. 2d 1178.

No. 81–1661. GENERAL MOTORS CORP. *v.* DEVEX CORP. ET AL. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 667 F. 2d 347.

Certiorari Denied

No. 80–1771. HYDROLEVEL CORP. *v.* AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 118.

No. 80–2138. CARTER *v.* DAYTON BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 56.

No. 81–854. SEGUIN ET AL. *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 651 F. 2d 1198.

No. 81–1274. ROBINSON *v.* CITY OF JUNCTION CITY. Ct. App. Kan. Certiorari denied. Reported below: 6 Kan. App. 2d xiv, 632 P. 2d 1082.

No. 81–1360. HOME INDEMNITY CO. ET AL. *v.* OESTERLE. C. A. 11th Cir. Certiorari denied. Reported below: 651 F. 2d 401.

No. 81–1486. FRIEDLAND *v.* UNITED STATES; and
No. 81–1490. FRIEDLAND *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 660 F. 2d 919.

No. 81–1495. MOORE *v.* JORDAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 1329.

No. 81–1508. ANDREW MARTIN MARINE CORP. ET AL. *v.* MOTOREN-WERKE MANNHEIM, A.G., ET AL. C. A. 5th Cir. Certiorari denied.

No. 81–1629. AMERICAN INDIANS RESIDING ON THE MARICOPA-AK CHIN RESERVATION *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 167, 667 F. 2d 980.

No. 81–1630. MODICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 1173.

No. 81–1658. MONACO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 2d 129.

No. 81–1660. MEMPHIS MOBILE TELEPHONE, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–1683. MAHER, COMMISSIONER OF INCOME MAINTENANCE OF CONNECTICUT *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 873.

No. 81–1701. JOHNSON *v.* J. RAY MCDERMOTT & CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 495.

No. 81–1718. DEVEX CORP. ET AL. *v.* GENERAL MOTORS CORP.; and

No. 81–1865. DEVEX CORP. ET AL. *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 667 F. 2d 347.

No. 81–1739. EADY *v.* ERBE. Ct. Civ. App. Ala. Certiorari denied. Reported below: 406 So. 2d 936.

No. 81–1781. SOLEBURY TOWNSHIP ET AL. *v.* HERITAGE FARMS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 2d 743.

No. 81–1797. THEATRE TECHNIQUES, INC. *v.* UNITED SCENIC ARTISTS, LOCAL 829 OF THE BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 493.

No. 81–1801. KRAMER *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 81–1807. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 534 F. Supp. 832.

No. 81–1822. FIALA *v.* VILLAGE OF CARPENTERSVILLE. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 1005, 425 N. E. 2d 33.

No. 81–1824. COHEN ET AL. *v.* UNITED STATES; and No. 81–1851. CARLONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 666 F. 2d 1112.

No. 81–1826. DAVIS ET AL. *v.* CITY OF SOUTH BEND. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 423 N. E. 2d 712.

No. 81–1827. E. W. SCRIPPS CO. *v.* HEHEMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 2d 1115 and 668 F. 2d 878.

No. 81–1838. HUGHES TOOL CO. *v.* RICHARDS. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 624 S. W. 2d 598.

No. 81–1846. LUSTGARTEN *v.* AYRES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1221.

No. 81–1854. LYONS *v.* NIPPON GAKKI SEIZO KABUSHIKI KAISHA (NIPPON GAKKI CO., LTD.) ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1335.

No. 81–1892. BONEN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 229 Ct. Cl. 144, 666 F. 2d 536.

No. 81–1901. FAKER ET UX. *v.* ELMORE ET UX. Ct. App. Wash. Certiorari denied. Reported below: 30 Wash. App. 1013.

No. 81–1932. MCCARTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 596.

No. 81–1935. MCGRATH *v.* STATE UNIVERSITY OF NEW YORK AT PLATTSBURGH. C. A. 2d Cir. Certiorari denied. Reported below: 679 F. 2d 873.

No. 81–1939. BARKSDALE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 667 F. 2d 97.

No. 81–1942. MCCAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 2d 436.

No. 81–1975. SAINT PRIX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 1077.

No. 81–1977. HODAKIEVIC *v.* MARADO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1220.

No. 81–1984. ROSENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–1987. BRYANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 688.

No. 81–2029. VASILE ET AL. *v.* LOCAL 676, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 689.

No. 81–5113. BOICE *v.* STATE UNIVERSITY OF NEW YORK AT NEW PALTZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 21.

No. 81–6214. LAKE *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 81–6255. BRADBURY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF FLORIDA REHABILITATION. C. A. 5th Cir. Certiorari denied. Reported below: 658 F. 2d 1083.

No. 81–6285. MATHIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 1157.

No. 81–6459. DOHNER *v.* MORRIS, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 81–6460. BROWN *v.* LOGGINS ET AL. C. A. 9th Cir. Certiorari denied.

No. 81–6466. WRIGHT *v.* LEIGHTON, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 81-6468. SCOTT *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 81-6470. SCOTT *v.* ARKANSAS. Ct. App. Ark. Certiorari denied.

No. 81-6474. ANTONE *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 672 F. 2d 906.

No. 81-6475. THOMAS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 852, 424 N. E. 2d 985.

No. 81-6478. POSEY *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 99 Ill. App. 3d 943, 426 N. E. 2d 209.

No. 81-6481. BODETTE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 84 App. Div. 2d 968, 448 N. Y. S. 2d 339.

No. 81-6482. CHANEY *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1307.

No. 81-6485. JOHNSON *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 81-6486. JACKSON *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1220.

No. 81-6488. JACKSON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied.

No. 81-6495. THOMPSON *v.* MORROW ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 626 S. W. 2d 706.

No. 81-6496. CLARK *v.* WILMOT. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 423.

No. 81–6544. TATUM *v.* NATIONAL BANK OF COMMERCE, LINCOLN, NEBRASKA. C. A. 8th Cir. Certiorari denied.

No. 81–6565. KOPACK ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 2d 946.

No. 81–6577. ROMIEH *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 81–6599. MONTGOMERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 673 F. 2d 1325.

No. 81–6601. GREEN *v.* WARDEN, U. S. PENITENTIARY, TERRE HAUTE, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied.

No. 81–6605. TOMBRELLO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 485.

No. 81–6610. SCOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 665 F. 2d 825 and 671 F. 2d 1138.

No. 81–6613. GONZALEZ-HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 441.

No. 81–1460. TEJEDA-MATA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 626 F. 2d 721.

No. 81–1497. CHEVERES *v.* SUPERIOR COURT OF CALIFORNIA, VENTURA COUNTY (MILLER, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Motion of respondent Glenda Cheveres Miller for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 81–6622. PARKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 918.

No. 81–1512. DOWDLE, SUPERINTENDENT, SAFFORD CONSERVATION CENTER, ET AL. *v.* WRIGHT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 659 F. 2d 1091.

No. 81–1833. MICHIGAN *v.* PAINTMAN. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 412 Mich. 518, 315 N. W. 2d 418.

No. 81–1585. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* HOLMES LIMESTONE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 655 F. 2d 732.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

This action was brought by respondents as a challenge to the validity of a regulation defining the term "cemetery" as used in § 522(e)(5) of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 509, 30 U. S. C. § 1272(e)(5) (1976 ed., Supp. IV). The United States District Court for the Northern District of Ohio dismissed the complaint for lack of jurisdiction, holding that § 526(a)(1) of the Act, 30 U. S. C. § 1276(a)(1) (1976 ed., Supp. IV), permits challenges to such regulations to be brought only in the United States District Court for the District of Columbia.

The United States Court of Appeals reversed and remanded the case for consideration of the merits. *Holmes Limestone Co.* v. *Andrus*, 655 F. 2d 732 (CA6 1981). It held that § 526(a)(1)[1] permits review of challenges to national

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[1] Section 526(a)(1) provides, in pertinent part:

"Any action by the Secretary promulgating national rules or regulations . . . shall be subject to judicial review in the United States District Court for the District of Columbia. . . . A petition for review of any action sub-

regulations in courts other than the United States District Court for the District of Columbia because while the statute provides that certain actions may be brought *only* in the district court where the mining operation is located, in the final version of the bill the word "only" was deleted from the phrase providing for judicial review of national regulations in the District of Columbia. 655 F. 2d, at 737. The court also concluded that there are "serious questions about the propriety" of the 60-day limitation on the filing of petitions for judicial review of rulemaking actions contained in § 526(a)(1). 655 F. 2d, at 738.

The decision below is troubling for several reasons. First, § 526(a)(1) provides that regulations with a national impact be reviewed in the District of Columbia, those with a statewide impact in the district court for the district of the capital of the State involved, and all other regulations only in the district where the surface mining operation at issue is located. By allowing a national regulation to be challenged in federal courts other than those in the District of Columbia, the Court of Appeals here arguably frustrated Congress' carefully devised plan for judicial review. Second, the court below based its holding on the fact that both the House[2] and Senate[3] versions of the bill provided that national regulations were to be reviewed *only* in the District Court for the District of Columbia, while the word "only" was omitted from the final version of the bill reported out of the Conference Committee. However, the Conference Committee's discussion of the changes made in the bill does not even mention this deletion, and it may well have been inadvertent. H. R. Rep. No. 95–493, p. 111 (1977). Finally, the only other

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ject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action . . . ." 91 Stat. 512.

[2] H. R. 2, 95th Cong., 1st Sess., § 526(a)(1) (1977). See also H. R. Rep. No. 95–218, p. 46 (1977).

[3] S. 7, 95th Cong., 1st Sess., § 426(a)(1) (1977). See also S. Rep. No. 95–128, p. 41 (1977).

courts to rule on this question have both held that § 526(a)(1) provides for exclusive review of national regulations in the District Court for the District of Columbia. *Reading Anthracite Co.* v. *Office of Surface Mining, Reclamation and Enforcement*, No. 80–0667 (ED Pa., Oct. 8, 1980); *Union Carbide Corp.* v. *Andrus*, 13 ERC 1481, 1489 (SD W. Va. 1979).

Because there are serious questions whether the Court of Appeals properly interpreted § 526(a)(1) and because such an interpretation appears to conflict with the congressional intent that there be uniform national performance standards for surface mining, see S. Rep. No. 95–128, p. 49 (1977); H. R. Rep. No. 95–218, pp. 57–58 (1977), I would grant the petition for certiorari and set the case for oral argument. Delaying resolution of the issue could cause substantial disruption both to the coal mining industry and to the agencies charged with administering the Surface Mining Act.[4]

No. 81–1605. RED BALL MOTOR FREIGHT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 2d 626.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In *Wright Line, a Division of Wright Line, Inc.*, 251 N. L. R. B. 1083, 1089 (1980), the National Labor Relations Board announced a test for identifying violations of § 8(a)(3) of the National Labor Relations Act, 29 U. S. C. § 158(a)(3): General Counsel must first "make a *prima facie* showing sufficient to support the inference that [an employer's opposition to] protected conduct was a 'motivating factor' in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the pro-

[4] The Court of Appeals did not rule directly on the 60-day limitation period for filing petitions for judicial review of rulemaking actions. Accordingly, it would not be necessary for the Court to address that issue.

tected conduct." Most Courts of Appeals, including the Court of Appeals for the Fifth Circuit in this case, have endorsed the Board's test in its entirety. See *NLRB* v. *Robin American Corp.*, 654 F. 2d 1022 (CA5 1981); *NLRB* v. *Lloyd A. Fry Roofing Co., Inc., of Delaware*, 651 F. 2d 442 (CA6 1981); *Peavey Co.* v. *NLRB*, 648 F. 2d 460 (CA7 1981); *NLRB* v. *Nevis Industries, Inc.*, 647 F. 2d 905 (CA9 1981); *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F. 2d 547 (CA8 1982). The Court of Appeals for the Third Circuit and that for the First Circuit, however, disagree with the Board on the exact nature of the employer's burden after the General Counsel establishes a prima facie case. These two Circuits hold the burden to be one of production, rather than one of persuasion. See *NLRB* v. *Wright Line*, 662 F. 2d 899 (CA1 1981), cert. denied, 455 U. S. 989 (1982); *Behring International, Inc.* v. *NLRB*, 675 F. 2d 83 (CA3 1982). In order to resolve this conflict on what is obviously a recurring issue that should be resolved, I would grant the writ of certiorari.

No. 81–1715. RAILWAY LABOR EXECUTIVES' ASSN. *v.* SCOTT, TRUSTEE, ET AL. C. A. 3d Cir.; and

No. 81–1805. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. C. A. 7th Cir. Motion of petitioner to consolidate the petitions for writs of certiorari denied. Certiorari denied. Reported below: No. 81–1715, 673 F. 2d 1301; No. 81–1805, 672 F. 2d 920.

No. 81–1813. FOUST ET AL. *v.* GARMON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* denied. Certiorari denied. Reported below: 668 F. 2d 400.

No. 81–1820. CFS CONTINENTAL, INC., ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 643 F. 2d 195 and 659 F. 2d 1322.

No. 81–1890. BECKMAN *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied.

No. 81–6171. BROOKS *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

JUSTICE BRENNAN, dissenting.

During the evening of August 2, 1974, petitioner Alfred Brooks and a male companion abducted two women at gunpoint. After robbing the women, the men took the victims into a field and shot them, wounding one and killing the other. Petitioner was thereafter charged, tried, and convicted in District Court, Oklahoma County, Okla., for the offense of murder in the first degree. He was sentenced to death. On appeal, the conviction was affirmed, but the sentence was modified to life imprisonment. *Brooks* v. *State*, 556 P. 2d 147 (Okla. Crim. App. 1977). The State later prosecuted petitioner for two additional offenses related to the events of August 2, 1974: assault and battery with a deadly weapon with intent to kill, and robbery with firearms. Petitioner pleaded guilty to both charges, and was sentenced to two concurrent 20-year terms of imprisonment. Seeking postconviction relief in the Oklahoma court, petitioner challenged the later convictions on double jeopardy grounds, *inter alia*. Following the denial of relief, which was affirmed on appeal, Brooks filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma. That court dismissed the petition, and the Court of Appeals for the Tenth Circuit affirmed.

Although all the charges leveled against petitioner arose out of the same criminal transaction or episode, they were prosecuted by the State in two separate proceedings. Accordingly, I would grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand for fur-

ther proceedings.* I adhere to my view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), 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 one proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting); *Cousins* v. *Maryland*, 429 U. S. 1027 (BRENNAN, J., dissenting); *Dempsey* v. *United States*, 423 U. S. 1079 (1976) (BRENNAN, J., dissenting); *Susi* v. *Flowers*, 423 U. S. 1006 (1975) (BRENNAN, J., dissenting); *Vardas* v. *Texas*, 423 U. S. 904 (1975) (BRENNAN, J., dissenting); *Stewart* v. *Iowa*, 423 U. S. 902 (1975) (BRENNAN, J., dissenting); *Waugh* v. *Gray*, 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri*, 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson*, 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico*, 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States*, 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington*, 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida*, 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White*, 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown*, 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana*, 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory*, 66 N. J. 510, 333 A. 2d 257 (1975).

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*Because the Court of Appeals held that "the double jeopardy clause is not applicable in this case," it declined to consider petitioner's "contention that by pleading guilty he did not waive his right to claim dismissal by reason of double jeopardy." App. to Pet. for Cert. A–3. The case therefore should be remanded to permit the Court of Appeals to consider this contention.

No. 81–6323. GAINES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 88 Ill. 2d 342, 430 N. E. 2d 1046.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 80–6701. ROSS *v.* REED ET AL., *ante*, p. 921;

No. 81–1369. SCHWANECKE ET AL. *v.* HARRIS COUNTY HOSPITAL DISTRICT, 455 U. S. 1019;

No. 81–6224. GODFREY *v.* GEORIGA, *ante*, p. 919;

No. 81–6278. HARTFORD *v.* ARIZONA, *ante*, p. 933;

No. 81–6282. HEJL *v.* TEXAS ET AL., *ante*, p. 933; and

No. 81–6297. MCCOLPIN *v.* EIKELBLOOM ET AL., *ante*, p. 947. Petitions for rehearing denied.

No. 80–1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES, *ante*, p. 107. Petitions of Howard Hughes and Lincoln Isaac for rehearing denied.

No. 80–1595. UNITED STATES *v.* FRADY, *ante*, p. 152. Petition for rehearing denied. THE CHIEF JUSTICE and JUSTICE MARSHALL took no part in the consideration or decision of this petition.

MAY 26, 1982

Dismissal Under Rule 53

No. 81–1864. COMMUNITY COMMUNICATIONS CO., INC. *v.* CITY OF BOULDER, COLORADO, ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 660 F. 2d 1370.

JUNE 1, 1982

Affirmed on Appeal

No. 81–837. CITY OF INDIANOLA, MISSISSIPPI, ET AL. *v.* DOTSON ET AL. Affirmed on appeal from D. C. N. D. Miss. Reported below: 521 F. Supp. 934.

No. 81–1856. SUMTER COUNTY SCHOOL DISTRICT ET AL. *v.* EDGE ET AL. Affirmed on appeal from D. C. M. D. Ga. Reported below: 541 F. Supp. 55.

Appeals Dismissed

No. 81–1529. BILOFSKY ET AL. *v.* DEUKMEJIAN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 124 Cal. App. 3d 825, 177 Cal. Rptr. 621.

No. 81–1829. KRAFT, INC. *v.* FLORIDA DEPARTMENT OF CITRUS. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 406 So. 2d 1079.

No. 81–1862. WILLIAMS ET AL. *v.* SMITH ET AL. Appeal from Ct. App. Ohio, Wood County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 81–656. CONSOLIDATED FOODS CORP. *v.* UNGER. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kremer* v. *Chemical Construction Corp.*, *ante*, p. 461. Reported below: 657 F. 2d 909.

JUSTICE BLACKMUN, concurring.

Respondent Trudy Unger filed charges with the Illinois Fair Employment Practices Commission (FEPC) alleging

that she had been a victim of sex discrimination in employment. The FEPC ruled against her, but on judicial review the state trial court found that the FEPC's decision was against the manifest weight of the evidence. The Appellate Court of Illinois reversed, concluding that the FEPC's order was not arbitrary, capricious, or an abuse of discretion. *Unger* v. *Sirena Division of Consolidated Foods Corp.*, 60 Ill. App. 3d 840, 845, 377 N. E. 2d 266, 270–271 (1978). The Illinois Supreme Court denied respondent's petition for leave to appeal.

During the pendency of the state proceedings, respondent filed this Title VII suit in the United States District Court for the Northern District of Illinois. Sometime after the Illinois Appellate Court ruled against respondent, the District Court found that she had in fact been a victim of sex discrimination. The United States Court of Appeals for the Seventh Circuit affirmed on this issue. 657 F. 2d 909 (1981).

Following its recent decision in *Kremer* v. *Chemical Construction Corp.*, *ante*, p. 461, the Court must grant, vacate, and remand the case for further consideration. But since the Illinois court professed to apply a deferential standard of review, it is not clear that *Kremer* governs this case. See *ante*, at 480–481, n. 21; *ante*, at 492–493, n. 8 (BLACKMUN, J., dissenting). In addition, on remand respondent will be free to argue that *Kremer* should not apply retroactively. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971).

If the Court of Appeals concludes that *Kremer* controls this case, it will be forced to order the dismissal of respondent's complaint as barred by the Illinois Appellate Court's affirmance of the FEPC's decision. Only one court, the District Court, has given respondent a full *de novo* hearing, and that court determined that respondent had been discriminated against because of her sex. Yet application of this Court's *Kremer* decision denies her any relief under Title VII, simply because she took the reasonable step of seeking correction of the FEPC's decision in the state courts. As I explained in my *Kremer* dissent, *ante*, p. 486, I cannot accept that this re-

sult is consistent with the congressional purpose underlying Title VII—that the fight against employment discrimination be a national policy of the highest priority. Surely all future discrimination victims in respondent's situation should be very careful to avoid the state courts entirely so that those victims will not risk losing the relief that Congress intended Title VII to afford them.

Miscellaneous Orders

No. — - ——. HYDABURG COOPERATIVE ASSN. ET AL. *v.* UNITED STATES. Ct. Cl. Motion of petitioners for leave to proceed *in forma pauperis* granted.

No. A–968. ERNEST *v.* COHEN, UNITED STATES ATTORNEY FOR THE DISTRICT OF MAINE, ET AL. Application for injunction and/or writ of habeas corpus, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–988 (81–5848). GILBERT ET AL. *v.* SOUTH CAROLINA, *ante*, p. 984. Application to suspend the effect of the order denying certiorari, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

No. D–263. IN RE DISBARMENT OF KITCHEN. Disbarment entered. [For earlier order herein, see *ante*, p. 903.]

No. D–274. IN RE DISBARMENT OF KLEINDIENST. It is ordered that Richard G. Kleindienst, of Tucson, 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. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. Motion of Kaiser Steel Corp. et al. for leave to file a brief as *amici curiae* granted. Exceptions of New Mexico to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 455 U. S. 932.]

No. 81–1120. UNITED STATES ET AL. *v.* RYLANDER ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 943.] Motion for appointment of counsel granted, and it is ordered that Joseph F. Harbison III, Esquire, of Sacramento, Cal., be appointed to serve as counsel for respondent Richard W. Rylander, Sr., in this case.

No. 81–1798. LARRY V. MUKO, INC. *v.* SOUTHWESTERN PENNSYLVANIA BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 81–1887. IN RE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS OF THE UNITED STATES, INC. Petition for writ of mandamus denied.

Certiorari Granted

No. 81–1487. BANKAMERICA CORP. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 656 F. 2d 428.

No. 81–1581. OLIM ET AL. *v.* WAKINEKONA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 664 F. 2d 708.

Certiorari Denied. (See also No. 81–1862, *supra.*)

No. 80–108. FIRST PENNSYLVANIA BANK N.A. *v.* ZEFFIRO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 623 F. 2d 290.

No. 81–1233. GIACOMINO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 661 F. 2d 937.

No. 81–1414. HOSKINS *v.* CUYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1299.

No. 81–1525. THOMPSON *v.* WOLTENBERG. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 2d 1047.

No. 81–1528. LEE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 195 Mont. 1, 635 P. 2d 1282.

No. 81–1546. CLEPPE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 96 Wash. 2d 373, 635 P. 2d 435.

No. 81–1598. NEW YORK STATE LIQUOR AUTHORITY *v.* BELLANCA, DBA THE MAIN EVENT, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 54 N. Y. 2d 228, 429 N. E. 2d 765.

No. 81–1622. PUEBLO OF SANTO DOMINGO *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 227 Ct. Cl. 265, 647 F. 2d 1087.

No. 81–1644. DEAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 667 F. 2d 729.

No. 81–1651. GALLOWAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 664 F. 2d 161.

No. 81–1831. ALABAMA *v.* MCCURLEY. Sup. Ct. Ala. Certiorari denied. Reported below: 412 So. 2d 1236.

No. 81–1832. LINK ET UX. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 100 Ill. App. 3d 1000, 427 N. E. 2d 589.

No. 81–1845. BENSON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 640 P. 2d 83.

No. 81–1847. COLLINS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1218.

No. 81–1848. BROCK *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 627 S. W. 2d 39.

No. 81–1853. SPUDNIK EQUIPMENT CO. *v.* GARZA, REPRESENTATIVE OF THE ESTATE OF GARZA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1030.

No. 81–1858. COBBS *v.* VIRGINIA. Cir. Ct. Henrico County, Va. Certiorari denied.

No. 81–1867. COHEN *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 625 S. W. 2d 573.

No. 81–1869. JOHNS-MANVILLE CORP. ET AL. *v.* LAM, INC. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 462.

No. 81–1870. BLUE DIAMOND COAL CO. ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 667 F. 2d 510.

No. 81–1871. MECO, INC. *v.* SINNETTE, JUDGE, BOYD CIRCUIT COURT, DIVISION II, ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 625 S. W. 2d 863.

No. 81–1879. DE VAULT *v.* MENOCAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 921.

No. 81–1883. UNITED AIR LINES, INC. *v.* SMALLWOOD. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 2d 303.

No. 81–1884. STAFOS *v.* BELL. C. A. 10th Cir. Certiorari denied. Reported below: 666 F. 2d 1343.

No. 81–1930. UNITED FRUIT & VEGETABLE CO., INC. *v.* DIRECTOR OF THE FRUIT AND VEGETABLE DIVISION, MARKETING SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 983.

No. 81–1996. HOSPAH COAL CO. ET AL. *v.* CHACO ENERGY CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 673 F. 2d 1161.

No. 81–2003. LABASH ET AL. *v.* UNITED STATES DEPARTMENT OF THE ARMY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 2d 1153.

No. 81–2017. DEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 2d 174.

No. 81–2023. LILES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 989.

No. 81–2025. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 616.

No. 81–2035. MERLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81–2052. PATTERSON *v.* CARR, JUDGE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 81–6170. SLATIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1303.

No. 81–6272. COBLE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 274 Ark. 134, 624 S. W. 2d 421.

No. 81–6333. COLLINS, ADMINISTRATOR *v.* DIFFER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 673 F. 2d 1298.

No. 81–6363. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 667 F. 2d 886.

No. 81–6381. MCNARY *v.* SOWDERS, SUPERINTENDENT, KENTUCKY STATE PENTITENTIARY. C. A. 6th Cir. Certiorari denied. Reported below: 660 F. 2d 703.

No. 81–6425. NELSON *v.* SCULLY, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 672 F. 2d 266.

No. 81-6484. MATTHEWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 671 F. 2d 1383.

No. 81-6492. MARSHALL *v.* UNITED STATES STEEL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 673 F. 2d 1333.

No. 81-6493. KREPS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 881, 433 N. E. 2d 541.

No. 81-6499. KOSTANTAS, ADMINISTRATRIX *v.* EXXON Co., U.S.A. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 605.

No. 81-6500. BROCK *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 627 S. W. 2d 42.

No. 81-6502. POLK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 81-6503. WILSON *v.* JAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 183.

No. 81-6505. SWAIN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 413 So. 2d 883.

No. 81-6506. GRIJALVA *v.* WEST, DIRECTOR, CALIFORNIA YOUTH AUTHORITY. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 922.

No. 81-6509. OLSON *v.* GREEN, CHAIRMAN, MINNESOTA BOARD OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 668 F. 2d 421.

No. 81-6513. GREEN *v.* WHITE, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN. C. A. 8th Cir. Certiorari denied.

No. 81-6517. MORRIS *v.* ROSS. C. A. 11th Cir. Certiorari denied. Reported below: 663 F. 2d 1032.

No. 81-6520. BRIDGES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 81-6521. GONZALEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 55 N. Y. 2d 720, 431 N. E. 2d 630.

No. 81-6522. HEMPHILL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-6566. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 781.

No. 81-6571. STRAHAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 674 F. 2d 96.

No. 81-6588. FORD *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 81-6607. CELIFIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81-6615. ANTONELLI *v.* SCHRIEBER ET AL. C. A. 7th Cir. Certiorari denied.

No. 81-6625. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 667 F. 2d 1374.

No. 81-6626. DIFRONZO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 809.

No. 81-6632. HUMPHREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 153.

No. 81-6643. TOWNLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 579.

No. 81-6646. McRary *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 674.

No. 81-6648. Bennett *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 675 F. 2d 596.

No. 81-6651. King *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 640 P. 2d 983.

No. 81-6663. Fiorot *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 641 P. 2d 551.

No. 81-6675. Wiggan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 673 F. 2d 145.

No. 81-6678. Whitley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 182.

No. 81-1587. Balkcom, Warden *v.* Baty. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 F. 2d 391.

No. 81-1776. Lewis *v.* Illinois. Sup. Ct. Ill.; and

No. 81-6419. Mikenas *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81-1776, 88 Ill. 2d 129, 430 N. E. 2d 1346; No. 81-6419, 407 So. 2d 892.

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. 81-1872. Turf Paradise, Inc. *v.* Arizona Downs. C. A. 9th Cir. Certiorari denied. Justice O'Connor took no part in the consideration or decision of this petition. Reported below: 670 F. 2d 813.

No. 81–2044. THREE J FARMS, INC., ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 1322.

Rehearing Denied

No. 81–1317. CITY OF PARMA, OHIO *v.* UNITED STATES, *ante*, p. 926; and

No. 81–6271. BARHAM *v.* UNITED STATES, *ante*, p. 947. Petitions for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 28, 1982, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1014. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, and 446 U. S. 995.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 1982

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure prescribed pursuant to Section 2072 of Title 28, United States Code;

Amendments to the Federal Rules of Criminal Procedure prescribed pursuant to Sections 3771 and 3772 of Title 18, United States Code; and

Amendments to the Rules and Forms Governing Proceedings in the United States District Courts under Sections 2254 and 2255 of Title 28, United States Code.

Accompanying these rules are excerpts from the Reports of the Judicial Conference of the United States containing the Advisory Committee notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, APRIL 28, 1982

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Rule 4 as hereinafter set forth:

[See *infra*, pp. 1017–1020.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1982, and shall govern all civil proceedings thereafter commenced and, insofar as just and reasonable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process.

(a) Summons Issuance.—Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the plaintiff or his attorney. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

. . . . .

(c) By whom served.

(1) Service of a summons and complaint shall be made by any person who is not a party and is not less than 18 years of age except as provided in subdivision (c)(2) of this rule.

(2) At the request of a party, service of a summons and complaint shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose—

(A) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U. S. C. § 1915 or of a seaman authorized to proceed under Title 28, U. S. C. § 1916,

(B) pursuant to any statutory provision expressly providing for service by a United States marshal or his deputy, and

(C) pursuant to any order issued by the court stating that service in that particular action is required to be made by a United States marshal, deputy, or special appointee in order to guarantee that service is properly effected.

(3) Service of all other process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose.

(4) The plaintiff or his attorney shall be responsible for making arrangements for prompt service. Special appointments to serve process shall be made freely.

(d) Summons and complaint: Personal service and service by mail.—The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

. . . . .

(7) For service upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state; except that a summons and complaint served by mail may be served only as authorized by and pursuant to the procedures set forth in paragraph (8) of this subdivision of this rule.

(8) Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a United States marshal or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. If delivery of the process is refused, the person serving the process, promptly upon the receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person.

(e) Same: Service upon party not inhabitant of or found within state.—Whenever a statute of the United States or an order of court thereunder provides for service of a summons, a notice, or an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, a notice, or an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule; except that service by mail must be made pursuant to the procedures set forth in paragraph (8) of subdivision (d) of this rule.

. . . . .

(g) Return.—The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. If service was by mail, the person serving process shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt or returned envelope if and when received by him showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also make proof of any further service mailed to the defendant pursuant to paragraph (8) of subdivision (d) of this rule. The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become part of the record. Failure to make proof of service does not affect the validity of the service.

. . . . .

(j) Summons: Time limit for service.—If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's own initiative. If service is made by mail pursuant to Rule 4(d)(8), service shall be deemed to have been made for the purposes of this provision as of the date on which the process was accepted, refused, or returned as unclaimed. This subdivision shall not apply to service in a foreign country pursuant to Rule 4(i).

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 28, 1982, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 1014. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, and 441 U. S. 985.

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, APRIL 28, 1982

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Rules 1, 5(b), 9(a), 9(b)(1), 9(b)(2), 9(c)(1), 9(c)(2), 11(c)(1), 11(c)(4), 11(c)(5), 20(b), 40(d)(1), 40(d)(2), 45(a), 54(a), 54(b)(4) and 54(c) as hereinafter set forth:

[See *infra*, pp. 1025–1030.]

2. That subdivision (d) of Rule 9 of the Federal Rules of Criminal Procedure is hereby abrogated.

3. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on August 1, 1982, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope.

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.

Rule 5. Initial Appearance Before the Magistrate.

. . . . .

(b) Misdemeanors.—If the charge against the defendant is a misdemeanor triable by a United States magistrate under 18 U. S. C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates.

. . . . .

Rule 9. Warrant or Summons Upon Indictment or Information.

(a) Issuance.—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a sum-

mons appears initially before a magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of Rule 5.

(b) Form.

(1) Warrant.—The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) Summons.—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(c) Execution or Service; and Return.

(1) Execution or Service.—The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U. S. C. § 3041.

(2) Return.—The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pend-

ing, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

[(d) *Remand to United States Magistrate for Trial of Minor Offenses.*] [Abrogated.]

Rule 11. Pleas.

. . . . .

(c) Advice to defendant.—Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; and

. . . . .

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

. . . . .

Rule 20. Transfer from the district for plea and sentence.

. . . . .

(b) Indictment or information not pending.—A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested, held, or present, subject to the ap-

proval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.

. . . . .

Rule 40. Commitment to another district.

. . . . .

(d) Arrest of Probationer.—If a person is arrested for a violation of his probation in a district other than the district having probation jurisdiction, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed under Rule 32.1 if jurisdiction over the probationer is transferred to that district pursuant to 18 U. S. C. § 3653;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the probationer to answer in the district court of the district having probation jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the probationer held to answer in the district court of the district having probation jurisdiction upon production of certified copies of the probation order, the warrant, and the application for the warrant, and upon a finding that the person before him is the person named in the warrant.

. . . . .

Rule 45. Time.

(a) Computation.—In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforemen-

tioned days. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

. . . . .

Rule 54. Application and exception.

(a) Courts.—These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.

(b) Proceedings.

. . . . .

(4) Proceedings before United States Magistrates.—Proceedings involving misdemeanors before United States magistrates are governed by the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

. . . . .

(c) Application of Terms.—As used in these rules the following terms have the designated meanings.

. . . . .

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a

United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

. . . . .

["Minor offense" is defined in 18 U. S. C. § 3401.]
[Deleted April 28, 1982, eff. August 1, 1982.]

. . . . .

AMENDMENTS TO RULES GOVERNING 28 U. S. C. §§ 2254 AND 2255 PROCEEDINGS

The following amendments to the Rules Governing Proceedings in the United States District Courts under 28 U. S. C. §§ 2254 and 2255 were prescribed by the Supreme Court of the United States on April 28, 1982, pursuant to 28 U. S. C. § 2072 and 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 1014. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 28 U. S. C. § 2072 and 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Rules Governing 28 U. S. C. §§ 2254 and 2255 Proceedings, see 425 U. S. 1167 and 441 U. S. 1001.

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, APRIL 28, 1982

ORDERED:

1. That the rules and forms governing proceedings in the United States district courts under Section 2254 and Section 2255 of Title 28, United States Code, be, and they hereby are, amended by including therein an amendment to Rule 2(c) of the rules for Section 2254 cases, an amendment to Rule 2(b) of the rules for Section 2255 proceedings, and amendments to the model forms for use in applications under Section 2254 and motions under Section 2255, as hereinafter set forth:

[See *infra*, pp. 1035–1061.]

2. That the aforementioned amendments shall take effect August 1, 1982, and shall be applicable to all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned amendments to the Congress in accordance with Section 2072 of Title 28 and Sections 3771 and 3772 of Title 18, United States Code.

AMENDMENTS TO RULES GOVERNING 28 U. S. C. § 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 2. Petition.

. . . . .

(c) Form of Petition.—The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

. . . . .

MODEL FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U. S. C. § 2254

Name _____

Prison number _____

_____

Place of confinement _____

United States District Court _____ District of _____

Case No. _____

(To be supplied by Clerk of U. S. District Court)

_____, PETITIONER

(Full name)

v.

_____, RESPONDENT

(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF _____

_____, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U. S. C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions.—Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court whose address is _____

_____

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____

_____

_____

_____

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

_____

6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court _____
    (2) Nature of proceeding _____
    _____
    (3) Grounds raised _____
    _____
    _____
    _____
    _____
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☐
    (5) Result _____
    (6) Date of result _____
    (b) As to any second petition, application or motion give the same information:
    (1) Name of court _____
    (2) Nature of proceeding _____
    _____
    (3) Grounds raised _____
    _____
    _____
    _____
    _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

B. Ground two: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

C. Ground three: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

D. Ground four: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing _____
    (b) At arraignment and plea _____
    (c) At trial _____
    (d) At sentencing _____
    (e) On appeal _____
    (f) In any post-conviction proceeding _____
    (g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
    (a) If so, give name and location of court which imposed sentence to be served in the future: _____
    (b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ .

(date)

_____

Signature of Petitioner

IN FORMA PAUPERIS DECLARATION

_____

[Insert appropriate court]

_____ (Petitioner) v. _____ (Respondent(s))	DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   _____

   _____

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   _____

   _____

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ☐ No ☐

   b. Rent payments, interest or dividends Yes ☐ No ☐

   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐

   d. Gifts or inheritances? Yes ☐ No ☐

   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

   _____

   _____

   _____

   _____

3. Do you own cash, or do you have money in checking or savings account?

   Yes ☐ No ☐ (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

   _____

   _____

   _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes ☐ No ☐

   If the answer is "yes," describe the property and state its approximate value. _____

   _____

   _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

   _____

   _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Petitioner

Certificate

I hearby certify that the petitioner herein has the sum of $ _____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution: _____

_____

_____

_____

_____
Authorized Officer of
Institution

MODEL FORM FOR USE IN 28 U. S. C. § 2254 CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court,

_____ District of _____

Case No. _____

_____, PETITIONER

v.

_____, RESPONDENT

and

_____, ADDITIONAL RESPONDENT

Petitioner's Response as to Why His Petition Should Not Be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive petitions.

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) 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 constituted an abuse of the writ.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9( ) for the following reason(s):

_____

_____

_____

_____

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

_____

(V) This response must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered?

   Yes ☐ No ☐

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____

   _____

3. Describe the nature of the assistance, including the names of those who rendered it to you. _____

   _____

   _____

   _____

   _____

4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions.

   _____

   _____

   _____

   _____

   _____

5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new

grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. _____

_____

_____

_____

_____

_____

_____

_____

_____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ .
(date)

_____
Signature of Petitioner

AMENDMENTS TO RULES GOVERNING 28 U. S. C. § 2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS

Rule 2. Motion.

* * * * *

(b) Form of Motion.—The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

* * * * *

MODEL FORM FOR MOTIONS UNDER 28 U. S. C. § 2255

Name _____
Prison Number _____
Place of Confinement _____
United States District Court _____ District of _____
Case No. _____ (to be supplied by Clerk of U. S. District Court)
United States,

v.

_____
(full name of movant)

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is _____

_____

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____

   _____

   _____

   _____

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____

   _____

   _____

6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
    Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(d) Did you appeal to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc.	Yes ☐	No ☐
(2) Second petition, etc.	Yes ☐	No ☐
(3) Third petition, etc.	Yes ☐	No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

B. Ground two: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

C. Ground three: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

D. Ground four: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

_____

_____

_____

_____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing _____

_____

(b) At arraignment and plea _____

_____

(c) At trial _____

_____

(d) At sentencing _____

_____

(e) On appeal _____

_____

(f) In any post-conviction proceeding _____

_____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

_____

(b) And give date and length of sentence to be served in the future: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Movant

IN FORMA PAUPERIS DECLARATION

_____

[Insert appropriate court]

United States v. _____ (Movant)	DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, _____, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   _____

   _____

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   _____

   _____

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ☐ No ☐

   b. Rent payments, interest or dividends Yes ☐ No ☐

   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐

   d. Gifts or inheritances? Yes ☐ No ☐

   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

   _____

   _____

   _____

3. Do you own any cash, or do you have money in a checking or savings account?

   Yes ☐ No ☐ (Include any funds in prison accounts)

   If the answer is "yes," state the total value of the items owned.

   _____

   _____

   _____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes ☐ No ☐

   If the answer is "yes," describe the property and state its approximate value. _____

   _____

   _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

   _____

   _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Movant

Certificate

I hearby certify that the movant herein has the sum of $ _____ on account to his credit at the _____ institution where he is confined. I further certify that movant likewise has the following securities to his credit according to the records of said _____ institution: ____

_____

_____

_____

_____

_____
Authorized Officer of
Institution

MODEL FORM FOR USE IN 28 U. S. C. § 2255 CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court

_____ District of _____

Case No. _____

United States

v.

_____

(Name of Movant)

Movant's Response as to Why His Motion Should Not be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive motions.

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive motions. A second or successive motion 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 movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under rule 9( ) for the following reason(s): _____

_____

_____

_____

_____

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your motion.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

_____

(V) This response must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?

   Yes ☐ No ☐

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____

   _____

3. Describe the nature of the assistance, including the names of those who rendered it to you. _____

   _____

   _____

   _____

   _____

4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____

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5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

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I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ .
(date)

_____
Signature of Movant

INDEX

AGENTS' APPARENT AUTHORITY. See **Antitrust Acts.**

AGGRAVATING CIRCUMSTANCES WARRANTING DEATH SENTENCE. See **Criminal Law,** 2.

ALABAMA. See **Constitutional Law,** III, 1.

ALIENS. See **Freedom of Information Act,** 1.

ANTIFRAUD PROVISIONS OF COMMODITY EXCHANGE ACT. See **Commodity Exchange Act.**

ANTITRUST ACTS.

American Society of Mechanical Engineers—Liability for agents' acts.—Petitioner, a nonprofit membership corporation that promulgates engineering codes which are frequently incorporated by reference in federal regulations and state and local laws, is civilly liable for antitrust violations of its agents committed within scope of their apparent authority; thus petitioner was liable for antitrust injuries suffered by respondent where response of petitioner's subcommittee to letter of inquiry from respondent's competitor (one of whose officials was vice chairman of subcommittee) declared in effect that respondent's product was unsafe, and where response was used by competitor to discourage customers from buying respondent's product. American Society of Mechanical Engineers v. Hydrolevel Corp., p. 556.

APPARENT AUTHORITY OF AGENTS. See **Antitrust Acts.**

APPORTIONMENT OF ELECTION DISTRICTS. See **Reapportionment.**

ARMED FORCES. See also **Constitutional Law,** VII; **Federal Water Pollution Control Act.**

Overseas military bases—Preferential employment of local nationals.—Word "treaty" as used in § 106 of Pub. L. 92–129, which prohibits employment discrimination against United States citizens on overseas military bases unless permitted by "treaty," includes executive agreements such as 1968 agreement between President and Republic of Philippines providing for preferential employment of Filipino citizens at United States military bases in Philippines. Weinberger v. Rossi, p. 25.

ARMY AND AIR FORCE EXCHANGE SERVICE. See **Tucker Act.**

ATTORNEY'S FEES. See **Labor Management Relations Act.**

AUTOMOBILE SEARCHES. See **Constitutional Law,** VIII.

BACK PAY ACT. See **Tucker Act.**

BASTARDS. See **Constitutional Law,** IV.

BIAS OF MEDICARE HEARING OFFICERS. See **Constitutional Law,** III, 3.

BILLS OF LADING. See **Interstate Commerce Act.**

BOILERS SAFETY CODE. See **Antitrust Acts.**

BOYCOTTS. See **Labor Management Relations Act; National Labor Relations Act,** 2.

BROKERS. See **Commodity Exchange Act.**

BURDEN OF PROOF AS TO SELF-DEFENSE. See **Habeas Corpus,** 2.

BUSINESS AGENTS OF UNIONS. See **Labor-Management Reporting and Disclosure Act of 1959.**

CANDIDATE'S PLEDGE TO LOWER SALARY IF ELECTED. See **Constitutional Law,** VI.

CAPITAL PUNISHMENT. See **Criminal Law,** 2.

CARRIERS. See **Interstate Commerce Act.**

"CAUSE AND ACTUAL PREJUDICE" STANDARD OF REVIEW. See **Criminal Law,** 1.

CERTIFICATION OF STATE-LAW QUESTION TO STATE COURT. See **Criminal Law,** 2.

CHARITABLE CONTRIBUTIONS. See **Constitutional Law,** V; **Standing to Sue.**

CITIZENSHIP INFORMATION. See **Freedom of Information Act,** 1.

CIVIL RIGHTS ACT OF 1964.

1. *Employment discrimination—Federal-court action—Effect of state-court judgment.*—In a federal-court employment discrimination action under Act, District Court was required, under "full faith and credit" provisions of 28 U. S. C. § 1738, to give preclusive effect to a New York court's decision upholding rejection of petitioner's discrimination claim by state agency to which, as required by Act, claim had been referred by Equal Employment Opportunity Commission, where New York's administrative and judicial procedures for handling such claims satisfied due process requirements of Fourteenth Amendment. Kremer v. Chemical Construction Corp., p. 461.

CIVIL RIGHTS ACT OF 1964—Continued.

2. *Employment discrimination—Seniority system—Disparate impact.*—Under § 703(h) of Act, which provides that it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a bona fide seniority system if such differences are not "the result of an intention to discriminate because of race," a showing of a disparate impact alone, without discriminatory purpose, is insufficient to invalidate a system, even though result may be to perpetuate pre-Act discrimination. Pullman-Standard v. Swint, p. 273.

3. *Employment discrimination—Seniority system—Review of District Court's finding.*—In an action against an employer and certain unions—where District Court found that differences in treatment of employees under seniority system did not result from an intent to discriminate against blacks and that system thus satisfied requirements of § 703(h) of Act—Court of Appeals erred in concluding that District Court's finding was one of "ultimate fact" not subject to clearly-erroneous standard of review under Federal Rule of Civil Procedure 52(a), and in independently determining that differences in treatment resulted from intentional discrimination; question of intent to discriminate is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. Pullman-Standard v. Swint, p. 273.

4. *Unlawful employment practices—Discrimination—Seniority systems.*—Section 703(h) of Act—which provides that it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, if such differences do not result from an intention to discriminate because of race, color, religion, sex, or national origin—is not limited to seniority systems adopted before Act's effective date. American Tobacco Co. v. Patterson, p. 63.

CLEARLY-ERRONEOUS STANDARD OF REVIEW. See **Civil Rights Act of 1964,** 3.

COLLATERAL ATTACK ON CONVICTION OR SENTENCE. See **Criminal Law,** 1; **Habeas Corpus,** 2; **Jurisdiction,** 2.

COLLATERAL ESTOPPEL. See **Civil Rights Act of 1964,** 1.

COLLECTIVE-BARGAINING AGREEMENTS. See **National Labor Relations Act,** 1.

COLORADO. See **Jurisdiction,** 3.

COMMERCE CLAUSE. See **Constitutional Law,** I.

COMMODITY EXCHANGE ACT.

Antifraud provisions—Price manipulation—Implied causes of action.—Private persons have an implied right of action under Act against their brokers, futures commission merchants, and mercantile exchanges

COMMODITY EXCHANGE ACT—Continued.

for violation of Act's antifraud provisions and its provisions designed to prevent price manipulation. Merrill Lynch, Pierce, Fenner & Smith v. Curran, p. 353.

COMMODITY FUTURES TRADING COMMISSION ACT OF 1974. See **Commodity Exchange Act.**

CONGRESSIONAL DISTRICTS. See **Reapportionment.**

CONSIGNOR'S LIABILITY FOR FREIGHT CHARGES. See **Interstate Commerce Act.**

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1964,** 1; **Criminal Law,** 1; **Habeas Corpus,** 2; **Jurisdiction,** 2; **National Labor Relations Act; Reapportionment; Standing to Sue.**

I. Commerce Clause.

Regulation of electric and gas utilities—Validity of Public Utility Regulatory Policies Act of 1978.—Provisions of Public Utility Regulatory Policies Act of 1978 directing state regulatory commissions and nonregulated electric and gas utilities to consider adoption of certain "rate design" and regulatory standards, requiring state commissions to follow certain procedures in acting on proposed federal standards, directing Federal Energy Regulatory Commission to promulgate rules to encourage cogeneration and small power facilities, requiring state authorities to implement such rules, and authorizing FERC to exempt such facilities from certain state and federal regulations, are within Congress' power under Commerce Clause. FERC v. Mississippi, p. 742.

II. Double Jeopardy.

Mistrial because of prosecutorial or judicial conduct—Retrial.—Where a defendant in a criminal trial successfully moves for a mistrial, he may invoke bar of double jeopardy upon retrial only if conduct giving rise to mistrial was prosecutorial or judicial conduct *intended* to provoke defendant into moving for a mistrial. Oregon v. Kennedy, p. 667.

III. Due Process.

1. *Capital offense—Jury instructions—Lesser included offense.*—Where respondent was convicted in an Alabama state court of capital offense of an intentional killing during a robbery and was sentenced to death, and where at time of trial an Alabama statute (later invalidated) precluded lesser included offense jury instructions in capital cases, Alabama statute did not prejudice respondent, and he was not entitled to a new trial, since his own evidence negated possibility that a lesser included offense instruction might have been warranted—due process requiring such an instruction only when warranted by evidence. Hopper v. Evans, p. 605.

2. *Eviction of tenants—Service of process.*—State deprived appellees, tenants in a public housing project, of property without due process where,

CONSTITUTIONAL LAW—Continued.

pursuant to a Kentucky statute, service of process in forcible entry and detainer actions against appellees was made only by posting summonses on their apartment doors and where appellees claimed that they never saw summonses and did not know of eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them and their opportunity for appeal had lapsed. Greene v. Lindsey, p. 444.

3. *Medicare program—Impartiality of hearing officers.*—Due process requirements are not violated by hearing procedures under Social Security Act's Medicare program whereby hearing officers—who conduct final review of decisions of private insurance carriers (acting on behalf of Secretary of Health and Human Services) refusing to award payments from federal funds for portions of claims for medical and health care costs under Part B of Medicare program—are chosen by such insurance carriers, record not establishing bias or disqualifying interests of either carriers or their hearing officers. Schweiker v. McClure, p. 188.

4. *Personal jurisdiction—Failure to comply with discovery order.*—Federal Rule of Civil Procedure 37(b)(2)(A)—authorizing a district court, as a sanction for failure to comply with discovery orders, to enter an order that matters regarding which discovery was sought shall be taken to be established—may be applied to support a finding of personal jurisdiction without violating due process, and District Court did not abuse its discretion in applying Rule in diversity action when foreign insurance companies raised defense of lack of personal jurisdiction and then failed to comply with court's orders for production of information sought by plaintiff to establish jurisdiction. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, p. 694.

IV. Equal Protection of the Laws.

Paternity suit—Validity of statute of limitations.—A Texas statute barring a paternity suit to identify natural father of an illegitimate child for purposes of obtaining support unless suit is brought before child is one year old denies illegitimate children equal protection of law. Mills v. Habluetzel, p. 91.

V. Freedom of Religion.

Religious organizations—Registration and reporting requirements—Validity of Minnesota statute.—A Minnesota statute providing that only those religious organizations that receive more than half of their total contributions from members or affiliated organizations are exempt from statutory registration and reporting requirements violates Establishment Clause of First Amendment. Larson v. Valente, p. 228.

VI. Freedom of Speech.

Elections—Candidate's pledge to lower salary if elected.—Where petitioner, in seeking election as a County Commissioner, first committed him-

CONSTITUTIONAL LAW—Continued.

self, at a press conference, to lowering Commissioners' salaries if elected but later retracted such pledge upon learning that it arguably violated a Kentucky statute prohibiting a candidate from offering material benefits to voters in consideration for their votes, application of such statute to void petitioner's election victory constituted a limitation of speech violative of First Amendment. Brown v. Hartlage, p. 45.

VII. Right to Speedy Trial.

Dismissal of military charges—Subsequent indictment on civilian charges.—Where military murder charges against respondent, an officer in Army Medical Corps, were dismissed in 1970 but Army, at Justice Department's request, continued its investigation and respondent was ultimately indicted in 1975 on murder charges and was thereafter convicted, time between dismissal of military charges and indictment on civilian charges could not be considered in determining whether delay in bringing respondent to trial violated his right to a speedy trial under Sixth Amendment. United States v. MacDonald, p. 1.

VIII. Searches and Seizures.

Stop of automobile—Scope of warrantless search.—Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of vehicle that is as thorough as a magistrate could authorize by warrant, extending to every part of vehicle and its contents, including all containers and packages, that may conceal object of search. United States v. Ross, p. 798.

IX. States' Powers.

Regulation of electric and gas utilities—Validity of Public Utility Regulatory Policies Act of 1978.—Provisions of Public Utility Regulatory Policies Act of 1978 directing state regulatory commissions and nonregulated electric and gas utilities to consider adoption of certain "rate design" and regulatory standards, requiring state commissions to follow certain procedures in acting on proposed federal standards, directing Federal Energy Regulatory Commission to promulgate rules to encourage cogeneration and small power facilities, requiring state authorities to implement such rules, and authorizing FERC to exempt such facilities from certain state and federal regulations, do not trench on state sovereignty in violation of Tenth Amendment. FERC v. Mississippi, p. 742.

CONSTRUCTION INDUSTRY LABOR AGREEMENTS. See **National Labor Relations Act,** 1.

CONTRACTS. See **Tucker Act.**

CONTRIBUTIONS TO RELIGIOUS ORGANIZATIONS. See **Constitutional Law,** V; **Standing to Sue.**

COURT OF CLAIMS. See **Jurisdiction,** 1.

COURTS OF APPEALS. See **National Labor Relations Act,** 1.

CREDIT REGULATIONS OF INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

CRIMINAL LAW. See also **Constitutional Law,** II; III, 1; VII; **Habeas Corpus,** 2; **Jurisdiction,** 2.

1. *Collateral attack on sentence—Trial-court jury instructions—Standard of review.*—In reversing District Court's denial of respondent's motion under 28 U. S. C. § 2255 to vacate life sentence for first-degree murder on alleged ground that instructions to trial jury as to malice had eliminated any possibility of a manslaughter verdict—District Court's denial of motion having been based on respondent's failure to challenge instructions on direct appeal of conviction or in prior collateral attacks on sentence—Court of Appeals erred in applying "plain error" standard of Federal Rule of Criminal Procedure 52(b) governing relief on direct appeal from errors not objected to at trial, instead of "cause and actual prejudice" standard; and respondent did not sustain burden of showing that alleged trial error had worked to his actual and substantial disadvantage so as to infect trial with error of constitutional dimensions. United States v. Frady, p. 152.

2. *Death sentence—Invalidity of one of aggravating circumstances found by jury.*—In federal habeas corpus proceedings by state prisoner challenging constitutionality of Georgia death sentence that was upheld by Georgia Supreme Court, which, while setting aside jury's finding of one statutory aggravating circumstance, had concluded that sentence was not impaired since evidence supported jury's findings of two other aggravating circumstances, this Court will, pursuant to a Georgia statute, certify question to Georgia Supreme Court as to what premises of state law supported conclusion that death sentence was not impaired by invalidity of one of aggravating circumstances found by jury. Zant v. Stephens, p. 410.

CYCLANDELATE. See **Trademark Act of 1946.**

DALLAS COUNTY. See **Reapportionment.**

DAMAGES. See **Labor Management Relations Act.**

DEATH SENTENCES. See **Criminal Law,** 2.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Education Amendments of 1972.**

DEPARTMENT OF STATE. See **Freedom of Information Act,** 1.

DISCHARGE OF GOVERNMENT EMPLOYEES. See **Tucker Act.**

DISCHARGE OF UNION BUSINESS AGENTS. See **Labor-Management Reporting and Disclosure Act of 1959.**

DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

DISCOVERY. See **Constitutional Law,** III, 4.

DISCRIMINATION AGAINST BLACKS. See **Civil Rights Act of 1964,** 2–4.

DISCRIMINATION IN EMPLOYMENT. See **Armed Forces; Civil Rights Act of 1964; Education Amendments of 1972.**

DISCRIMINATION IN FEDERALLY FUNDED EDUCATION PROGRAMS. See **Education Amendments of 1972.**

DISCRIMINATION ON BASIS OF NATIONAL ORIGIN. See **Civil Rights Act of 1964,** 1.

DISCRIMINATION ON BASIS OF SEX. See **Education Amendments of 1972.**

DISMISSAL OF MILITARY CHARGES AS AFFECTING SPEEDY TRIAL ON SUBSEQUENT CIVILIAN CHARGES. See **Constitutional Law,** VII.

DISTRICT COURTS. See **Tucker Act.**

DISTRICT OF COLUMBIA. See **Criminal Law,** 1; **Jurisdiction,** 2.

DOUBLE JEOPARDY. See **Constitutional Law,** II.

DRUGS. See **Trademark Act of 1946.**

DUE PROCESS. See **Civil Rights Act of 1964,** 1; **Constitutional Law,** III; VII; **Habeas Corpus,** 2.

EDUCATION AMENDMENTS OF 1972.

Federally funded education programs—Sex discrimination against employees.—Section 901(a) of Title IX of Amendments—which provides that "no person" shall, on basis of sex, be denied benefits of, or be subjected to discrimination under, any federally funded education program—prohibits such programs from discriminating against not only students but also such programs' employees, and Health, Education, and Welfare Department's regulations prohibiting such employment discrimination are valid. North Haven Bd. of Ed. v. Bell, p. 512.

ELECTION OF UNION OFFICERS. See **Labor-Management Reporting and Disclosure Act of 1959.**

ELECTIONS. See **Constitutional Law,** VI; **Reapportionment.**

ELECTRIC UTILITIES. See **Constitutional Law,** I; IX.

EMPLOYER AND EMPLOYEES. See **Armed Forces; Civil Rights Act of 1964; Education Amendments of 1972; Labor-Management Reporting and Disclosure Act of 1959; Tucker Act.**

EMPLOYMENT DISCRIMINATION. See **Armed Forces; Civil Rights Act of 1964; Education Amendments of 1972.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV; **Jurisdiction,** 2.

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** V; **Standing to Sue.**

EVICTIONS. See **Constitutional Law,** III, 2.

EXEMPTION 6 OF FREEDOM OF INFORMATION ACT. See **Freedom of Information Act,** 1.

EXEMPTION 7 OF FREEDOM OF INFORMATION ACT. See **Freedom of Information Act,** 2.

FEDERAL BUREAU OF INVESTIGATION FILES AS EXEMPT FROM PUBLIC DISCLOSURE. See **Freedom of Information Act,** 2.

FEDERAL EMPLOYEES. See **Tucker Act.**

FEDERAL ENERGY REGULATORY COMMISSION. See **Constitutional Law,** I; IX.

FEDERALLY FUNDED EDUCATION PROGRAMS. See **Education Amendments of 1972.**

FEDERAL RULES OF CIVIL PROCEDURE. See also **Civil Rights Act of 1964,** 3; **Constitutional Law,** III, 4; **Trademark Act of 1946.**

Amendments to Rules, p. 1013.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Criminal Law,** 1.

Amendments to Rules, p. 1021.

FEDERAL-STATE RELATIONS. See **Civil Rights Act of 1964,** 1; **Constitutional Law,** I; IX; **Criminal Law,** 2; **Habeas Corpus,** 2; **Reapportionment.**

FEDERAL WATER POLLUTION CONTROL ACT.

Navy's discharge of ordnance into waters—Failure to obtain permit—Injunctive relief.—In an action alleging violation of Act by Navy's discharge of ordnance into waters near island used for air-to-ground weapons training, wherein District Court found that water quality was not harmed but ordered Navy to comply with Act by applying for permit from Environmental Protection Agency, Act did not withdraw District Court's equitable discretion so as to require it to enjoin Navy's operations pending consideration of permit application. Weinberger v. Romero-Barcelo, p. 305.

FIFTH AMENDMENT. See **Constitutional Law,** II; VII.

FINAL JUDGMENTS. See **Jurisdiction,** 3.

FIRST AMENDMENT. See **Constitutional Law,** V; VI; **National Labor Relations Act,** 2; **Standing to Sue.**

FORCIBLE ENTRY AND DETAINER ACTIONS. See **Constitutional Law,** III, 2.

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1964,** 1; **Constitutional Law,** II; III, 2; IV; **Habeas Corpus,** 2.

FOURTH AMENDMENT. See **Constitutional Law,** VIII.

FRAUD. See **Commodity Exchange Act.**

FREEDOM OF ASSEMBLY. See **Labor-Management Reporting and Disclosure Act of 1959.**

FREEDOM OF INFORMATION ACT.

1. *Exemption 6—Iranian nationals—Possession of passports.*—Information sought by respondent from petitioner State Department, consisting of documents indicating whether certain Iranian nationals held valid United States passports, satisfied "similar files" requirement of Act's Exemption 6, relating to personnel and medical files and "similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and petitioner's denial of disclosure request should have been sustained upon a showing that release of information would constitute a clearly unwarranted invasion of personal privacy. Department of State v. Washington Post Co., p. 595.

2. *Exemption 7—Summaries of information compiled for law enforcement purposes.*—Information contained in records originally compiled for law enforcement purposes but later reproduced or summarized in a new document prepared for other purposes—such as summaries culled from Federal Bureau of Investigation files on individuals who had criticized Presidential administration, which summaries were transmitted by FBI to White House—does not lose its exempt status under Exemption 7 of Act but continues to meet Exemption's threshold requirement of being compiled for law enforcement purposes. FBI v. Abramson, p. 615.

FREEDOM OF RELIGION. See **Constitutional Law,** V; **Standing to Sue.**

FREEDOM OF SPEECH. See **Constitutional Law,** VI; **Labor-Management Reporting and Disclosure Act of 1959; National Labor Relations Act,** 2.

FREIGHT CHARGES. See **Interstate Commerce Act.**

FULL FAITH AND CREDIT. See **Civil Rights Act of 1964,** 1.

FUTURES TRADING. See **Commodity Exchange Act.**

GAS UTILITIES. See **Constitutional Law,** I; IX.

GENDER-BASED DISCRIMINATION. See **Education Amendments of 1972.**

GENERIC PRESCRIPTION DRUGS. See **Trademark Act of 1946.**

GEORGIA. See **Criminal Law,** 2.

GOVERNMENT EMPLOYEES. See **Armed Forces; Tucker Act.**

HABEAS CORPUS.

1. Amendment to Rules Governing 28 U. S. C. § 2254 Proceedings, p. 1031.

2. *Federal relief—Burden of proving self-defense—Validity of state-court instructions.*—Respondent state prisoners alleged no deprivation of federal rights and were not entitled to federal habeas relief insofar as they simply challenged correctness, under Ohio law, of state-court jury instructions that a defendant bore burden of proving self-defense by a preponderance of evidence; and respondents are barred from asserting, in federal habeas corpus proceedings, their colorable constitutional claim that Due Process Clause required State to disprove self-defense beyond a reasonable doubt since such claim was forfeited in state courts because of respondents' failure to comply with Ohio rule mandating contemporaneous objections to jury instructions. Engle v. Isaac, p. 107.

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Education Amendments of 1972.**

HEARING OFFICERS UNDER MEDICARE PROGRAM. See **Constitutional Law,** III, 3.

ILLEGITIMATE CHILDREN. See **Constitutional Law,** IV.

IMPARTIALITY OF MEDICARE HEARING OFFICERS. See **Constitutional Law,** III, 3.

IMPLIED CAUSES OF ACTION. See **Commodity Exchange Act.**

IMPLIED EMPLOYMENT CONTRACTS. See **Tucker Act.**

IMPORTATION OF RUSSIAN GOODS. See **National Labor Relations Act,** 2.

INFRINGEMENT OF TRADEMARKS. See **Trademark Act of 1946.**

INJUNCTIONS. See **Federal Water Pollution Control Act.**

INSTRUCTIONS TO JURY. See **Constitutional Law,** III, 1; **Criminal Law,** 1; **Habeas Corpus,** 2.

INSURANCE CARRIERS' DECISIONS AS TO MEDICARE BENEFITS. See **Constitutional Law,** III, 3; **Jurisdiction,** 1.

INTERSTATE COMMERCE. See **Constitutional Law,** I; **Interstate Commerce Act.**

INTERSTATE COMMERCE ACT.

Railroad freight charges—Consignor's liability.—Although petitioner, a common carrier by rail, violated Interstate Commerce Commission's credit regulations promulgated under § 3(2) of Act by delivering shipments to consignee without first collecting freight charges or checking consignee's credit standing, such violation did not bar petitioner's collection of freight charges from respondent consignor who had not executed "nonrecourse clause" in bills of lading and thus was primarily liable for freight charges. Southern Pacific Transportation Co. v. Commercial Metals Co., p. 336.

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act.**

IRANIAN NATIONALS. See **Freedom of Information Act,** 1.

JUDICIAL CONDUCT RESULTING IN MISTRIAL. See **Constitutional Law,** II.

JUDICIAL REVIEW OF DECISIONS AS TO MEDICARE BENEFITS. See **Jurisdiction,** 1.

JUDICIAL REVIEW OF NATIONAL LABOR RELATIONS BOARD ORDERS. See **National Labor Relations Act,** 1.

JURISDICTION. See also **Constitutional Law,** III, 4; **National Labor Relations Act,** 1; **Tucker Act.**

1. *Court of Claims—Medicare program—Review of insurance carriers' decisions.*—In view of provisions of Social Security Act limiting judicial review of decisions of private insurance carriers (acting for Government) concerning Part B of Medicare program to review of decisions as to eligibility to participate in Part B, Court of Claims has no jurisdiction to review such carriers' determinations of amount of benefits payable under Part B. United States v. Erika, Inc., p. 201.

2. *Supreme Court—Conviction in District Court for District of Columbia—Collateral attack under 28 U. S. C. § 2255.*—Supreme Court has jurisdiction to review Court of Appeals' judgment reversing judgment of Federal District Court for District of Columbia—respondent having filed motion in District Court under 28 U. S. C. § 2255 collaterally attacking his sentence in prosecution in 1963 when District Court had exclusive jurisdiction over local felonies committed in District—and Supreme Court is not required to refrain from reviewing decision on alleged ground that Court of Appeals' decision was based on an adequate and independent local ground of decision; equal protection principles do not require that a § 2255 motion by a prisoner convicted in 1963 be treated as though it was a motion under District of Columbia Code after 1970. United States v. Frady, p. 152.

JURISDICTION—Continued.

3. *Supreme Court—Review of "final" judgments.*—Supreme Court has no jurisdiction under 28 U. S. C. § 1257, which provides for review of "final" judgments, to review Colorado Supreme Court's judgment remanding case for trial. O'Dell v. Espinoza, p. 430.

JURISDICTIONAL PICKETING. See **Labor Management Relations Act.**

JURY INSTRUCTIONS. See **Constitutional Law,** III, 1; **Criminal Law,** 1; **Habeas Corpus,** 2.

KENTUCKY. See **Constitutional Law,** III, 2; VI.

LABOR MANAGEMENT RELATIONS ACT.

Union's illegal activities—Employer's "damages"—Attorney's fees in NLRB proceedings.—In an employer's action under § 303 of Act to recover damages for union's violation of secondary boycott and jurisdictional picketing prohibitions of National Labor Relations Act, as established in proceedings before National Labor Relations Board, employer's attorney's fees incurred during Board proceedings are not a proper element of "damages" under § 303(b). Summit Valley Industries, Inc. v. Carpenters, p. 717.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

Union business agents—Discharge after election of union president.—Sections 101(a)(1) and (2) of Act, which guarantee equal voting rights and rights of free speech and assembly to union members, and § 609, which forbids a union to discipline a member for exercising any right under Act, were not violated when petitioner union members were discharged from their appointed positions as business agents for respondent local union by respondent union president following his election over a candidate supported by petitioners. Finnegan v. Leu, p. 431.

LABOR UNIONS. See **Civil Rights Act of 1964,** 2–4; **Labor Management Relations Act; Labor-Management Reporting and Disclosure Act of 1959; National Labor Relations Act.**

LANDLORD AND TENANT. See **Constitutional Law,** III, 2.

LESSER INCLUDED OFFENSES. See **Constitutional Law,** III, 1.

LIMITATION OF ACTIONS. See **Constitutional Law,** IV.

MALICE. See **Criminal Law,** 1.

MANUFACTURERS OF DRUGS. See **Trademark Act of 1946.**

MECHANICAL ENGINEERS' SOCIETY. See **Antitrust Acts.**

MEDICARE. See **Constitutional Law,** III, 3; **Jurisdiction,** 1.

MERCANTILE EXCHANGES. See **Commodity Exchange Act.**

MILITARY BASES. See **Armed Forces.**

MILITARY CRIMINAL CHARGES. See **Constitutional Law,** VII.

MINNESOTA. See **Constitutional Law,** V; **Standing to Sue.**

MISLABELING OF DRUGS. See **Trademark Act of 1946.**

MISSISSIPPI. See **Constitutional Law,** I; IX.

MISTRIALS. See **Constitutional Law,** II.

MOTOR VEHICLE SEARCHES. See **Constitutional Law,** VIII.

NATIONAL LABOR RELATIONS ACT. See also **Labor Management Relations Act.**

1. *Collective-bargaining agreements—Construction industry—Subcontracting clauses.*—Proviso to § 8(e) of Act, exempting from proscription of secondary agreements between employer and unions those agreements that concern contracting or subcontracting of work to be performed at a construction jobsite, ordinarily shelters subcontracting clauses that require employer to subcontract jobsite work to subcontractors who are parties to agreement with appropriate union and that are sought or negotiated in context of a collective-bargaining relationship, even when not limited to particular jobsites at which both union and nonunion workers are employed; Court of Appeals, while properly enforcing National Labor Relations Board's orders upholding validity of such subcontracting clauses, was without jurisdiction to decide that unions did not violate § 8(b)(4)(A) in picketing to obtain such clauses, where that issue was not raised in proceedings before Board. Woelke & Romero Framing, Inc. v. NLRB, p. 645.

2. *Unfair labor practice—Refusal to handle Russian cargo—Secondary boycott.*—Petitioner union's refusal to handle ships' cargo arriving from or destined for Soviet Union—as a protest against Russian invasion of Afghanistan—thus completely disrupting respondent's business of importing Russian goods shipped by an American shipper that employed a stevedoring company that in turn employed union members, constituted an illegal secondary boycott under § 8(b)(4)(B) of Act; application of § 8(b)(4)(B) here does not infringe First Amendment rights of petitioner or its members. Longshoremen v. Allied International, Inc., p. 212.

NATIONAL LABOR RELATIONS BOARD. See **Labor Management Relations Act; National Labor Relations Act,** 1.

NAVY'S DISCHARGE OF ORDNANCE INTO WATERS. See **Federal Water Pollution Control Act.**

NEW TRIALS. See **Constitutional Law,** II; III, 1.

NEW YORK. See **Civil Rights Act of 1964,** 1.

"NONRECOURSE CLAUSE" IN BILLS OF LADING. See **Interstate Commerce Act.**

NOTICE OF EVICTION. See **Constitutional Law,** III, 2.

OBJECTIONS TO JURY INSTRUCTIONS. See **Criminal Law,** 1; **Habeas Corpus,** 2.

OHIO. See **Habeas Corpus,** 2.

OREGON. See **Constitutional Law,** II.

OVERSEAS MILITARY BASES. See **Armed Forces.**

PACKAGE SEARCHES. See **Constitutional Law,** VIII.

PARENT AND CHILD. See **Constitutional Law,** IV.

PASSPORTS. See **Freedom of Information Act,** 1.

PATERNITY SUITS. See **Constitutional Law,** IV.

PATRONAGE DISCHARGES OF UNION EMPLOYEES. See **Labor-Management Reporting and Disclosure Act of 1959.**

PERSONAL JURISDICTION. See **Constitutional Law,** III, 4.

PHILIPPINES. See **Armed Forces.**

PICKETING. See **Labor Management Relations Act; National Labor Relations Act,** 1.

"PLAIN ERROR" STANDARD OF REVIEW. See **Criminal Law,** 1.

POLITICAL BOYCOTT OF RUSSIAN GOODS. See **National Labor Relations Act,** 2.

POLITICAL CAMPAIGNS. See **Constitutional Law,** VI.

POLLUTION. See **Federal Water Pollution Control Act.**

POSTCONVICTION PROCEEDINGS.

Amendments to Rules Governing 28 U. S. C. § 2255 Proceedings, p. 1031.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Constitutional Law,** IX.

PREFERENTIAL EMPLOYMENT OF LOCAL NATIONALS AT OVERSEAS MILITARY BASES. See **Armed Forces.**

PRESCRIPTION DRUGS. See **Trademark Act of 1946.**

PRICE MANIPULATION. See **Commodity Exchange Act.**

PRIMARY ELECTIONS. See **Reapportionment.**

PRINCIPAL AND AGENT. See **Antitrust Acts.**

PRISONERS. See **Criminal Law; Habeas Corpus,** 2.

PRIVATE CAUSES OF ACTION. See **Commodity Exchange Act.**

PROFESSIONAL SOCIETIES. See **Antitrust Acts.**

PROSECUTORIAL CONDUCT RESULTING IN MISTRIAL. See **Constitutional Law,** II.

PUBLIC DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

PUBLIC EMPLOYEES. See **Armed Forces; Tucker Act.**

PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978. See **Constitutional Law,** I; IX.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964,** 2–4.

RAILROAD FREIGHT CHARGES. See **Interstate Commerce Act.**

RATES OF PUBLIC UTILITIES. See **Constitutional Law,** I; IX.

REAPPORTIONMENT.

Texas congressional districts—Legislative plan.—In an action challenging validity of Texas Legislature's reapportionment plan for congressional districts, District Court having delayed proceeding pending review of plan under Voting Rights Act of 1965 by Attorney General, who ultimately objected to certain districts in south Texas but otherwise approved plan—District Court erred in formulating plan which, in addition to resolving Attorney General's objection to specified districts, also established new districts for Dallas County, Attorney General not having objected to Dallas County districts under Texas Legislature's plan and District Court not having found constitutional or statutory violation as to those districts; however, District Court in first instance should determine whether forthcoming congressional primary elections for Dallas County should be rescheduled or should proceed under court's interim plan. Upham v. Seamon, p. 37.

RELIGIOUS FREEDOM. See **Constitutional Law,** V; **Standing to Sue.**

REPORTING AND REGISTRATION REQUIREMENTS AS TO RELIGIOUS ORGANIZATIONS. See **Constitutional Law,** V; **Standing to Sue.**

RES JUDICATA. See **Civil Rights Act of 1964,** 1.

RETRIALS. See **Constitutional Law,** II; III, 1.

RIGHT TO SPEEDY TRIAL. See **Constitutional Law,** VII.

SAFETY CODES. See **Antitrust Acts.**

SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS. See **Constitutional Law,** III, 4.

SCHOOL BOARD EMPLOYEES. See **Education Amendments of 1972.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VIII.

SECONDARY AGREEMENTS BETWEEN EMPLOYERS AND UNIONS. See **National Labor Relations Act,** 1.

SECONDARY BOYCOTTS. See **Labor Management Relations Act; National Labor Relations Act,** 2.

SELF-DEFENSE. See **Habeas Corpus,** 2.

SENIORITY SYSTEMS. See **Civil Rights Act of 1964,** 2–4.

SERVICE OF PROCESS. See **Constitutional Law,** III, 2.

SEX DISCRIMINATION. See **Education Amendments of 1972.**

SHERMAN ACT. See **Antitrust Acts.**

SHIPPERS. See **National Labor Relations Act,** 2.

SIXTH AMENDMENT. See **Constitutional Law,** VII.

SOCIAL SECURITY ACT. See **Constitutional Law,** III, 3; **Jurisdiction,** 1.

SOLICITATION OF RELIGIOUS CONTRIBUTIONS. See **Constitutional Law,** V; **Standing to Sue.**

SPECULATORS IN FUTURES CONTRACTS. See **Commodity Exchange Act.**

SPEEDY TRIAL. See **Constitutional Law,** VII.

STANDING TO SUE.

Unification Church and its followers—Registration and reporting requirements—Validity of Minnesota statute.—Unification Church and individuals following its tenets have Art. III standing to challenge validity, under Establishment Clause of First Amendment, of Minnesota statute which provides that only those religious organizations that receive more than half of their total contributions from members or affiliated organizations are exempt from statutory registration and reporting requirements. Larson v. Valente, p. 228.

STATE DEPARTMENT. See **Freedom of Information Act,** 1.

STATES' POWERS. See **Constitutional Law,** IX.

STATUTES OF LIMITATIONS. See **Constitutional Law,** IV.

STEVEDORES. See **National Labor Relations Act,** 2.

SUBCONTRACTING CLAUSES IN CONSTRUCTION INDUSTRY LABOR AGREEMENTS. See **National Labor Relations Act,** 1.

SUMMARIES OF AGENCY FILES AS EXEMPT FROM PUBLIC DISCLOSURE. See **Freedom of Information Act,** 2.

SUMMONSES. See **Constitutional Law,** III, 2.

SUPPORT OF ILLEGITIMATE CHILDREN. See **Constitutional Law,** IV.

SUPREME COURT. See also **Jurisdiction,** 2, 3.

1. Notation of the death of Justice Fortas (resigned), p. v.

2. Amendments to Federal Rules of Civil Procedure, p. 1013.

3. Amendments to Federal Rules of Criminal Procedure, p. 1021.

4. Amendments to Rules Governing 28 U. S. C. §§ 2254 and 2255 Proceedings, p. 1031.

TENANTS' RIGHT TO EVICTION NOTICE. See **Constitutional Law,** III, 2.

TENTH AMENDMENT. See **Constitutional Law,** IX.

TEXAS. See **Constitutional Law,** IV; **Reapportionment.**

TRADEMARK ACT OF 1946.

Prescription drugs—Trademark infringement—Court of Appeals' review of District Court findings.—In an action under Act by respondent manufacturer of prescription drug who sold drug to retail pharmacists under registered trademark—alleging that petitioner generic drug manufacturers had copied appearance of respondent's capsules and, with petitioner wholesalers, had contributed to some pharmacists' dispensing generic drugs mislabeled under respondent's trademark—Court of Appeals erred in setting aside District Court's findings that respondent failed to show that petitioners intentionally induced pharmacists' mislabeling or continued to supply pharmacists who petitioners knew or should have known were mislabeling, where Court of Appeals acted on its own review of evidence, rather than on basis of "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). Inwood Laboratories, Inc. v. Ives Laboratories, Inc., p. 844.

TREATIES. See **Armed Forces.**

TUCKER ACT. See also **Jurisdiction,** 1.

Jurisdiction—Discharge from Government employment—Express or implied contract.—Act's provisions giving federal courts jurisdiction over certain suits against United States founded upon express or implied con-

TUCKER ACT—Continued.

tracts did not confer jurisdiction on Federal District Court over respondent's damages claim for alleged wrongful discharge from employment with Army and Air Force Exchange Service in violation of Service's regulations, since respondent had been appointed to his positions in Service, rather than employed pursuant to an express contract, and since relevant regulations did not furnish a basis for implying a contract. Army and Air Force Exchange Service v. Sheehan, p. 728.

UNFAIR LABOR PRACTICES. See **Labor Management Relations Act; National Labor Relations Act.**

UNIFICATION CHURCH. See **Constitutional Law,** V; **Standing to Sue.**

UNIONS. See **Civil Rights Act of 1964,** 2–4; **Labor Management Relations Act; Labor-Management Reporting and Disclosure Act of 1959; National Labor Relations Act.**

UNLAWFUL EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964.**

VEHICLE SEARCHES. See **Constitutional Law,** VIII.

VOTING RIGHTS ACT OF 1965. See **Reapportionment.**

VOTING RIGHTS OF UNION MEMBERS. See **Labor-Management Reporting and Disclosure Act of 1959.**

WARRANTLESS SEARCHES OF AUTOMOBILES. See **Constitutional Law,** VIII.

WATER BOILERS SAFETY CODE. See **Antitrust Acts.**

WATER POLLUTION. See **Federal Water Pollution Control Act.**

WEAPONS TRAINING. See **Federal Water Pollution Control Act.**

WITHHOLDING INFORMATION FROM PUBLIC DISCLOSURE. See **Freedom of Information Act.**

WORDS AND PHRASES.

1. *"Damages."* § 303(b), Labor Management Relations Act, 29 U. S. C. § 187(b). Summit Valley Industries, Inc. v. Carpenters, p. 717.

2. *"Discipline."* § 609, Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 529. Finnegan v. Leu, p. 431.

3. *"Investigatory records compiled for law enforcement purposes."* Freedom of Information Act, 5 U. S. C. § 552(b)(7). FBI v. Abramson, p. 615.

4. *"No person."* § 901(a), Education Amendments of 1972, 20 U. S. C. § 1681(a). North Haven Bd. of Ed. v. Bell, p. 512.

WORDS AND PHRASES—Continued.

5. *"Personnel and medical files and similar files."* Freedom of Information Act, 5 U. S. C. § 552(b)(6). Department of State v. Washington Post Co., p. 595.

6. *"Treaty."* § 106, Pub. L. 92–129, note following 5 U. S. C. § 7201 (1976 ed., Supp. IV). Weinberger v. Rossi, p. 25.

WRONGFUL DISCHARGE OF GOVERNMENT EMPLOYEES. See **Tucker Act.**

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