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UNITED STATES REPORTS

VOLUME 480

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1986

FEBRUARY 24 THROUGH MARCH 31, 1987

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, 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.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
STEPHEN G. MARGETON, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, 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, WILLIAM H. REHNQUIST, Chief Justice.

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

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

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

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

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

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

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 6, 1986.

(For next previous allotment, and modifications, see 453 U. S., p. VI, 459 U. S., p. IV, and 478 U. S., p. V.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD CO. *v.* WOODS ET AL.

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

No. 85–1088. Argued November 4, 1986—Decided February 24, 1987

An Alabama statute requires an appellate court, upon affirming a money judgment without substantial modification, to impose a 10% penalty on any appellant who had obtained a stay of that judgment by executing a bond. The statute's purposes are to penalize frivolous appeals and those interposed for delay, and to provide appellees with additional compensation for having to suffer the ordeal of appeal. Upon affirming without modification a judgment for respondents in their federal diversity action arising from a motorcycle accident, the Eleventh Circuit imposed the Alabama statute's penalty on petitioner, which had posted bond to stay the judgment pending appeal.

Held: The Alabama mandatory affirmance penalty statute has no application to judgments entered by federal courts sitting in diversity. Pp. 3–8.

(a) Rule 38 of the Federal Rules of Appellate Procedure affords federal courts of appeals plenary discretion to award damages to an appellee upon determining that the appeal is frivolous. Federal Rule 38's discretionary mode of operation conflicts with the Alabama statute's mandatory operation. Furthermore, the purposes underlying Rule 38—to penalize frivolous appeals and to compensate injured appellees for the delay and added expense inherent therein—are sufficiently coextensive with the statute's purposes to indicate that the Rule occupies the statute's field of operation. The fact that Alabama has a similar Appel-

late Rule coexisting with the statute does not mean that a federal court could impose the mandatory statutory penalty while remaining free to exercise its Federal Rule 38 discretionary authority, since the statute would improperly limit the exercise of that discretion in instances in which the court wished to impose a penalty of less than 10%. Pp. 4–8.

(b) Rule 38 must be applied under the analysis set forth in *Hanna* v. *Plumer*, 380 U. S. 460, since (a) it is a constitutional exercise of rulemaking authority in that it regulates matters that can reasonably be classified as procedural, and (b) it affects only the process of enforcing litigants' rights and not the rights themselves, and therefore does not violate the Rule Enabling Act's prohibition against affecting substantive rights (28 U. S. C. § 2072). P. 8.

Reversed.

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

L. Vastine Stabler, Jr., argued the cause and filed briefs for petitioner.

James O. Haley argued the cause for respondents. With him on the brief were *John W. Haley* and *Francis W. Hare, Jr.**

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the issue whether, in diversity actions, federal courts must apply a state statute that imposes a fixed penalty on appellants who obtain stays of judgment pending unsuccessful appeals.

I

Respondents brought this tort action in Alabama state court to recover damages for injuries sustained in a motorcycle accident. Petitioner removed the case to a Federal District Court having diversity jurisdiction. A jury trial resulted in a judgment of $300,000 for respondent Alan Woods and $5,000 for respondent Cara Woods. Petitioner posted bond to stay the judgment pending appeal, and the Court of Appeals affirmed without modification. 768 F. 2d 1287 (CA11 1985).

**Ellis J. Horvitz* and *Peter Abrahams* filed a brief for the Association of Southern California Defense Counsel as *amicus curiae*.

Respondents then moved in the Court of Appeals, pursuant to Ala. Code § 12–22–72 (1986), for imposition of that State's mandatory affirmance penalty of 10% of the amount of judgment. Petitioner challenged the application of this statute as violative of the equal protection and due process guarantees of the Fourteenth Amendment and as "a procedural rule . . . inapplicable in federal court under the doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 (1938) and its progeny." App. to Pet. for Cert. A–5. The Court of Appeals summarily granted respondents' motion to assess the penalty and subsequently denied a petition for rehearing. The parties have stipulated that the final judgment has been paid, except for the $30,500 statutory affirmance penalty, which petitioner has withheld pending proceedings in this Court.

We granted certiorari to consider the equal protection and due process challenges as well as the *Erie* claim. 475 U. S. 1080 (1986). Because we conclude that the Alabama statute imposing a mandatory affirmance penalty has no application in federal diversity actions, we decline to reach the Fourteenth Amendment issues.

II

The Alabama statute provides in relevant part:

> "When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . ." Ala. Code § 12–22–72 (1986).[1]

[1] Compare Ky. Rev. Stat. § 26A.300 (1985) (mandatory 10% penalty for second appeal); Miss. Code Ann. § 11–3–23 (Supp. 1986) (15% mandatory penalty regardless of stay); Va. Code § 16.1–113 (Supp. 1986) (10% mandatory penalty regardless of stay).

As set forth in the statute, then, a combination of three conditions will automatically trigger the 10% penalty: (1) the trial court must enter a money judgment or decree, (2) the judgment or decree must be stayed by the requisite bond,[2] and (3) the judgment or decree must be affirmed without substantial modification. *E. g.*, *Chapman* v. *Rivers Construction Co.*, 284 Ala. 633, 644–645, 227 So. 2d 403, 414–415 (1969). The purposes of the mandatory affirmance penalty are to penalize frivolous appeals and appeals interposed for delay, *Montgomery Light & Water Power Co.* v. *Thombs*, 204 Ala. 678, 684, 87 So. 205, 211 (1920), and to provide "additional damages" as compensation to the appellees for having to suffer the ordeal of defending the judgments on appeal. *Birmingham* v. *Bowen*, 254 Ala. 41, 46–47, 47 So. 2d 174, 179–180 (1950).

Petitioner contends that the statute's underlying purposes and mandatory mode of operation conflict with the purposes and operation of Rule 38 of the Federal Rules of Appellate Procedure, and therefore that the statute should not be applied by federal courts sitting in diversity. Entitled "Damages for delay," Rule 38 provides: "If the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." See also 28 U. S. C. § 1912. Under this Rule, "damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant." Advisory Committee's Notes on Fed. Rule App. Proc. 38, 28 U. S. C. App., p. 492.

In *Hanna* v. *Plumer*, 380 U. S. 460 (1965), we set forth the appropriate test for resolving conflicts between state law and the Federal Rules. The initial step is to determine whether, when fairly construed, the scope of Federal Rule 38 is "suffi-

[2] Under Alabama law, an appellant may obtain a stay of judgment pending appeal by providing an acceptable surety bond of a set amount, which in this case would have been 125% of the trial court's judgment had the case been tried in state court. Ala. Rule App. Proc. 8(a)(1).

ciently broad" to cause a "direct collision" with the state law or, implicitly, to "control the issue" before the court, thereby leaving no room for the operation of that law. *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 749–750, and n. 9 (1980); *Hanna*, *supra*, at 471–472. The Rule must then be applied if it represents a valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act, 28 U. S. C. § 2072.[3] *Hanna*, 380 U. S., at 471–474.

The constitutional constraints on the exercise of this rulemaking authority define a test of reasonableness. Rules regulating matters indisputably procedural are *a priori* constitutional. Rules regulating matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either," also satisfy this constitutional standard. *Id.*, at 472. The Rules Enabling Act, however, contains an additional requirement. The Federal Rule must not "abridge, enlarge or modify any substantive right . . . ." 28 U. S. C. § 2072. The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. See *Hanna*, *supra*, at 464–465; *Missis-*

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[3] Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts. In the Rules Enabling Act, Congress authorized this Court to prescribe uniform Rules to govern the "practice and procedure" of the federal district courts and courts of appeals. 28 U. S. C. § 2072. Though *Hanna* v. *Plumer*, 380 U. S. 460 (1965), involved a conflict between state law and a Federal Rule of Civil Procedure, its analytical framework provides the test for the validity of Federal Rules of Appellate Procedure as well, since these Rules were also prescribed pursuant to the Rules Enabling Act. See Advisory Committee's Notes on Fed. Rule App. Proc. 1, 28 U. S. C. App., p. 466.

sippi Publishing Corp. v. *Murphree*, 326 U. S. 438, 445–446 (1946); 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4509, pp. 145–146 (1982). Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, see 28 U. S. C. § 2072, give the Rules presumptive validity under both the constitutional and statutory constraints. See *Hanna*, *supra*, at 471.

Applying the *Hanna* analysis to an analogous Mississippi statute which provides for a mandatory affirmance penalty, the United States Court of Appeals for the Fifth Circuit concluded in *Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F. 2d 305 (1984), that the statute conflicted with Rule 38 and thus was not applicable in federal diversity actions.[4] The Fifth Circuit discussed two aspects of the conflict: (1) the discretionary mode of operation of the Federal Rule, compared to the mandatory operation of the Mississippi statute, and (2) the limited effect of the Rule in penalizing only frivolous appeals or appeals interposed for purposes of delay, compared to the effect of the Mississippi statute in penalizing every unsuccessful appeal regardless of merit. *Id.*, at 308–309.

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[4] The Mississippi statute applies without regard to whether the judgment has been stayed pending appeal. Miss. Code Ann. § 11–3–23 (Supp. 1986). In *Walters* v. *Inexco Oil Co.*, 725 F. 2d 1014, 1016–1017 (1984), the Court of Appeals for the Fifth Circuit held the statute applicable in federal diversity actions. Later that year, in *Affholder, Inc.* v. *Southern Rock, Inc.*, the Fifth Circuit overruled *Walters*, *supra*, and expressly rejected a similar decision, *Proctor* v. *Gissendaner*, 587 F. 2d 182 (1979) *(per curiam)*, in which it had applied the Alabama statute we are now considering. *Affholder*, 746 F. 2d, at 311. In *Gissendaner*, *supra*, the court had held without discussing *Hanna*, *supra*, that the Alabama statute dealt with a "non-federal substantive matter" and therefore applied in diversity actions. 587 F. 2d, at 184. This decision was among those adopted as binding precedent by the Eleventh Circuit following its creation in 1981, *Bonner* v. *Prichard*, 661 F. 2d 1206, 1209 (1981), and it provides the apparent rationale for imposition of the penalty in the present case.

We find the Fifth Circuit's analysis persuasive. Rule 38 affords a court of appeals plenary discretion to assess "just damages" in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment. Thus, the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions.[5]

Respondents argue that, because Alabama has a similar Appellate Rule which may be applied in state court alongside the affirmance penalty statute, see Ala. Rule App. Proc. 38; *McAnnally* v. *Levco, Inc.*, 456 So. 2d 66, 67 (Ala. 1984), a federal court sitting in diversity could impose the mandatory penalty and likewise remain free to exercise its discretionary authority under Federal Rule 38. This argument, however, ignores the significant possibility that a court of appeals may, in any given case, find a limited justification for imposing penalties in an amount *less than* 10% of the lower court's

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[5] Rule 37 of the Federal Rules of Appellate Procedure provides further indication that the Rules occupy the Alabama statute's field of operation so as to preclude its application in diversity actions. Since the affirmance penalty only applies if a trial court's judgment is stayed pending appeal, see Ala. Code § 12–22–72 (1986), it operates to compensate a victorious appellee for the lost use of the judgment proceeds during the period of appeal. Federal Rule 37, however, already serves this purpose by providing for an award of postjudgment interest following an unsuccessful appeal. See also 28 U. S. C. § 1961.

In addition, we note that federal provisions governing the availability of a stay of judgment pending appeal do not condition the procurement of a stay on exposure to payment of any additional damages in the event the appeal is unsuccessful and, unlike the state provision in this case, allow the federal courts to set the amount of security in their discretion. Compare Fed. Rules Civ. Proc. 62(d) and 62(g) and Fed. Rule App. Proc. 8(b) with Ala. Rule App. Proc. 8(b). See also 28 U. S. C. § 1651.

judgment. Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals; the Alabama statute precludes any exercise of discretion within its scope of operation. Whatever circumscriptive effect the mandatory affirmance penalty statute may have on the state court's exercise of discretion under Alabama's Rule 38, that Rule provides no authority for defining the scope of discretion allowed under Federal Rule 38.

Federal Rule 38 regulates matters which can reasonably be classified as procedural, thereby satisfying the constitutional standard for validity. Its displacement of the Alabama statute also satisfies the statutory constraints of the Rules Enabling Act. The choice made by the drafters of the Federal Rules in favor of a discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves.

III

We therefore hold that the Alabama mandatory affirmance penalty statute has no application to judgments entered by federal courts sitting in diversity.

Reversed.

IOWA MUTUAL INSURANCE CO. *v.* LAPLANTE ET AL.

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

No. 85–1589. Argued December 1, 1986—Decided February 24, 1987

Respondent employee (hereafter respondent) of a ranch located on the Blackfeet Indian Reservation and owned by Indians, brought suit in Blackfeet Tribal Court seeking compensation from the ranch for personal injuries respondent suffered when the cattle truck he was driving "jackknifed," and seeking compensatory and punitive damages from petitioner, the ranch's insurer, for its alleged bad-faith refusal to settle the personal injury claim. Upon petitioner's motion to dismiss, the Tribal Court held that it had subject-matter jurisdiction, ruling that the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. Without seeking review by the Tribal Court of Appeals, petitioner brought an action in Federal District Court, alleging diversity of citizenship as the basis for federal jurisdiction, and seeking a declaration that petitioner had no duty to defend the ranch because respondent's injuries fell outside the applicable insurance policies' coverage. The District Court dismissed the action for lack of subject-matter jurisdiction, and the Federal Court of Appeals affirmed, concluding that the Tribal Court system should be permitted to initially determine its own jurisdiction, which determination could be reviewed later in federal court.

Held:

1. A federal district court may not exercise diversity jurisdiction over a dispute before an appropriate Indian tribal court system has first had an opportunity to determine its own jurisdiction. Pp. 14–20.

(a) The rule announced in *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, requiring exhaustion of tribal remedies, applies here even though *National Farmers Union* was a federal-question case rather than a diversity case. Regardless of the basis for jurisdiction, federal policy supporting tribal self-government requires federal courts, as a matter of comity, to stay their hands in order to give tribal courts a full opportunity to first determine their own jurisdiction. Pp. 15–16.

(b) At a minimum, the requirement of exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review lower tribal court determinations. Here, since petitioner did not obtain appellate review of the Tribal Court's initial determination that it had

jurisdiction, the *National Farmers Union* rule has not been satisfied and federal courts should not intervene. Pp. 16–17.

(c) Nothing in the diversity statute (28 U. S. C. § 1332) or its legislative history suggests a congressional intent to override the federal policy of deference to tribal courts, and, in the absence of any indication of such an intent, civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal courts. Pp. 17–18.

(d) Petitioner's contention that local bias and incompetence on the part of tribal courts justify the exercise of federal jurisdiction is without merit since incompetence is not among *National Farmers Union*'s exceptions to the exhaustion requirement and would be contrary to the congressional policy promoting tribal courts' development, and since the Indian Civil Rights Act, 25 U. S. C. § 1302, protects non-Indians against unfair treatment in tribal courts. Pp. 18–19.

2. Although a final determination of jurisdiction by the Blackfeet Tribal Courts will be subject to review in federal court, relitigation of any Tribal Court resolution of respondent's bad-faith claim will be precluded by the proper deference owed the tribal court system, unless a federal court determines that the Tribal Court, in fact, lacked jurisdiction. P. 19.

3. The Federal Court of Appeals erred in affirming the District Court's dismissal of petitioner's suit for lack of subject-matter jurisdiction, and, on remand, the District Court should consider whether that suit should be stayed pending further tribal court proceedings or dismissed under *National Farmers Union*'s prudential rule. Pp. 19–20.

774 F. 2d 1174, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 20.

Maxon R. Davis argued the cause and filed briefs for petitioner.

Joe Bottomly argued the cause and filed a brief for respondents.*

*Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Wallace*, *Richard G. Taranto*, and *Edward J. Shawaker;* for the Blackfeet Tribe of Indians by *Jeanne S. Whiteing;* and for the Navajo Nation Tribe of Indians et al. by *Claudeen Bates Arthur*, *Yvonne T. Knight*, and *W. Richard West, Jr.*

JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner, an Iowa insurance company, brought this action in Federal District Court against members of the Blackfeet Indian Tribe resident on the Tribe's reservation in Montana. The asserted basis for federal jurisdiction was diversity of citizenship. At the time the action was initiated, proceedings involving the same parties and based on the same dispute were pending before the Blackfeet Tribal Court. The question before us is whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction.

I

Respondent Edward LaPlante, a member of the Blackfeet Indian Tribe, was employed by the Wellman Ranch Company, a Montana corporation. The Wellman Ranch is located on the Blackfeet Indian Reservation and is owned by members of the Wellman family, who are also Blackfeet Indians residing on the Reservation. Petitioner Iowa Mutual Insurance Company was the insurer of the Wellman Ranch and its individual owners.

On May 3, 1982, LaPlante was driving a cattle truck within the boundaries of the Reservation. While proceeding up a hill, he lost control of the vehicle and was injured when the truck "jackknifed." Agents of Midland Claims Service, Inc., an independent insurance adjuster which represented Iowa Mutual in this matter, attempted unsuccessfully to settle LaPlante's claim. In May 1983, LaPlante and his wife Verla, also a Blackfeet Indian, filed a complaint in the Blackfeet Tribal Court. The complaint stated two causes of action: the first named the Wellman Ranch and its individual owners as defendants and sought compensation for LaPlante's personal injuries and his wife's loss of consortium; the second alleged a claim for compensatory and punitive damages against Iowa Mutual and Midland Claims for bad-faith refusal to settle.

Iowa Mutual and Midland Claims moved to dismiss for failure properly to allege Tribal Court jurisdiction and for lack of jurisdiction over the subject matter of the suit. The Tribal Court dismissed the complaint for failure to allege the factual basis of the court's jurisdiction, but it allowed the LaPlantes to amend their complaint to allege facts from which jurisdiction could be determined. The Tribal Court also addressed the issue of subject-matter jurisdiction, holding that the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. Since the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction, the court concluded that it would have jurisdiction over the suit.[1] Although the Blackfeet Tribal Code establishes a Court of Appeals, see ch. 11, § 1, it does not allow interlocutory appeals from jurisdictional rulings. Accordingly, appellate review of the Tribal Court's jurisdiction can occur only after a decision on the merits.

Subsequent to the Tribal Court's jurisdictional ruling, Iowa Mutual filed the instant action in Federal District Court against the LaPlantes, the Wellmans, and the Wellman Ranch Company,[2] alleging diversity of citizenship under 28

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[1] Iowa Mutual and Midland Claims renewed their motions to dismiss for lack of subject-matter jurisdiction after the LaPlantes amended their complaint to set forth the factual bases for the Tribal Court's jurisdiction. The Tribal Court summarily denied the motions. Brief for United States as *Amicus Curiae* 3–4.

[2] Midland Claims also initiated a federal action against the LaPlantes in which Iowa Mutual intervened as a plaintiff. The companies sought a declaratory judgment that the Tribal Court lacked jurisdiction over the LaPlantes' claim of bad-faith refusal to settle, as well as an injunction barring further proceedings in the Tribal Courts. The jurisdictional basis for this suit was 28 U. S. C. § 1331. The District Court dismissed this suit for failure to state a claim and both companies appealed. While the appeal was pending, this Court decided *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985). The Court of Appeals for the Ninth Circuit remanded the action to the District Court for reconsideration in light of *National Farmers Union*. On remand, the District Court dismissed the action without prejudice, pending exhaustion of tribal court remedies. That decision is not before us.

U. S. C. § 1332 as the basis for federal jurisdiction. Iowa Mutual sought a declaration that it had no duty to defend or indemnify the Wellmans or the Ranch because the injuries sustained by the LaPlantes fell outside the coverage of the applicable insurance policies.[3] The LaPlantes moved to dismiss the action for lack of subject-matter jurisdiction and the District Court granted the motion. Relying on *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F. 2d 979 (CA9 1983), the court held that the Blackfeet Tribal Court must first be given an opportunity to determine its own jurisdiction. The District Court noted that the Montana state courts lack jurisdiction over comparable suits filed by Montana insurance companies;[4] it indicated that its jurisdiction was similarly precluded because, based on its reading of *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 538 (1949), federal courts sitting in diversity operate solely as adjuncts to the state court system. The District Court held that "[o]nly if the Blackfeet Tribe decides not to exercise its exclusive jurisdiction . . . would this court be free to entertain" the case under 28 U. S. C. § 1332.

The Court of Appeals for the Ninth Circuit affirmed the District Court's order. 774 F. 2d 1174 (1985). It found *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, *supra*, to be consistent with this Court's intervening decision

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[3] Iowa Mutual also asserted lack of coverage as an affirmative defense in its answer to respondents' amended Tribal Court complaint. See Reply Brief for Petitioner 1, n. 1.

[4] A federal statute, Pub. L. 280, originally allowed States to assume civil jurisdiction over reservation Indians without tribal consent, but Montana did not take such action with respect to the Blackfeet Tribe. See *Kennerly* v. *District Court*, 400 U. S. 423 (1971). Tribal consent is now a prerequisite to the assumption of jurisdiction, see 25 U. S. C. § 1326, and the Blackfeet Tribe has not consented to state jurisdiction. Petitioner does not contend that the Montana state courts would have jurisdiction over the dispute. Brief for Petitioner 5 and 7; see *Milbank Mutual Ins. Co.* v. *Eagleman*, 218 Mont. 35, 705 P. 2d 1117 (1985) (Montana state courts lack subject-matter jurisdiction over suit between Indian and non-Indian arising out of on-reservation conduct).

in *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985). Quoting *id.*, at 857, the Court of Appeals concluded: "We merely permit the tribal court to initially determine its own jurisdiction. The tribal court's determination can be reviewed later 'with the benefit of [tribal court] expertise in such matters.'" App. to Pet. for Cert. 5a–6a. We granted certiorari. 476 U. S. 1139 (1986).

II

We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. See, *e. g.*, *Three Affiliated Tribes* v. *Wold Engineering*, 476 U. S. 877, 890 (1986); *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 138, n. 5 (1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143–144, and n. 10 (1980); *Williams* v. *Lee*, 358 U. S. 217, 220–221 (1959).[5] This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975), to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, *supra*, at 220.

Tribal courts play a vital role in tribal self-government, cf. *United States* v. *Wheeler*, 435 U. S. 313, 332 (1978), and the Federal Government has consistently encouraged their

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[5] Numerous federal statutes designed to promote tribal government embody this policy. See, *e. g.*, 25 U. S. C. §§ 450, 450a (Indian Self-Determination and Education Assistance Act); 25 U. S. C. §§ 476–479 (Indian Reorganization Act); 25 U. S. C. §§ 1301–1341 (Indian Civil Rights Act).

development.[6] Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), their civil jurisdiction is not similarly restricted. See *National Farmers Union*, *supra*, at 854–855, and nn. 16 and 17. If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. See *Fisher* v. *District Court*, 424 U. S. 382 (1976); *Williams* v. *Lee*, *supra*.

A federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts, as we recognized in *National Farmers Union*.[7] In that case, a Tribal Court had entered a default judgment against a school district for injuries suffered by an Indian child on school property. The school district and its insurer sought injunctive relief in District Court, invoking 28 U. S. C. § 1331 as the basis for federal jurisdiction and claiming that the Tribal Court lacked jurisdiction over non-Indians. The District Court agreed and entered an injunction against execution of the Tribal Court's judgment, but the Court of Appeals reversed, holding that the District Court lacked jurisdiction. We refused to foreclose tribal court jurisdiction over a civil dispute involving a non-Indian. 471 U. S., at 855. We concluded that, although the existence of tribal court jurisdiction presented a federal question within the scope of 28 U. S. C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court. 471 U. S., at 857. Promotion of tribal self-government and self-determination re-

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[6] For example, Title II of the Indian Civil Rights Act provides "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U. S. C. § 1311(4).

[7] See also *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 60 (1978) (providing a federal forum for claims arising under the Indian Civil Rights Act interferes with tribal autonomy and self-government).

quired that the Tribal Court have "the first opportunity to evaluate the factual and legal bases for the challenge" to its jurisdiction. *Id.*, at 856. We remanded the case to the District Court to determine whether the federal action should be dismissed or stayed pending exhaustion of the remedies available in the tribal court system.[8] *Id.*, at 857.

Although petitioner alleges that federal jurisdiction in this case is based on diversity of citizenship, rather than the existence of a federal question, the exhaustion rule announced in *National Farmers Union* applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." *Ibid.* In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 59 (1978); see also *Fisher* v. *District Court*, *supra*, at 388. Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.

As *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors." 471 U. S., at 857. The federal policy of promoting tribal self-government encompasses the develop-

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[8] As the Court's directions on remand in *National Farmers Union* indicate, the exhaustion rule enunciated in *National Farmers Union* did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances. In *Colorado River*, as here, strong federal policy concerns favored resolution in the nonfederal forum. See *id.*, at 819.

ment of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch. 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Petitioner argues that the statutory grant of diversity jurisdiction overrides the federal policy of deference to tribal courts. We do not agree. Although Congress undoubtedly has the power to limit tribal court jurisdiction,[9] we do not read the general grant of diversity jurisdiction to have implemented such a significant intrusion on tribal sovereignty, any more than we view the grant of federal-question jurisdiction, the statutory basis for the intrusion on tribal jurisdiction at issue in *National Farmers Union*, to have done so. The diversity statute, 28 U. S. C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government. Tribal courts in the Anglo-American mold were virtually unknown in 1789 when Congress first authorized diversity jurisdiction, see Judiciary Act of 1789, § 11, 1 Stat. 78–79; and the original statute did not manifest a congressional intent to limit tribal sovereignty. Moreover, until the late 19th century, most Indians were neither considered citizens of the States in which their reservation was located, nor regarded as citizens of a foreign State, see, *e. g.*, *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 15–18 (1831); *Elk* v. *Wilkins*, 112 U. S. 94, 102–103 (1884), so a suit to which Indians were parties would not have satis-

[9] "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo* v. *Martinez*, *supra*, at 56. See generally F. Cohen, Handbook of Federal Indian Law 207–216 (1982).

fied the statutory requirements for diversity jurisdiction.[10] Congress has amended the diversity statute several times since the development of tribal judicial systems,[11] but it has never expressed any intent to limit the civil jurisdiction of the tribal courts.

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana* v. *United States*, 450 U. S. 544, 565–566 (1981); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 152–153 (1980); *Fisher* v. *District Court*, 424 U. S., at 387–389. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S., at 149, n. 14. See also *Santa Clara Pueblo* v. *Martinez*, *supra*, at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"). In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Petitioner also contends that the policies underlying the grant of diversity jurisdiction—protection against local bias and incompetence—justify the exercise of federal jurisdiction

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[10] In 1924, Congress declared that all Indians born in the United States are United States citizens, see Act of June 2, 1924, ch. 233, 43 Stat. 253, now codified at 8 U. S. C. § 1401, and, therefore, under the Fourteenth Amendment, Indians are citizens of the States in which they reside. There is no indication that this grant of citizenship was intended to affect federal protection of tribal self-government.

[11] The most recent amendment occurred in 1976. See Act of Oct. 21, 1976, Pub. L. 94–583, § 3, 90 Stat. 2891.

in this case. We have rejected similar attacks on tribal court jurisdiction in the past. See, *e. g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U. S., at 65, and n. 21. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*, 471 U. S., at 856, n. 21,[12] and would be contrary to the congressional policy promoting the development of tribal courts. Moreover, the Indian Civil Rights Act, 25 U. S. C. § 1302, provides non-Indians with various protections against unfair treatment in the tribal courts.

Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review. If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. See *National Farmers Union*, *supra*, at 853. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts.

III

The Court of Appeals correctly recognized that *National Farmers Union* requires that the issue of jurisdiction be resolved by the Tribal Courts in the first instance. However, the court should not have affirmed the District Court's dis-

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[12] In *National Farmers Union*, we indicated that exhaustion would not be required where "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." 471 U. S., at 856, n. 21 (citation omitted). While petitioner contends that tribal court jurisdiction over outsiders "is questionable at best," Reply Brief for Petitioner 6, it does not argue that the present action is "patently violative of express jurisdictional prohibitions," nor do we understand it to invoke any of the other exceptions enumerated in *National Farmers Union*.

missal for lack of subject-matter jurisdiction.[13] Accordingly, we reverse and remand for further proceedings consistent with this opinion.[14]

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

The complaint filed by petitioner in the United States District Court for the District of Montana raised questions concerning the coverage of the insurance policy that petitioner had issued to respondents Wellman Ranch Co. and its owners. Complaint ¶¶ 8, 9 (App. 3–4). It did not raise any question concerning the jurisdiction of the Blackfeet Tribal Court. For purposes of our decision, it is therefore appropriate to assume that the Tribal Court and the Federal District Court had concurrent jurisdiction over the dispute. The question presented is whether the Tribal Court's jurisdiction is a sufficient reason for requiring the federal court to decline to exercise its own jurisdiction until the Tribal Court has decided the case on the merits. In my opinion it is not.

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[13] See n. 8, *supra*.

The Court of Appeals also relied on *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 (CA9 1949), as a basis for dismissal. Following its earlier decision in *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F. 2d 979, 982 (1983), the court held that diversity jurisdiction would be barred as long as the courts of the State in which the federal court sits would not entertain the suit, apparently assuming that the exercise of federal jurisdiction would contravene a substantive state policy. However, it is not clear that Montana has such a policy, since state-court jurisdiction seems to be precluded by the application of the *federal* substantive policy of non-infringement, rather than any *state* substantive policy. See, *e. g.*, *Milbank Mutual Ins. Co.* v. *Eagleman*, 218 Mont. 35, 705 P. 2d 1117 (1985).

[14] On remand, the District Court should consider whether, on the facts of this case, the federal action should be stayed pending further Tribal Court proceedings or dismissed under the prudential rule announced in *National Farmers Union*.

A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or a tribal court. Thus, in *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985), we held that the Federal District Court should not entertain a challenge to the jurisdiction of the Crow Tribal Court until after petitioner had exhausted its remedies in the Tribal Court. Our holding was based on our belief that Congress' policy of supporting tribal self-determination "favors a rule that will provide the forum *whose jurisdiction is being challenged* the first opportunity to evaluate the factual and legal bases for the challenge." *Id.*, at 856 (emphasis added; footnote omitted). We have enforced a similar exhaustion requirement in cases challenging the jurisdiction of state tribunals. See, *e. g.*, *Juidice* v. *Vail*, 430 U. S. 327, 335–336 (1977).

The deference given to the deliberations of tribal courts on the merits of a dispute, however, is a separate matter as to which *National Farmers Union* offers no controlling precedent. Indeed, in holding that exhaustion of the tribal jurisdictional issue was necessary, we explicitly contemplated later federal-court consideration of the merits of the dispute. We noted that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." 471 U. S., at 856 (footnote omitted). I see no reason why tribal courts should receive more deference on the merits than state courts. It is not unusual for a state court and a federal court to have concurrent jurisdiction over the same dispute. In some such cases it is appropriate for the federal court to stay its hand until the state-court litigation has terminated, see, *e. g.*, *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 813–816 (1976), but as we have consistently held, "[a]bstention from the exercise

of federal jurisdiction is the exception, not the rule." *Id.*, at 813. The mere fact that a case involving the same issue is pending in another court has never been considered a sufficient reason to excuse a federal court from performing its duty "to adjudicate a controversy properly before it." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188 (1959). On the contrary, as between state and federal courts, the general rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." *McClellan* v. *Carland*, 217 U. S. 268, 282 (1910). In this case a controversy concerning the coverage of the insurance policy issued to respondents Wellman Ranch Co. and its owners by petitioner is properly before the Federal District Court.* That controversy raises no question concerning the jurisdiction of the Blackfeet Tribal Court.

Adherence to this doctrine, by allowing the declaratory judgment action to proceed in District Court, would imply no disrespect for the Blackfeet Tribe or for its judiciary. It would merely avoid what I regard as the anomalous suggestion that the sovereignty of an Indian tribe is in some respects greater than that of the State of Montana, for example.

Until today, we have never suggested that an Indian tribe's judicial system is entitled to a greater degree of deference than the judicial system of a sovereign State. Today's opinion, however, requires the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case instead were pending in state court. Thus, although I of course agree with the Court's conclusion that the Federal District Court had subject-matter jurisdiction over the case, I respectfully dissent from its exhaustion holding.

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*The Court seems to assume that the merits of this controversy are governed by "tribal law." See *ante*, at 16. I express no opinion on this choice-of-law question.

COMMISSIONER OF INTERNAL REVENUE *v.* GROETZINGER

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

No. 85–1226. Argued December 8, 1986—Decided February 24, 1987

For most of 1978, respondent devoted 60 to 80 hours per week to pari-mutuel wagering on dog races with a view to earning a living from such activity, had no other employment, and gambled solely for his own account. His efforts generated gross winnings of $70,000 on bets of $72,032, for a net gambling loss for the year of $2,032. Although he reported this loss on his 1978 tax return, he did not utilize it in computing his adjusted gross income or claim it as a deduction. Upon audit, the Commissioner of Internal Revenue determined that, under the Internal Revenue Code of 1954 (Code) as it existed in 1978, respondent was subject to a minimum tax because part of the gambling loss deduction to which he was entitled was an "ite[m] of tax preference." Under the Code, such items could be lessened by certain deductions that were "attributable to a trade or business carried on by the taxpayer." In redetermining respondent's tax deficiency, the Tax Court held that he was in the "trade or business" of gambling, so that no part of his gambling losses was an item of tax preference subjecting him to a minimum tax for 1978. The Court of Appeals affirmed.

Held: A full-time gambler who makes wagers solely for his own account is engaged in a "trade or business" within the meaning of Code §§ 162(a) and 62(1). Pp. 27–36.

771 F. 2d 269, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 37.

Albert G. Lauber, Jr., argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Olsen, Alan I. Horowitz, Jonathan S. Cohen*, and *Bruce R. Ellisen.*

Carroll Baymiller argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether a full-time gambler who makes wagers solely for his own account is engaged in a "trade or business," within the meaning of §§ 162(a) and 62(1) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 162(a) and 62(1) (1976 ed. and Supp. V).[1] The tax year with which we here are concerned is the calendar year 1978; technically, then, we look to the Code as it read at that time.

I

There is no dispute as to the facts. The critical ones are stipulated. See App. 9. Respondent Robert P. Groetzinger had worked for 20 years in sales and market research for an Illinois manufacturer when his position was terminated in February 1978. During the remainder of that year, respondent busied himself with parimutuel wagering, primarily on greyhound races. He gambled at tracks in Florida and Colorado. He went to the track 6 days a week for 48 weeks in 1978. He spent a substantial amount of time studying racing forms, programs, and other materials. He devoted from 60 to 80 hours each week to these gambling-related endeavors. He never placed bets on behalf of any other person, or sold tips, or collected commissions for placing bets, or functioned as a bookmaker. He gambled solely for his own account. He had no other profession or type of employment.[2]

**George A. Hrdlicka* filed a brief for Touche Ross & Co. as *amicus curiae.*

[1] All references herein to the Internal Revenue Code are to the 1954 Code, not to the Internal Revenue Code of 1986, as it has been designated by § 2(a) of the Tax Reform Act of 1986, 100 Stat. 2095.

[2] The Tax Court put it this way: "It is not disputed that petitioner during 1978 was engaged fulltime in parimutuel wagering on dog races, had no other employment during that period, gambled solely for his own account, and devoted an extraordinary amount of time and effort to his gambling

Respondent kept a detailed accounting of his wagers and every day noted his winnings and losses in a record book. In 1978, he had gross winnings of $70,000, but he bet $72,032; he thus realized a net gambling loss for the year of $2,032.

Respondent received $6,498 in income from other sources in 1978. This came from interest, dividends, capital gains, and salary earned before his job was terminated.

On the federal income tax return he filed for the calendar year 1978 respondent reported as income only the $6,498 realized from nongambling sources. He did not report any gambling winnings or deduct any gambling losses.[3] He did not itemize deductions. Instead, he computed his tax liability from the tax tables.

Upon audit, the Commissioner of Internal Revenue determined that respondent's $70,000 in gambling winnings were to be included in his gross income and that, pursuant to § 165(d) of the Code, 26 U. S. C. § 165(d), a deduction was to be allowed for his gambling losses to the extent of these gambling gains. But the Commissioner further determined that, under the law as it was in 1978, a portion of respondent's $70,000 gambling-loss deduction was an item of tax preference and operated to subject him to the minimum tax under § 56(a) of the Code, 26 U. S. C. § 56(a) (1976 ed.). At that time, under statutory provisions in effect from 1976 until 1982, "items of tax preference" were lessened by certain deductions, but not by deductions not "attributable to a trade or business carried on by the taxpayer." §§ 57(a)(1) and (b)(1)(A), and § 62(1), 26 U. S. C. §§ 57(a)(1) and (b)(1)(A), and § 62(1) (1976 ed. and Supp. I).[4]

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with a view to earning a living from such activity." 82 T. C. 793, 795 (1984).

[3] Respondent, however, did report his net gambling loss of $2,032 in Schedule E (Supplemental Income Schedule) of his return, but he did not utilize that amount in computing his adjusted gross income or claim it as an itemized deduction.

[4] This statutory scheme was amended by the Tax Equity and Fiscal Responsibility Act of 1982, § 201(a), 96 Stat. 411. For tax years after

These determinations by the Commissioner produced a § 56(a) minimum tax of $2,142 and, with certain other adjustments not now in dispute, resulted in a total asserted tax deficiency of $2,522 for respondent for 1978.

Respondent sought redetermination of the deficiency in the United States Tax Court. That court, in a reviewed decision, with only two judges dissenting, held that respondent was in the trade or business of gambling, and that, as a consequence, no part of his gambling losses constituted an item of tax preference in determining any minimum tax for 1978. 82 T. C. 793 (1984). In so ruling, the court adhered to its earlier court-reviewed decision in *Ditunno* v. *Commissioner*, 80 T. C. 362 (1983). The court in *Ditunno*, *id.*, at 371, had overruled *Gentile* v. *Commissioner*, 65 T. C. 1 (1975), a case where it had rejected the Commissioner's contention (*contrary* to his position here) that a full-time gambler *was* in a trade or business and therefore was subject to self-employment tax.

The United States Court of Appeals for the Seventh Circuit affirmed. 771 F. 2d 269 (1985). Because of a conflict on the issue among Courts of Appeals,[5] we granted certiorari. 475 U. S. 1080 (1986).

1982, gambling-loss deductions explicitly are excluded from the minimum tax base. The Commissioner acknowledges that a taxpayer like respondent for a year after 1982 would not be subject to minimum tax liability because of his gambling-loss deduction. Brief for Petitioner 4, n. 4.

[5] Compare *Nipper* v. *Commissioner*, 746 F. 2d 813 (CA11 1984), aff'g, without opinion, 47 TCM 136, ¶ 83,644 P-H Memo TC (1983), and the Seventh Circuit's decision in the present case, with *Gajewski* v. *Commissioner*, 723 F. 2d 1062 (CA2 1983), cert. denied, 469 U. S. 818 (1984); *Estate of Cull* v. *Commissioner*, 746 F. 2d 1148 (CA6 1984), cert. denied, 472 U. S. 1007 (1985); and *Noto* v. *United States*, 770 F. 2d 1073 (CA3 1985), aff'g, without opinion, 598 F. Supp. 440 (NJ 1984).

Despite the interim reversals by the Second and Sixth Circuits in *Gajewski* and *Cull*, *supra*, the Tax Court has adhered to its position that a full-time gambler is engaged in a trade or business. See, *e. g.*, *Meredith* v. *Commissioner*, 49 TCM 318, ¶ 84,651 P-H Memo TC (1984); *Barrish* v. *Commissioner*, 49 TCM 115, ¶ 84,602 P-H Memo TC (1984). It has drawn

II

The phrase "trade or business" has been in § 162(a) and in that section's predecessors for many years. Indeed, the phrase is common in the Code, for it appears in over 50 sections and 800 subsections and in hundreds of places in proposed and final income tax regulations. The slightly longer phrases, "carrying on a trade or business" and "engaging in a trade or business," themselves are used no less than 60 times in the Code. The concept thus has a well-known and almost constant presence on our tax-law terrain. Despite this, the Code has never contained a definition of the words "trade or business" for general application, and no regulation has been issued expounding its meaning for all purposes.[6] Neither has a broadly applicable authoritative judicial definition emerged.[7] Our task in this case is to ascertain the meaning of the phrase as it appears in the sections of the Code with which we are here concerned.[8]

In one of its early tax cases, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911), the Court was concerned with the Corporation Tax imposed by § 38 of the Tariff Act of 1909, ch. 6, 36 Stat. 112–117, and the status of being engaged in business. It said: "'Business' is a very comprehensive term

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no distinction between the gambler and the active market trader. See also *Baxter* v. *United States*, 633 F. Supp. 912 (Nev. 1986).

[6] Some sections of the Code, however, do define the term for limited purposes. See § 355(b)(2), 26 U. S. C. § 355(b)(2) (distribution of stock of controlled corporation); §§ 502(b) and 513(b), 26 U. S. C. §§ 502(b) and 513(b) (exempt organizations); and § 7701(a)(26), 26 U. S. C. § 7701(a)(26) (defining the term to include "the performance of the functions of a public office").

[7] Judge Friendly some time ago observed that "the courts have properly assumed that the term includes all means of gaining a livelihood by work, even those which would scarcely be so characterized in common speech." *Trent* v. *Commissioner*, 291 F. 2d 669, 671 (CA2 1961).

[8] We caution that in this opinion our interpretation of the phrase "trade or business" is confined to the specific sections of the Code at issue here. We do not purport to construe the phrase where it appears in other places.

and embraces everything about which a person can be employed." 220 U. S., at 171. It embraced the Bouvier Dictionary definition: "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." *Ibid.* See also *Helvering* v. *Horst*, 311 U. S. 112, 118 (1940). And Justice Frankfurter has observed that "we assume that Congress uses common words in their popular meaning, as used in the common speech of men." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947).

With these general comments as significant background, we turn to pertinent cases decided here. *Snyder* v. *Commissioner*, 295 U. S. 134 (1935), had to do with margin trading and capital gains, and held, in that context, that an investor, seeking merely to increase his holdings, was not engaged in a trade or business. Justice Brandeis, in his opinion for the Court, noted that the Board of Tax Appeals theretofore had ruled that a taxpayer who devoted the major portion of his time to transactions on the stock exchange for the purpose of making a livelihood could treat losses incurred as having been sustained in the course of a trade or business. He went on to observe that no facts were adduced in *Snyder* to show that the taxpayer "might properly be characterized as a 'trader on an exchange who makes a living in buying and selling securities.'" *Id.*, at 139. These observations, thus, are dicta, but, by their use, the Court appears to have drawn a distinction between an active trader and an investor.

In *Deputy* v. *Du Pont*, 308 U. S. 488 (1940), the Court was concerned with what were "ordinary and necessary" expenses of a taxpayer's trade or business, within the meaning of § 23(a) of the Revenue Act of 1928, 45 Stat. 799. In ascertaining whether carrying charges on short sales of stock were deductible as ordinary and necessary expenses of the taxpayer's business, the Court *assumed* that the activities of the taxpayer in conserving and enhancing his estate constituted a trade or business, but nevertheless disallowed the

claimed deductions because they were not "ordinary" or "necessary." 308 U. S., at 493–497. Justice Frankfurter, in a concurring opinion joined by Justice Reed, did not join the majority. He took the position that whether the taxpayer's activities constituted a trade or business was "open for determination," *id.*, at 499, and observed:

> "'. . . carrying on any trade or business,' within the contemplation of § 23(a), involves holding one's self out to others as engaged in the selling of goods or services. This the taxpayer did not do. . . . Without elaborating the reasons for this construction and not unmindful of opposing considerations, including appropriate regard for administrative practice, I prefer to make the conclusion explicit instead of making the hypothetical litigation-breeding assumption that this taxpayer's activities, for which expenses were sought to be deducted, did constitute a 'trade or business.'" *Ibid.*

Next came *Higgins* v. *Commissioner*, 312 U. S. 212 (1941). There the Court, in a bare and brief unanimous opinion, ruled that salaries and other expenses incident to looking after one's own investments in bonds and stocks were not deductible under § 23(a) of the Revenue Act of 1932, 47 Stat. 179, as expenses paid or incurred in carrying on a trade or business. While surely cutting back on *Flint*'s broad approach, the Court seemed to do little more than announce that since 1918 "the present form [of the statute] was fixed and has so continued"; that "[n]o regulation has ever been promulgated which interprets the meaning of 'carrying on a business'"; that the comprehensive definition of "business" in *Flint* was "not controlling in this dissimilar inquiry"; that the facts in each case must be examined; that not all expenses of every business transaction are deductible; and that "[n]o matter how large the estate or how continuous or extended the work required may be, such facts are not sufficient as a matter of law to permit the courts to reverse the decision of the Board." 312 U. S., at 215–218. The opinion, therefore—although devoid

of analysis and not setting forth what elements, if any, in addition to profit motive and regularity, were required to render an activity a trade or business—must stand for the propositions that full-time market activity in managing and preserving one's own estate is not embraced within the phrase "carrying on a business," and that salaries and other expenses incident to the operation are not deductible as having been paid or incurred in a trade or business.[9] See also *United States* v. *Gilmore*, 372 U. S. 39, 44–45 (1963); *Whipple* v. *Commissioner*, 373 U. S. 193 (1963). It is of interest to note that, although Justice Frankfurter was on the *Higgins* Court and this time did not write separately, and although Justice Reed, who had joined the concurring opinion in *Du Pont*, was the author of the *Higgins* opinion, the Court in that case did not even cite *Du Pont* and thus paid no heed whatsoever to the content of Justice Frankfurter's pronouncement in his concurring opinion.[10] Adoption of the Frankfurter gloss obviously would have disposed of the case in the Commissioner's favor handily and automatically, but that easy route was not followed.

Less than three months later, the Court considered the issue of the deductibility, as business expenses, of estate and trust fees. In unanimous opinions issued the same day and written by Justice Black, the Court ruled that the efforts

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[9] See, however, § 212 of the 1954 Code, 26 U. S. C. § 212. This section has its roots in § 23(a)(2) of the 1939 Code, as added by § 121 of the Revenue Act of 1942, 56 Stat. 819. It allows as a deduction all the ordinary and necessary expenses paid or incurred "for the management, conservation, or maintenance of property held for the production of income," and thus overcame the specific ruling in *Higgins* that expenses of that kind were not deductible. The statutory change, of course, does not read directly on the term "trade or business." Obviously, though, Congress sought to overcome *Higgins* and achieved that end.

[10] *Deputy* v. *Du Pont*, 308 U. S. 488 (1940), however, was cited by the parties in their *Higgins* briefs submitted to this Court. See Brief for Petitioner 28, 29, 40, and 61, and Brief for Respondent 17 and 18, in *Higgins* v. *Commissioner*, O. T. 1940, No. 253.

of an estate or trust in asset conservation and maintenance did not constitute a trade or business. *City Bank Farmers Trust Co.* v. *Helvering*, 313 U. S. 121 (1941); *United States* v. *Pyne*, 313 U. S. 127 (1941). The *Higgins* case was deemed to be relevant and controlling. Again, no mention was made of the Frankfurter concurrence in *Du Pont*. Yet Justices Reed and Frankfurter were on the Court.

Snow v. *Commissioner*, 416 U. S. 500 (1974), concerned a taxpayer who had advanced capital to a partnership formed to develop an invention. On audit of his 1966 return, a claimed deduction under § 174(a)(1) of the 1954 Code for his pro rata share of the partnership's operating loss was disallowed. The Tax Court and the Sixth Circuit upheld that disallowance. This Court reversed. Justice Douglas, writing for the eight Justices who participated, observed: "Section 174 was enacted in 1954 to dilute some of the conception of 'ordinary and necessary' business expenses under § 162(a) (then § 23(a)(1) of the Internal Revenue Code of 1939) adumbrated by Mr. Justice Frankfurter in a concurring opinion in *Deputy* v. *Du Pont* . . . where he said that the section in question . . . 'involves holding one's self out to others as engaged in the selling of goods or services.'" 416 U. S., at 502–503. He went on to state, *id.*, at 503, that § 162(a) "is more narrowly written than is § 174."

From these observations and decisions, we conclude (1) that, to be sure, the statutory words are broad and comprehensive *(Flint);* (2) that, however, expenses incident to caring for one's own investments, even though that endeavor is full time, are not deductible as paid or incurred in carrying on a trade or business *(Higgins; City Bank; Pyne);* (3) that the opposite conclusion may follow for an active trader *(Snyder);* (4) that Justice Frankfurter's attempted gloss upon the decision in *Du Pont* was not adopted by the Court in that case; (5) that the Court, indeed, later characterized it as an "adumbration" *(Snow);* and (6) that the Frankfurter observation, specifically or by implication, never has been accepted

as law by a majority opinion of the Court, and more than once has been totally ignored. We must regard the Frankfurter gloss merely as a two-Justice pronouncement in a passing moment and, while entitled to respect, as never having achieved the status of a Court ruling. One also must acknowledge that *Higgins*, with its stress on examining the facts in each case, affords no readily helpful standard, in the usual sense, with which to decide the present case and others similar to it. The Court's cases, thus, give us results, but little general guidance.

III

Federal and state legislation and court decisions, perhaps understandably, until recently have not been noticeably favorable to gambling endeavors and even have been reluctant to treat gambling on a parity with more "legitimate" means of making a living. See, *e. g.*, § 4401 *et seq.* of the Code; *Marchetti* v. *United States*, 390 U. S. 39, 44–46, and nn. 5 and 6 (1968).[11] And the confinement of gambling-loss deductions to the amount of gambling gains, a provision brought into the income tax law as § 23(g) of the Revenue Act of 1934, 48 Stat. 689, and carried forward into § 165(d) of the 1954 Code, closed the door on suspected abuses, see H. R. Rep. No. 704, 73d Cong., 2d Sess., 22 (1934); S. Rep. No. 558, 73d Cong., 2d Sess., 25 (1934), but served partially to differentiate genuine gambling losses from many other types of adverse financial consequences sustained during the tax year. Gambling winnings, however, have not been isolated from gambling losses. The Congress has been realistic enough to recognize that such losses do exist and do have some effect on income, which is the primary focus of the federal income tax.

The issue this case presents has "been around" for a long time and, as indicated above, has not met with consistent treatment in the Tax Court itself or in the Federal Courts of

[11] Today, however, the vast majority of States permit some form of public gambling. The lottery, bingo, parimutuel betting, jai alai, casinos, and slot machines easily come to mind.

Appeals. The Seventh Circuit, in the present case, said the issue "has proven to be most difficult and troublesome over the years." 771 F. 2d, at 271. The difficulty has not been ameliorated by the persistent absence of an all-purpose definition, by statute or regulation, of the phrase "trade or business" which so frequently appears in the Code. Of course, this very frequency well may be the explanation for legislative and administrative reluctance to take a position as to one use that might affect, with confusion, so many others.

Be that as it may, this taxpayer's case must be decided and, from what we have outlined above, must be decided in the face of a decisional history that is not positive or even fairly indicative, as we read the cases, of what the result should be. There are, however, some helpful indicators.

If a taxpayer, as Groetzinger is stipulated to have done in 1978, devotes his full-time activity to gambling, and it is his intended livelihood source, it would seem that basic concepts of fairness (if there be much of that in the income tax law) demand that his activity be regarded as a trade or business just as any other readily accepted activity, such as being a retail store proprietor or, to come closer categorically, as being a casino operator or as being an active trader on the exchanges.

It is argued, however, that a full-time gambler is not offering goods or his services, within the line of demarcation that Justice Frankfurter would have drawn in *Du Pont*. Respondent replies that he indeed is supplying goods and services, not only to himself but, as well, to the gambling market; thus, he says, he comes within the Frankfurter test even if that were to be imposed as the proper measure. "It takes two to gamble." Brief for Respondent 3. Surely, one who clearly satisfies the Frankfurter adumbration usually is in a trade or business. But does it necessarily follow that one who does not satisfy the Frankfurter adumbration is not in a trade or business? One might well feel that a full-time gam-

bler ought to qualify as much as a full-time trader,[12] as Justice Brandeis in *Snyder* implied and as courts have held.[13] The Commissioner, indeed, accepts the trader result. Tr. of Oral Arg. 17. In any event, while the offering of goods and services usually would qualify the activity as a trade or business, this factor, it seems to us, is not an absolute prerequisite.

We are not satisfied that the Frankfurter gloss would add any helpful dimension to the resolution of cases such as this one, or that it provides a "sensible test," as the Commissioner urges. See Brief for Petitioner 36. It might assist now and then, when the answer is obvious and positive, but it surely is capable of breeding litigation over the meaning of "goods," the meaning of "services," or the meaning of "holding one's self out." And we suspect that—apart from gambling—almost every activity would satisfy the gloss.[14] A test that everyone passes is not a test at all. We therefore now formally reject the Frankfurter gloss which the Court has never adopted anyway.

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[12] "It takes a buyer to make a seller and it takes an opposing gambler to make a bet." Boyle, What is a Trade or Business?, 39 Tax Lawyer 737, 763 (1986).

[13] *Levin* v. *United States*, 220 Ct. Cl. 197, 205, 597 F. 2d 760, 765 (1979); *Commissioner* v. *Nubar*, 185 F. 2d 584, 588 (CA4 1950), cert. denied, 341 U. S. 925 (1951); *Fuld* v. *Commissioner*, 139 F. 2d 465, 468–469 (CA2 1943). See also *Moller* v. *United States*, 721 F. 2d 810 (CA Fed. 1983), cert. denied, 467 U. S. 1251 (1984); *Purvis* v. *Commissioner*, 530 F. 2d 1332, 1334 (CA9 1976).

[14] Each of the three cases in conflict with the Seventh Circuit's decision in the present case, see n. 5, *supra*, was a gambler's case and adopted the Frankfurter gloss. Because the same courts, in cases not involving gamblers, have not referred to the Frankfurter gloss, see *Bessenyey* v. *Commissioner*, 379 F. 2d 252 (CA2), cert. denied, 389 U. S. 931 (1967); *Gestrich* v. *Commissioner*, 681 F. 2d 805 (CA3 1982), aff'g, without opinion, 74 T. C. 525 (1980), *Main Line Distributors, Inc.* v. *Commissioner*, 321 F. 2d 562 (CA6 1963), it would appear that these courts in effect were creating a special class of, and with special rules for, the full-time gambler. We find no warrant for this in the Code.

Of course, not every income-producing and profit-making endeavor constitutes a trade or business. The income tax law, almost from the beginning, has distinguished between a business or trade, on the one hand, and "transactions entered into for profit but not connected with . . . business or trade," on the other. See Revenue Act of 1916, § 5(a), Fifth, 39 Stat. 759. Congress "distinguished the broad range of income or profit producing activities from those satisfying the narrow category of trade or business." *Whipple* v. *Commissioner*, 373 U. S., at 197. We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify.

It is suggested that we should defer to the position taken by the Commissioner and by the Solicitor General, but, in the absence of guidance, for over several decades now, through the medium of definitive statutes or regulations, we see little reason to do so. We would defer, instead, to the Code's normal focus on what we regard as a common-sense concept of what is a trade or business. Otherwise, as here, in the context of a minimum tax, it is not too extreme to say that the taxpayer is being taxed on his gambling losses,[15] a result distinctly out of line with the Code's focus on income.

We do not overrule or cut back on the Court's holding in *Higgins* when we conclude that if one's gambling activity is pursued full time, in good faith, and with regularity, to the production of income for a livelihood, and is not a mere hobby, it is a trade or business within the meaning of the statutes with which we are here concerned. Respondent

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[15] "The more he lost, the more minimum tax he had to pay." Boyle, 39 Tax Lawyer, at 754. The Commissioner concedes that application of the goods-or-services-test here "visits somewhat harsh consequences" on taxpayer Groetzinger, Brief for Petitioner 36, and "points to . . . perhaps unfortunate draftsmanship." *Ibid.* See also Reply Brief for Petitioner 11.

Groetzinger satisfied that test in 1978. Constant and large-scale effort on his part was made. Skill was required and was applied. He did what he did for a livelihood, though with a less-than-successful result. This was not a hobby or a passing fancy or an occasional bet for amusement.

We therefore adhere to the general position of the *Higgins* Court, taken 46 years ago, that resolution of this issue "requires an examination of the facts in each case." 312 U. S., at 217. This may be thought by some to be a less-than-satisfactory solution, for facts vary. See Boyle, What is a Trade or Business?, 39 Tax Lawyer 737, 767 (1986); Note, The Business of Betting: Proposals for Reforming the Taxation of Business Gamblers, 38 Tax Lawyer 759 (1985); Lopez, Defining "Trade or Business" Under the Internal Revenue Code: A Survey of Relevant Cases, 11 Fla. St. U. L. Rev. 949 (1984). Cf. Comment, Continuing Vitality of the "Goods or Services" Test, 15 U. Balt. L. Rev. 108 (1985). But the difficulty rests in the Code's wide utilization in various contexts of the term "trade or business," in the absence of an all-purpose definition by statute or regulation, and in our concern that an attempt judicially to formulate and impose a test for all situations would be counterproductive, unhelpful, and even somewhat precarious for the overall integrity of the Code. We leave repair or revision, if any be needed, which we doubt, to the Congress where we feel, at this late date, the ultimate responsibility rests. Cf. *Flood* v. *Kuhn*, 407 U. S. 258, 269–285 (1972).[16]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[16] It is possible, of course, that our conclusion here may subject the gambler to self-employment tax, see §§ 1401–1403 of the Code, and therefore may not be an unmixed blessing for him. Federal taxes, however, rest where Congress has placed them.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The 1982 amendments to the Tax Code made clear that gambling is not a trade or business. Under those amendments, the alternative minimum tax base equals adjusted gross income reduced by specified amounts, including gambling losses, and increased by items not relevant here. See 26 U. S. C. §§ 55(b), 55(e)(1)(A), 165(d) (1982 ed. and Supp. III).[1] If full-time gambling were a trade or business, a full-time gambler's gambling losses would be "deductions . . . attributable to a trade or business carried on by the taxpayer," and hence deductible from gross income in computing adjusted gross income, 26 U. S. C. § 62(1), though only to the extent of gambling winnings, 26 U. S. C. § 165(d). To again subtract gambling losses (to the extent of gambling winnings) from adjusted gross income when computing the alternative minimum tax base would be to give the full-time gambler a double deduction for alternative minimum tax purposes, which was certainly not Congress' intent.[2] Thus, when Con-

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[1] All references are to the Code as it stood prior to the 1986 amendments.

[2] Consider two single individuals filing for the tax year ending December 31, 1986: A has $75,000 in nongambling income, and $75,000 in itemized nongambling deductions; B, a full-time gambler, has $75,000 in gambling winnings, $75,000 in gambling losses, $75,000 in nongambling income, and $75,000 in itemized nongambling deductions. A's gross income and adjusted gross income are both $75,000, and so is his alternative minimum tax base. The alternative minimum tax assessed on A is 20% of the excess of $75,000 over $30,000, see 26 U. S. C. §§ 55(a), 55(f)(1)(B), or $9,000. Assuming that full-time gambling is a trade or business, B has gross income of $150,000, adjusted gross income of $75,000 (because his gambling losses are attributable to a trade or business), and an alternative minimum tax base of zero (because gambling losses are deducted from adjusted gross income in computing the alternative minimum tax base). Thus, if full-time gambling were treated as a trade or business, B's gambling losses would shield him against the $9,000 minimum tax that Congress clearly intended him to pay. "The Code should not be interpreted to allow [a taxpayer] 'the practical equivalent of a double deduction,' *Charles Ilfeld Co.* v. *Her-*

gress amended the alternative minimum tax provisions in 1982, it implicitly accepted the teaching of *Gentile* v. *Commissioner*, 65 T. C. 1 (1975), that gambling is not a trade or business.[3] Groetzinger would have had no problem under the 1982 amendments.

One could argue, I suppose, that although gambling is not a trade or business under the 1982 amendments, it was in 1978, the tax year at issue here. But there is certainly no indication that Congress intended in 1982 to alter the status of gambling as a trade or business. Rather, Congress was correcting an inequity that had arisen because gambling is *not* a trade or business, just as 40 years earlier Congress had, by enacting the predecessor to 26 U. S. C. § 212, corrected an inequity that became apparent when this Court held that a full-time investor is not engaged in a trade or business. See *Higgins* v. *Commissioner*, 312 U. S. 212 (1941). In neither case did Congress attempt to alter the then-prevailing definition of trade or business, nor do I think this Court should do so now to avoid a harsh result in this case.[4] In any event, the Court should recognize that its holding is a sport that applies only to a superseded statute and not to the tax years governed by the 1982 amendments. Accordingly, I dissent.

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nandez, 292 U. S. 62, 68 (1934), absent a clear declaration of intent by Congress." *United States* v. *Skelly Oil Co.*, 394 U. S. 678, 684 (1969). There is no such clear declaration of intent accompanying the 1982 amendments.

[3] The Commissioner had acquiesced in *Gentile*. See 1980–2 Cum. Bull. 1, 4, n. 39.

[4] While the consequences of accepting the Commissioner's position in this case may be harsh to the respondent—which is no doubt why Congress amended the relevant Code provisions in 1982—I find the Court's characterization of the result as a tax on gambling losses, *ante*, at 35, somewhat misleading. If gambling is not a trade or business, the practical effect of the minimum tax on tax preference items is to reduce the deduction allowed for gambling losses from an amount equal to 100% of gambling winnings to some lesser percentage of gambling winnings.

PENNSYLVANIA *v.* RITCHIE

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 85–1347. Argued December 3, 1986—Decided February 24, 1987

Respondent was charged with various sexual offenses against his minor daughter. The matter was referred to the Children and Youth Services (CYS), a protective service agency established by Pennsylvania to investigate cases of suspected child mistreatment and neglect. During pretrial discovery, respondent served CYS with a subpoena, seeking access to the records related to the immediate charges, as well as certain earlier records compiled when CYS investigated a separate report that respondent's children were being abused. CYS refused to comply with the subpoena, claiming that the records were privileged under a Pennsylvania statute which provides that all CYS records must be kept confidential, subject to specified exceptions. One of the exceptions is that CYS may disclose reports to a "court of competent jurisdiction pursuant to a court order." At an in-chambers hearing in the trial court, respondent argued that he was entitled to the information because the CYS file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. Although the trial judge did not examine the entire CYS file, he refused to order disclosure. At the trial, which resulted in respondent's conviction by a jury, the main witness against him was his daughter, who was cross-examined at length by defense counsel. On appeal, the Pennsylvania Superior Court held that the failure to disclose the daughter's statements contained in the CYS file violated the Confrontation Clause of the Sixth Amendment. The court vacated the conviction and remanded for further proceedings to determine whether a new trial should be granted. On the State's appeal, the Pennsylvania Supreme Court held that, by denying access to the CYS file, the trial court order had violated both the Confrontation and the Compulsory Process Clauses of the Sixth Amendment, and that the conviction must be vacated and the case remanded to determine if a new trial was necessary. The court concluded that defense counsel was entitled to review the entire file for any useful evidence.

Held: The judgment is affirmed in part and reversed in part, and the case is remanded.

509 Pa. 357, 502 A. 2d 148, affirmed in part, reversed in part, and remanded.

JUSTICE POWELL delivered the opinion of the Court as to Parts I, II, III–B, III–C, and IV, concluding that:

1. This Court does not lack jurisdiction on the ground that the decision below is not a "final judgment or decree," as required by 28 U. S. C. § 1257(3). Although this Court has no jurisdiction to review an interlocutory judgment, jurisdiction is proper where a federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had whatever the ultimate outcome of the case. Here, the Sixth Amendment issue will not survive for this Court to review regardless of the outcome of the proceedings on remand. The Sixth Amendment issue has been finally decided by the highest court of Pennsylvania, and unless this Court reviews that decision, the harm that the State seeks to avoid—the disclosure of the confidential file—will occur regardless of the result on remand. Pp. 47–50.

2. Criminal defendants have the right under the Compulsory Process Clause to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt. However, this Court has never held that the Clause guarantees the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence. Instead, claims such as respondent's traditionally have been evaluated under the broader protections of the Due Process Clause of the Fourteenth Amendment. Compulsory process provides no greater protections in this area than those afforded by due process, and thus respondent's claims more properly are considered by reference to due process. Pp. 55–56.

3. Under due process principles, the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Although the public interest in protecting sensitive information such as that in CYS records is strong, this interest does not necessarily prevent disclosure in all circumstances. Because the Pennsylvania Legislature contemplated *some* use of CYS records in judicial proceedings, there is no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determined that the information was "material" to the accused's defense. The Pennsylvania Supreme Court thus properly ordered a remand for further proceedings. Respondent is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the CYS file contains no such information, or if the nondisclosure is harmless beyond a reasonable doubt, the trial court will be free to reinstate the prior conviction. Pp. 57–58.

4. The Pennsylvania Supreme Court erred in holding that defense counsel must be allowed to examine the confidential information. A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search the State's files and make the determination as to the materiality of the information. Both respondent's and the State's interests in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review. To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the State's compelling interest in protecting its child abuse information. Pp. 59–61.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded in Part III–A that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause. There is no merit to respondent's claim that by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination guaranteed by the Clause. Respondent argued that he could not effectively question his daughter because, without the CYS material, he did not know which types of questions would best expose the weaknesses in her testimony. However, the Confrontation Clause is not a constitutionally compelled rule of pretrial discovery. The right of confrontation is a *trial* right, guaranteeing an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. Pp. 51–54.

JUSTICE BLACKMUN concluded that the Confrontation Clause may be relevant to limitations placed on a defendant's pretrial discovery. There may well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness. A State cannot avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage. However, the procedure the Court has set out for the lower court to follow on remand is adequate to address any confrontation problem. Pp. 61–66.

POWELL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, and IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined, and an opinion with respect to Part III–A, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 61. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined,

post, p. 66. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and SCALIA, JJ., joined, *post*, p. 72.

Edward Marcus Clark argued the cause for petitioner. With him on the briefs was *Robert L. Eberhardt.*

John H. Corbett, Jr., by invitation of the Court, 478 U. S. 1019, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With him on the brief was *Lester G. Nauhaus.**

JUSTICE POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, and IV, and an opinion with respect to Part III–A, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join.

The question presented in this case is whether and to what extent a State's interest in the confidentiality of its investiga-

*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, *Arnold Overoye*, Assistant Attorney General, *Joel Carey*, Supervising Deputy Attorney General, and *Karen Ziskind*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Duane Woodard* of Colorado, *Joseph Lieberman* of Connecticut, *Corinne Watanabe*, Acting Attorney General of Hawaii, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *David Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *Michael Greely* of Montana, *Stephen E. Merrill* of New Hampshire, *Lacy H. Thornburg* of North Carolina, *Mike Turpen* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Mike Cody* of Tennessee, *David L. Wilkinson* of Utah, *Jeffrey L. Amestoy* of Vermont, *William A. Broadus* of Virginia, *Kenneth O. Eikenberry* of Washington, *Charlie Brown* of West Virginia, and *Archie G. McClintock* of Wyoming; for the County of Allegheny, Pennsylvania, on behalf of Allegheny County Children and Youth Services by *George M. Janocsko* and *Robert L. McTiernan;* for the Appellate Committee of the District Attorneys Association of California by *Ira Reiner*, *Harry B. Sondheim*, and *Arnold T. Guminski;* for the Pennsylvania Coalition Against Rape et al. by *Nancy D. Wasser;* and for the Sunny von Bulow National Victim Advocacy Center, Inc., et al. by *Frank Gamble Carrington, Jr.*, *David Crump*, and *Ann M. Haralambie.*

tive files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence.

I

As part of its efforts to combat child abuse, the Commonwealth of Pennsylvania has established Children and Youth Services (CYS), a protective service agency charged with investigating cases of suspected mistreatment and neglect. In 1979, respondent George Ritchie was charged with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor. The victim of the alleged attacks was his 13-year-old daughter, who claimed that she had been assaulted by Ritchie two or three times per week during the previous four years. The girl reported the incidents to the police, and the matter then was referred to the CYS.

During pretrial discovery, Ritchie served CYS with a subpoena, seeking access to the records concerning the daughter. Ritchie requested disclosure of the file related to the immediate charges, as well as certain records that he claimed were compiled in 1978, when CYS investigated a separate report by an unidentified source that Ritchie's children were being abused.[1] CYS refused to comply with the subpoena, claiming that the records were privileged under Pennsylvania law. The relevant statute provides that all reports and other information obtained in the course of a CYS investigation must be kept confidential, subject to 11 specific exceptions.[2] One of those exceptions is that the agency may

[1] Although the 1978 investigation took place during the period that the daughter claimed she was being molested, it is undisputed that the daughter did not tell CYS about the assaults at that time. No criminal charges were filed as a result of this earlier investigation.

[2] The statute provides in part:

"(a) Except as provided in section 14 [Pa. Stat. Ann., Tit. 11, § 2214 (Purdon Supp. 1986)], reports made pursuant to this act including but not limited to report summaries of child abuse . . . and written reports . . . as well as any other information obtained, reports written or photographs or X-rays taken concerning alleged instances of child abuse in the possession

disclose the reports to a "court of competent jurisdiction pursuant to a court order." Pa. Stat. Ann., Tit. 11, § 2215(a)(5) (Purdon Supp. 1986).

Ritchie moved to have CYS sanctioned for failing to honor the subpoena, and the trial court held a hearing on the motion in chambers. Ritchie argued that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. He also requested disclosure of a medical report that he believed was compiled during the 1978 CYS investigation. Although the trial judge acknowledged that he had not examined the entire CYS file, he accepted a CYS representative's assertion that there was no medical report in the record.[3] The judge then denied the motion and refused to order CYS to disclose the files.[4] See App. 72a.

At trial, the main witness against Ritchie was his daughter. In an attempt to rebut her testimony, defense counsel

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of the department, a county children and youth social service agency or a child protective service shall be confidential and shall only be made available to:

. . . . . .

"(5) A court of competent jurisdiction pursuant to a court order." Pa. Stat. Ann., Tit. 11, § 2215(a) (Purdon Supp. 1986).

At the time of trial the statute only provided five exceptions to the general rule of confidentiality, including the exception for court-ordered disclosure. The statute was amended in 1982 to increase the number of exceptions. For example, the records now may be revealed to law enforcement officials for use in criminal investigations. § 2215(a)(9). But, the identity of a person who reported the abuse or who cooperated in the investigation may not be released if the disclosure would be detrimental to that person's safety. § 2215(c).

[3] The trial judge stated that he did not read "50 pages or more of an extensive record." App. 72a. The judge had no knowledge of the case before the pretrial hearing. See *id.*, at 68a.

[4] There is no suggestion that the Commonwealth's prosecutor was given access to the file at any point in the proceedings, or that he was aware of its contents.

cross-examined the girl at length, questioning her on all aspects of the alleged attacks and her reasons for not reporting the incidents sooner. Except for routine evidentiary rulings, the trial judge placed no limitation on the scope of cross-examination. At the close of trial Ritchie was convicted by a jury on all counts, and the judge sentenced him to 3 to 10 years in prison.

On appeal to the Pennsylvania Superior Court, Ritchie claimed, *inter alia*, that the failure to disclose the contents of the CYS file violated the Confrontation Clause of the Sixth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment.[5] The court agreed that there had been a constitutional violation, and accordingly vacated the conviction and remanded for further proceedings. 324 Pa. Super. 557, 472 A. 2d 220 (1984). The Superior Court ruled, however, that the right of confrontation did not entitle Ritchie to the full disclosure that he sought. It held that on remand, the trial judge first was to examine the confidential material *in camera*, and release only the verbatim statements made by the daughter to the CYS counselor. But the full record then was to be made available to Ritchie's lawyer, for the limited purpose of allowing him to argue the relevance of the statements. The court stated that the prosecutor also should be allowed to argue that the failure to disclose the statements was harmless error. If the trial judge determined that the lack of information was preju-

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[5] The Sixth Amendment of the United States Constitution protects both the right of confrontation and the right of compulsory process:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."

Both Clauses are made obligatory on the States by the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U. S. 400, 403–406 (1965) (Confrontation Clause); *Washington* v. *Texas*, 388 U. S. 14, 17–19 (1967) (Compulsory Process Clause).

dicial, Ritchie would be entitled to a new trial. *Id.*, at 567–568, 472 A. 2d, at 226.

On appeal by the Commonwealth, the Supreme Court of Pennsylvania agreed that the conviction must be vacated and the case remanded to determine if a new trial is necessary. 509 Pa. 357, 502 A. 2d 148 (1985). But the court did not agree that the search for material evidence must be limited to the daughter's verbatim statements. Rather, it concluded that Ritchie, through his lawyer, is entitled to review the entire file to search for any useful evidence.[6] It stated: "When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it." *Id.*, at 367, 502 A. 2d, at 153. The Pennsylvania Court concluded that by denying access to the file, the trial court order had violated both the Confrontation Clause and the Compulsory Process Clause. The court was unpersuaded by the Commonwealth's argument that the trial judge already had examined the file and determined that it contained no relevant information. It ruled that the constitutional infirmity in the trial court's order was that Ritchie was unlawfully denied the opportunity to have the records reviewed by "the eyes and the perspective of an advocate," who may see relevance in places that a neutral judge would not. *Ibid.*

In light of the substantial and conflicting interests held by the Commonwealth and Ritchie, we granted certiorari. 476 U. S. 1139 (1986). We now affirm in part, reverse in part, and remand for proceedings not inconsistent with this opinion.

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[6] The court noted that the trial court should take "appropriate steps" to guard against improper dissemination of the confidential material, including, for example, "fashioning of appropriate protective orders, or conducting certain proceedings *in camera*." 509 Pa., at 368, n. 16, 502 A. 2d, at 153, n. 16. These steps were to be taken, however, subject to "the right of [Ritchie], through his counsel, to gain access to the information." *Ibid.*

II

Before turning to the constitutional questions, we first must address Ritchie's claim that the Court lacks jurisdiction, because the decision below is not a "final judgment or decree." See 28 U. S. C. § 1257(3); *Market Street R. Co.* v. *Railroad Comm'n of California*, 324 U. S. 548, 551 (1945). Normally the finality doctrine contained in § 1257(3) is not satisfied if the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved. *Ibid.*; *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 123–127 (1945). Ritchie argues that under this standard the case is not final, because there are several more proceedings scheduled in the Pennsylvania courts: at a minimum there will be an *in camera* review of the file, and the parties will present arguments on whether the lack of disclosure was prejudicial; after that, there could be a new trial on the merits. Ritchie claims that because the Sixth Amendment issue may become moot at either of these stages, we should decline review until these further proceedings are completed.

Although it is true that this Court is without jurisdiction to review an interlocutory judgment, it also is true that the principles of finality have not been construed rigidly. As we recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), there are at least four categories of cases in which jurisdiction is proper even when there are further proceedings anticipated in the state court. One of these exceptions states that the Court may consider cases:

> "[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. . . . [I]n these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the

governing state law would not permit him again to present his federal claims for review." *Id.*, at 481.

We find that the case before us satisfies this standard because the Sixth Amendment issue will not survive for this Court to review, regardless of the outcome of the proceedings on remand. If the trial court decides that the CYS files do not contain relevant information, or that the nondisclosure was harmless, the Commonwealth will have prevailed and will have no basis to seek review. In this situation Ritchie's conviction will be reinstated, and the issue of whether defense counsel should have been given access will be moot. Should Ritchie appeal the trial court's decision, the Commonwealth's only method for preserving the constitutional issue would be by cross-claims. Thus the only way that *this* Court will be able to reach the Sixth Amendment issue is if Ritchie eventually files a petition for certiorari on the trial court's adverse ruling, and the Commonwealth files a cross-petition. When a case is in this procedural posture, we have considered it sufficiently final to justify review. See, *e. g.*, *New York* v. *Quarles*, 467 U. S. 649, 651, n. 1 (1984); *South Dakota* v. *Neville*, 459 U. S. 553, 558, n. 6 (1983).

Alternatively, if Ritchie is found to have been prejudiced by the withholding and is granted a new trial, the Commonwealth still will be unable to obtain a ruling from this Court. On retrial Ritchie either will be convicted, in which case the Commonwealth's ability to obtain review again will rest on Ritchie's willingness to appeal; or he will be acquitted, in which case the Commonwealth will be barred from seeking review by the Double Jeopardy Clause. See *ibid.*; *California* v. *Stewart*, 384 U. S. 436, 498, n. 71 (1966) (decided with *Miranda* v. *Arizona*, 384 U. S. 436 (1966)). Therefore, if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future.[7]

[7] As JUSTICE STEVENS' dissent points out, *post*, at 74, there is a third possibility. If the trial court finds prejudicial error and orders a retrial, the Commonwealth may attempt to take an immediate appeal of this order.

The Sixth Amendment issue has been finally decided by the highest court of Pennsylvania, and unless we review that decision, the harm that the Commonwealth seeks to avoid—the disclosure of the entire confidential file—will occur regardless of the result on remand. We thus cannot agree with the suggestion in JUSTICE STEVENS' dissent that if we were to dismiss this case and it was resolved on other grounds after disclosure of the file, "the Commonwealth would not have been harmed." *Post*, at 74. This hardly could be true, because of the acknowledged public interest in ensuring the confidentiality of CYS records. See n. 17, *infra*. Although this consideration is not dispositive, we have noted that "statutorily created finality requirements

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See Pa. Rule App. Proc. 311(a). JUSTICE STEVENS' dissent suggests that because the Commonwealth can raise the Sixth Amendment issue again in this appeal, respect for the finality doctrine should lead us to dismiss. But even if we were persuaded that an immediate appeal would lie in this situation, it would not necessarily follow that the constitutional issue will survive. The appellate court could find that the failure to disclose was harmless, precluding further review by the Commonwealth. Alternatively, the appellate court could agree that the error was prejudicial, thus permitting the Commonwealth to claim that the Sixth Amendment does not compel disclosure. But as JUSTICE STEVENS' dissent recognizes, the Pennsylvania courts already have considered and resolved this issue in their earlier proceedings; if the Commonwealth were to raise it again in a new set of appeals, the courts below would simply reject the claim under the law-of-the-case doctrine. Law-of-the-case principles are not a bar to this Court's jurisdiction, of course, and thus JUSTICE STEVENS' dissent apparently would require the Commonwealth to raise a fruitless Sixth Amendment claim in the trial court, the Superior Court, and the Pennsylvania Supreme Court still another time before we regrant certiorari on the question that is now before us.

The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine—efficiency, judicial restraint, and federalism, see *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945); *post*, at 72—would be ill served by another round of litigation on an issue that has been authoritatively decided by the highest state court.

should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge*, 424 U. S. 319, 331, n. 11 (1976). We therefore reject Ritchie's claim that the Court lacks jurisdiction, and turn to the merits of the case before us.[8]

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[8] Nothing in our decision in *United States* v. *Ryan*, 402 U. S. 530 (1971), requires a different result. In that case the respondent was served with a subpoena requiring him to produce business records for a grand jury. The District Court denied a motion to quash, and respondent appealed. We concluded that the District Court order was not appealable. *Id.*, at 532. We rejected the contention that immediate review was necessary to avoid the harm of disclosing otherwise protected material, noting that parties who face such an order have the option of making the decision "final" simply by refusing to comply with the subpoena.

Although there are similarities between this case and *Ryan*, the analogy is incomplete. In *Ryan* the Court was concerned about the "necessity for expedition in the administration of the criminal law," *id.*, at 533, an interest that would be undermined if all pretrial orders were immediately appealable. *Ryan* also rests on an implicit assumption that unless a party resisting discovery is willing to risk being held in contempt, the significance of his claim is insufficient to justify interrupting the ongoing proceedings. That is not the situation before us. Here the trial *already* has taken place, and the issue reviewed by the Commonwealth appellate courts. The interests of judicial economy and the avoidance of delay, rather than being hindered, would be best served by resolving the issue. Cf. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S., 469, 477–478 (1975) (exceptions to finality doctrine justified in part by need to avoid economic waste and judicial delay).

We also reject Ritchie's suggestion that we should dismiss this action and allow the case to return to the trial court, so that the Commonwealth can formally refuse to comply with the Pennsylvania Supreme Court decision and be held in contempt. Here we are not faced merely with an individual's assertion that a subpoena is unduly burdensome, but with a holding of a State Supreme Court that the legislative interest in confidentiality will not be given effect. The Commonwealth's interest in immediate review of this case is obvious and substantial. Contrary to JUSTICE STEVENS' dissent, we do not think that the finality doctrine requires a new round of litigation and appellate review simply to give the Commonwealth "the chance to decide whether to comply with the order." *Post*, at 77. See n. 7, *supra*. To prolong the proceedings on this basis would be incon-

III

The Pennsylvania Supreme Court held that Ritchie, through his lawyer, has the right to examine the full contents of the CYS records. The court found that this right of access is required by both the Confrontation Clause and the Compulsory Process Clause. We discuss these constitutional provisions in turn.

A

The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. *Delaware* v. *Fensterer*, 474 U. S. 15, 18–19 (1985) *(per curiam)*. Ritchie does not allege a violation of the former right. He was not excluded from any part of the trial, nor did the prosecutor improperly introduce out-of-court statements as substantive evidence, thereby depriving Ritchie of the right to "confront" the declarant. See *Ohio* v. *Roberts*, 448 U. S. 56 (1980). Cf. *United States* v. *Inadi*, 475 U. S. 387 (1986). Instead, Ritchie claims that by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination.

Ritchie argues that he could not effectively question his daughter because, without the CYS material, he did not know which types of questions would best expose the weaknesses in her testimony. Had the files been disclosed, Ritchie argues that he might have been able to show that the daughter made statements to the CYS counselor that were inconsistent with her trial statements, or perhaps to reveal that the girl acted with an improper motive. Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or

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sistent with the "pragmatic" approach we normally have taken to finality questions. See generally *Bradley* v. *Richmond School Bd.*, 416 U. S. 696, 722–723, n. 28 (1974) ("This Court has been inclined to follow a 'pragmatic approach' to the question of finality") (citation omitted).

unbelievable. *United States* v. *Abel*, 469 U. S. 45, 50 (1984); *Davis* v. *Alaska*, 415 U. S. 308, 316 (1974). Because this type of evidence can make the difference between conviction and acquittal, see *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959), Ritchie argues that the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial. See *United States* v. *Inadi*, *supra*, at 396.

The Pennsylvania Supreme Court accepted this argument, relying in part on our decision in *Davis* v. *Alaska*, *supra*. In *Davis* the trial judge prohibited defense counsel from questioning a witness about the latter's juvenile criminal record, because a state statute made this information presumptively confidential. We found that this restriction on cross-examination violated the Confrontation Clause, despite Alaska's legitimate interest in protecting the identity of juvenile offenders. 415 U. S., at 318–320. The Pennsylvania Supreme Court apparently interpreted our decision in *Davis* to mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony. See 509 Pa., at 365–367, 502 A. 2d, at 152–153.

If we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. See *California* v. *Green*, 399 U. S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Barber* v. *Page*, 390 U. S. 719, 725 (1968) ("The right to confrontation is basically a trial

right"). The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.[9] Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. *Delaware* v. *Fensterer*, 474 U. S., at 20. In short, the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*, at 20 (emphasis in original). See also *Ohio* v. *Roberts*, *supra*, at 73, n. 12 (except in "extraordinary cases, no inquiry into 'effectiveness' [of cross-examination] is required").

We reaffirmed this interpretation of the Confrontation Clause last Term in *Delaware* v. *Fensterer*, *supra*. In that case, the defendant was convicted in part on the testimony of the State's expert witness, who could not remember which scientific test he had used to form his opinion. Although this inability to recall frustrated defense counsel's efforts to discredit the testimony, we held that there had been no Sixth Amendment violation. The Court found that the right of confrontation was not implicated, "for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way." 474 U. S., at 19. *Fensterer* was in full accord with our earlier decisions that have upheld a Confrontation Clause infringement claim on this issue only

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[9] This is not to suggest, of course, that there are no protections for pretrial discovery in criminal cases. See discussion in Part III–B, *infra*. We simply hold that with respect to this issue, the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial. Also, we hardly need say that nothing in our opinion today is intended to alter a trial judge's traditional power to control the scope of cross-examination by prohibiting questions that are prejudicial, irrelevant, or otherwise improper. See *Delaware* v. *Van Arsdall*, 475 U. S. 673, 678 (1986).

when there was a specific statutory or court-imposed restriction at trial on the scope of questioning.[10]

The lower court's reliance on *Davis* v. *Alaska* therefore is misplaced. There the state court had prohibited defense counsel from questioning the witness about his criminal record, even though that evidence might have affected the witness' credibility. The constitutional error in that case was *not* that Alaska made this information confidential; it was that the defendant was denied the right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." 415 U. S., at 318. Similarly, in this case the Confrontation Clause was not violated by the withholding of the CYS file; it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the daughter. Because defense counsel was able to cross-examine all of the trial witnesses fully, we find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause.

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[10] See, *e. g.*, *Delaware* v. *Van Arsdall*, *supra* (denial of right to cross-examine to show bias); *Davis* v. *Alaska*, 415 U. S. 308 (1974); *Chambers* v. *Mississippi*, 410 U. S. 284 (1973) (denial of right to impeach own witness); *Smith* v. *Illinois*, 390 U. S. 129 (1968) (denial of right to ask witness' real name and address at trial); *Douglas* v. *Alabama*, 380 U. S. 415 (1965) (denial of right to cross-examine codefendant). Moreover, the Court normally has refused to find a Sixth Amendment violation when the asserted interference with cross-examination did not occur at trial. Compare *McCray* v. *Illinois*, 386 U. S. 300, 311–313 (1967) (no Confrontation Clause violation where defendant was denied the chance to discover an informant's name at pretrial hearing), with *Roviaro* v. *United States*, 353 U. S. 53 (1957) (on the facts presented, Government required to disclose informant's name at trial). See generally Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 125–126 (1974) ("The right of confrontation is exclusively a 'trial right' . . . . It does not . . . require the government to produce witnesses whose statements are not used at trial, or to produce the underlying information on which its witnesses base their testimony") (footnotes omitted) (hereinafter Westen).

B

The Pennsylvania Supreme Court also suggested that the failure to disclose the CYS file violated the Sixth Amendment's guarantee of compulsory process. Ritchie asserts that the trial court's ruling prevented him from learning the names of the "witnesses in his favor," as well as other evidence that might be contained in the file. Although the basis for the Pennsylvania Supreme Court's ruling on this point is unclear, it apparently concluded that the right of compulsory process includes the right to have the State's assistance in uncovering arguably useful information, without regard to the existence of a state-created restriction—here, the confidentiality of the files.

1

This Court has had little occasion to discuss the contours of the Compulsory Process Clause. The first and most celebrated analysis came from a Virginia federal court in 1807, during the treason and misdemeanor trials of Aaron Burr. Chief Justice Marshall, who presided as trial judge, ruled that Burr's compulsory process rights entitled him to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence.[11] *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807). Despite the implications of the *Burr* decision for federal criminal procedure, the Compulsory Process Clause rarely was a factor in this Court's decisions during the next 160 years.[12] More re-

[11] The evidence consisted of a letter that was sent to President Jefferson by General James Wilkinson that allegedly showed that Burr was planning to invade Mexico and set up a separate government under his control. After being ordered to do so, Jefferson eventually turned over an edited version of the letter. For an excellent summary of the *Burr* case and its implications for compulsory process, see Westen 101–108.

[12] The pre-1967 cases that mention compulsory process do not provide an extensive analysis of the Clause. See *Pate* v. *Robinson*, 383 U. S. 375, 378, n. 1 (1966); *Blackmer* v. *United States*, 284 U. S. 421, 442 (1932); *United States* v. *Van Duzee*, 140 U. S. 169, 173 (1891); *Ex parte Harding*, 120 U. S. 782 (1887). See generally Westen 108, and n. 164.

cently, however, the Court has articulated some of the specific rights secured by this part of the Sixth Amendment. Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.[13]

This Court has never squarely held that the Compulsory Process Clause guarantees the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence. But cf. *United States* v. *Nixon*, 418 U. S. 683, 709, 711 (1974) (suggesting that the Clause may require the production of evidence). Instead, the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment. See *United States* v. *Bagley*, 473 U. S. 667 (1985); *Brady* v. *Maryland*, 373 U. S. 83 (1963). See also *Wardius* v. *Oregon*, 412 U. S. 470 (1973). Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.

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[13] See, *e. g.*, *Chambers* v. *Mississippi*, *supra*; *Cool* v. *United States*, 409 U. S. 100 (1972) *(per curiam)*; *Washington* v. *Texas*, 388 U. S. 14 (1967). Cf. *Webb* v. *Texas*, 409 U. S. 95 (1972) *(per curiam)* (decision based on Due Process Clause).

2

It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. *United States* v. *Agurs*, 427 U. S. 97 (1976); *Brady* v. *Maryland*, *supra*, at 87. Although courts have used different terminologies to define "materiality," a majority of this Court has agreed, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States* v. *Bagley*, 473 U. S., at 682 (opinion of BLACKMUN, J.); see *id.*, at 685 (opinion of WHITE, J.).

At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file. The Commonwealth, however, argues that no materiality inquiry is required, because a statute renders the contents of the file privileged. Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file "might" have been useful to the defense.

Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances. This is not a case where a state statute grants CYS the absolute authority to shield its files from all eyes. Cf. 42 Pa. Cons. Stat. § 5945.1(b) (1982) (unqualified statutory privilege for communications between sexual assault counselors and victims).[14] Rather, the Pennsylvania

[14] We express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to *anyone*, including law-enforcement and judicial personnel.

law provides that the information shall be disclosed in certain circumstances, including when CYS is directed to do so by court order. Pa. Stat. Ann., Title 11, § 2215(a)(5) (Purdon Supp. 1986). Given that the Pennsylvania Legislature contemplated *some* use of CYS records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions. In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is "material" to the defense of the accused.

We therefore affirm the decision of the Pennsylvania Supreme Court to the extent it orders a remand for further proceedings. Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction.[15]

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[15] The Commonwealth also argues that Ritchie is not entitled to disclosure because he did not make a particularized showing of what information he was seeking or how it would be material. See Brief for Petitioner 18 (quoting *United States* v. *Agurs*, 427 U. S. 97, 109–110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense")). Ritchie, of course, may not require the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence. See *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 867 (1982) ("He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense"). Although the obligation to disclose exculpatory material does not depend on the presence of a specific request, we note that the degree of specificity of Ritchie's request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure. See *United States* v. *Bagley*, 473 U. S. 667, 682–683 (1985) (opinion of BLACKMUN, J.).

C

This ruling does not end our analysis, because the Pennsylvania Supreme Court did more than simply remand. It also held that defense counsel must be allowed to examine all of the confidential information, both relevant and irrelevant, and present arguments in favor of disclosure. The court apparently concluded that whenever a defendant alleges that protected evidence might be material, the appropriate method of assessing this claim is to grant full access to the disputed information, regardless of the State's interest in confidentiality. We cannot agree.

A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files. See *United States* v. *Bagley*, *supra*, at 675; *United States* v. *Agurs*, *supra*, at 111. Although the eye of an advocate may be helpful to a defendant in ferreting out information, *Dennis* v. *United States*, 384 U. S. 855, 875 (1966), this Court has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under *Brady* v. *Maryland*, 373 U. S. 83 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention,[16] the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance. See *Weatherford* v. *Bursey*, 429 U. S. 545, 559 (1977) ("There

[16] See Fed. Rule Crim. Proc. 16(d)(2); Pa. Rule Crim. Proc. 305(E) ("If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule [mandating disclosure of exculpatory evidence], the court may . . . enter such . . . order as it deems just under the circumstances").

is no general constitutional right to discovery in a criminal case, and *Brady* did not create one").

We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review. Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (*e. g.*, the medical report), he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth—like all other States[17]—has made a commendable effort to assure vic-

[17] The importance of the public interest at issue in this case is evidenced by the fact that all 50 States and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse. See Brief for State of California *ex rel.* John K. Van de Kamp et al.

tims and witnesses that they may speak to the CYS counselors without fear of general disclosure. The Commonwealth's purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence. Neither precedent nor common sense requires such a result.

IV

We agree that Ritchie is entitled to know whether the CYS file contains information that may have changed the outcome of his trial had it been disclosed. Thus we agree that a remand is necessary. We disagree with the decision of the Pennsylvania Supreme Court to the extent that it allows defense counsel access to the CYS file. An *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations. The judgment of the Pennsylvania Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

I join Parts I, II, III–B, III–C, and IV of the Court's opinion. I write separately, however, because I do not accept the plurality's conclusion, as expressed in Part III–A of JUSTICE POWELL's opinion, that the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery. In this, I am in substantial agreement with much of what JUSTICE BRENNAN says, *post*, in dissent. In my view, there might well be a confrontation violation

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as *Amici Curiae* 12, n. 1 (listing illustrative statutes). See also Besharov, The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect, 23 Vill. L. Rev. 458, 508–512 (1978).

if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.

The plurality recognizes that the Confrontation Clause confers upon a defendant a right to conduct cross-examination. *Ante*, at 51. It believes that this right is satisfied so long as defense counsel can *question* a witness on any proper subject of cross-examination. For the plurality, the existence of a confrontation violation turns on whether counsel has the opportunity to conduct such questioning; the plurality in effect dismisses—or, at best, downplays—any inquiry into the effectiveness of the cross-examination. *Ante*, at 51–52. Thus, the plurality confidently can state that the Confrontation Clause creates nothing more than a trial right. *Ante*, at 52.

If I were to accept the plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross-examination, I believe that in some situations the confrontation right would become an empty formality. As even the plurality seems to recognize, see *ante*, at 51–52, one of the primary purposes of cross-examination is to call into question a witness' credibility. This purpose is often met when defense counsel can demonstrate that the witness is biased or cannot clearly remember the events crucial to the testimony. The opportunity the Confrontation Clause gives a defendant's attorney to pursue any proper avenue of questioning a witness makes little sense set apart from the goals of cross-examination.

There are cases, perhaps most of them, where simple questioning of a witness will satisfy the purposes of cross-examination. *Delaware* v. *Fensterer*, 474 U. S. 15 (1985) *(per curiam)* is one such example. There the Court rejected a Confrontation Clause challenge brought on the ground that an expert witness for the prosecution could not remember the method by which he had determined that some hair of the victim, whom Fensterer was accused of killing, had been

forcibly removed. Although I did not join the summary reversal in *Fensterer* and would have given the case plenary consideration, see *id.*, at 23, it is easy to see why cross-examination was effective there. The expert's credibility and conclusions were seriously undermined by a demonstration that he had forgotten the method he used in his analysis. Simple questioning provided such a demonstration, and was reinforced by the testimony of the defendant's own expert who could undermine the other expert's opinion. See *id.*, at 20.[1]

There are other cases where, in contrast, simple questioning will not be able to undermine a witness' credibility and in fact may do actual injury to a defendant's position. *Davis* v. *Alaska*, 415 U. S. 308 (1974), is a specific example. There defense counsel had the juvenile record of a key prosecution witness in hand but was unable to refer to it during his cross-examination of the witness because of an Alaska rule prohibiting the admission of such a record in a court proceeding. *Id.*, at 310–311. The juvenile record revealed that the witness was on probation for the same burglary for which Davis was charged. Accordingly, the possibility existed that the witness was biased or prejudiced against Davis, in that he was attempting to turn towards Davis the attention of the police that would otherwise have been directed against him.

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[1] Accordingly, the remark from *Delaware* v. *Fensterer*, which the plurality would use, *ante*, at 53, as support for its argument that confrontation analysis has little to do with inquiries concerning the effectiveness of cross-examination, actually suggests the opposite. The Court observed in *Fensterer* that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." 474 U. S., at 20 (emphasis in original). This remark does not imply that concern about such effectiveness has no place in analysis under the Confrontation Clause. Rather, it means that when, as in *Fensterer*, simple questioning serves the purpose of cross-examination, a defendant cannot claim a confrontation violation because there might have been a more effective means of cross-examination.

Although Davis' counsel was permitted to "question" the witness as to bias, any attempt to point to the reason for that bias was denied. *Id.*, at 313–314.

In the Court's view, this questioning of the witness both was useless to Davis and actively harmed him. The Court observed: "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." *Id.*, at 318. The Court concluded that, without being able to refer to the witness' juvenile record, "[p]etitioner was thus denied the right of effective cross-examination." *Ibid.*

The similarities between *Davis* and this case are much greater than are any differences that may exist. In cross-examining a key prosecution witness, counsel for Davis and counsel for respondent were both limited to simple questioning. They could not refer to specific facts that might have established the critical bias of the witness: Davis' counsel could not do so because, while he had the juvenile record in hand, he could not refer to it in light of the Alaska rule, see *id.*, at 311, n. 1; respondent's attorney had a similar problem because he had no access at all to the CYS file of the child-abuse victim, see *ante*, at 43–44, and n. 2. Moreover, it is likely that the reaction of each jury to the actual cross-examination was the same—a sense that defense counsel was doing nothing more than harassing a blameless witness.

It is true that, in a technical sense, the situations of Davis and Ritchie are different. Davis' counsel had access to the juvenile record of the witness and could have used it but for the Alaska prohibition. Thus, the infringement upon Davis' confrontation right occurred at the trial stage when his counsel was unable to pursue an available line of inquiry. Respondent's attorney could not cross-examine his client's daughter with the help of the possible evidence in the CYS

file because of the Pennsylvania prohibition that affected his pretrial preparations. I do not believe, however, that a State can avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage.

Despite my disagreement with the plurality's reading of the Confrontation Clause, I am able to concur in the Court's judgment because, in my view, the procedure the Court has set out for the lower court to follow on remand is adequate to address any confrontation problem. Here I part company with JUSTICE BRENNAN. Under the Court's prescribed procedure, the trial judge is directed to review the CYS file for "material" information. *Ante*, at 58. This information would certainly include such evidence as statements of the witness that might have been used to impeach her testimony by demonstrating any bias towards respondent or by revealing inconsistencies in her prior statements.[2] When reviewing confidential records in future cases, trial courts should be particularly aware of the possibility that impeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial. As the Court points out, moreover, the trial court's obligation to review the confidential record for material information is ongoing.

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[2] In *United States* v. *Bagley*, 473 U. S. 667 (1985), the Court rejected any distinction between exculpatory and impeachment evidence for purposes of *Brady* v. *Maryland*, 373 U. S. 83 (1963). 473 U. S., at 676. We noted that nondisclosure of impeachment evidence falls within the general rule of *Brady* "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence.'" *Id.*, at 677, quoting *Giglio* v. *United States*, 405 U. S. 150, 154 (1972). We observed moreover, that, while a restriction on pretrial discovery might not suggest as direct a violation on the confrontation right as would a restriction on the scope of cross-examination at trial, the former was not free from confrontation concerns. 473 U. S., at 678.

Impeachment evidence is precisely the type of information that might be deemed to be material only well into the trial, as, for example, after the key witness has testified.[3]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I join JUSTICE STEVENS' dissenting opinion regarding the lack of finality in this case. I write separately to challenge the Court's narrow reading of the Confrontation Clause as applicable only to events that occur at trial. That interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial. In this case, the trial court properly viewed Ritchie's vague speculations that the agency file might contain something useful as an insufficient basis for permitting general access to the file. However, in denying access to the prior statements of the victim the court deprived Ritchie of material crucial to any effort to impeach the victim at trial. I view this deprivation as a violation of the Confrontation Clause.

This Court has made it plain that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination," *Douglas* v. *Alabama*, 380 U. S. 415, 418 (1965). "[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case," *Pointer* v. *Texas*, 380 U. S. 400, 404 (1965). The Court therefore has scrupulously guarded against "restrictions imposed by law or by the trial court on the scope of

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[3] If the withholding of confidential material from the defendant at the pretrial stage is deemed a Confrontation Clause violation, harmless-error analysis, of course, may still be applied. See *Delaware* v. *Van Arsdall*, 475 U. S. 673, 684 (1986).

cross-examination." *Delaware* v. *Fensterer*, 474 U. S. 15, 18 (1985) *(per curiam)*.

One way in which cross-examination may be restricted is through preclusion at trial itself of a line of inquiry that counsel seeks to pursue. See *ante*, at 53, n. 9 (citing cases). The logic of our concern for restriction on the ability to engage in cross-examination does not suggest, however, that the Confrontation Clause prohibits *only* such limitations.* A crucial avenue of cross-examination also may be foreclosed by the denial of access to material that would serve as the basis for this examination. Where denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought. Thus, he or she cannot point to a specific subject of inquiry that has been foreclosed, as can a counsel whose interrogation at trial has been limited by the trial judge. Nonetheless, there occurs as effective a preclusion of a topic of cross-examination as if the judge at trial had ruled an entire area of questioning off limits.

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*The Court contends that its restrictive view is supported by statements in *California* v. *Green*, 399 U. S. 149, 157 (1970), and *Barber* v. *Page*, 390 U. S. 719, 725 (1968), that the right to confrontation is essentially a trial right. Neither statement, however, was intended to address the question whether Confrontation Clause rights may be implicated by events outside of trial. In *Green*, the Court held that it was permissible to introduce at trial the out-of-court statements of a witness available for cross-examination. The Court rejected the argument that the Confrontation Clause precluded the admission of all hearsay evidence, because the ability of the defendant to confront and cross-examine the witness at trial satisfied the concerns of that Clause. 399 U. S., at 157. In *Barber*, the Court held that, where a witness could be called to testify, the failure to do so was not excused by the fact that defense counsel had an opportunity to cross-examine the witness at a preliminary hearing. The Court held that, since the Confrontation Clause is concerned with providing an opportunity for cross-examination at trial, the failure to afford such an opportunity when it was clearly available violated that Clause. Thus, neither *Green* nor *Barber* suggested that the right of confrontation attached exclusively at trial.

The Court has held that the right of cross-examination may be infringed even absent limitations on questioning imposed at trial. *Jencks* v. *United States*, 353 U. S. 657 (1957), held that the defendant was entitled to obtain the prior statements of persons to government agents when those persons testified against him at trial. Impeachment of the witnesses was "singularly important" to the defendant, we said, *id.*, at 667, and the reports were essential to the impeachment effort. Thus, we held that a defendant is entitled to inspect material "with a view to use on cross-examination" when that material "[is] shown to relate to the testimony of the witness." *Id.*, at 669. As I later noted in *Palermo* v. *United States*, 360 U. S. 343 (1959), *Jencks* was based on our supervisory authority rather than the Constitution, "but it would be idle to say that the commands of the Constitution were not close to the surface of the decision." 360 U. S., at 362–363 (BRENNAN, J., concurring in result). In *Palermo*, I specifically discussed the Confrontation Clause as a likely source of the rights implicated in a case such as *Jencks*. 360 U. S., at 362.

The Court insists that the prerequisite for finding a restriction on cross-examination is that counsel be prevented from pursuing a specific line of questioning. This position has similarities to an argument the Court rejected in *Jencks*. The Government contended in that case that the prerequisite for obtaining access to witnesses' prior statements should be a showing by the defendant of an inconsistency between those statements and trial testimony. We rejected that argument, noting, "[t]he occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, . . . the accused is helpless to know or discover conflict without inspecting the reports." 353 U. S., at 667–668. Cf. *United States* v. *Burr*, 25 F. Cas. 187, 191 (No. 14,694) (CC Va. 1807) ("It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is witheld?"). Simi-

larly, unless counsel has access to prior statements of a witness, he or she cannot identify what subjects of inquiry have been foreclosed from exploration at trial. Under the Court's holding today, the result is that partial denials of access may give rise to Confrontation Clause violations, but absolute denials cannot.

The Court in *United States* v. *Wade*, 388 U. S. 218 (1967), also recognized that pretrial events may undercut the right of cross-examination. In *Wade*, we held that a pretrial identification lineup was a critical stage of criminal proceedings at which the Sixth Amendment right to counsel was applicable. This holding was premised explicitly on concern for infringement of Confrontation Clause rights. The presence of counsel at a lineup is necessary, the Court said, "to preserve the defendant's right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.*, at 227. If counsel is excluded from such a proceeding, he or she is at a serious disadvantage in calling into question an identification at trial. The "inability effectively to reconstruct at trial any unfairness that occurred at the lineup" may then "deprive [the defendant] of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 232. The Court continued:

> "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, *the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. Pointer* v. *Texas*, 380 U. S. 400." *Id.*, at 235 (emphasis added).

Since a lineup from which counsel is absent is potentially prejudicial, and "since presence of counsel itself can often avert prejudice *and assure a meaningful confrontation at trial*", *id.*, at 236 (emphasis added) (footnote omitted), the

Court in *Wade* concluded that a pretrial lineup is a stage of prosecution at which a defendant is entitled to have counsel present.

The exclusion of counsel from the lineup session necessarily prevents him or her from posing any specific cross-examination questions based on observation of how the lineup was conducted. The Court today indicates that this inability would preclude a finding that cross-examination has been restricted. The premise of the Court in *Wade*, however, was precisely the opposite: the very problem that concerned the Court was that counsel would be foreclosed from developing a line of inquiry grounded on actual experience with the lineup.

The Court suggests that the court below erred in relying on *Davis* v. *Alaska*, 415 U. S. 308 (1974), for its conclusion that the denial of access to the agency file raised a Confrontation Clause issue. While *Davis* focused most explicitly on the restriction at trial of cross-examination, nothing in the opinion indicated that an infringement on the right to cross-examination could occur *only* in that context. Defense counsel was prevented from revealing to the jury that the government's witness was on probation. The immediate barrier to revelation was the trial judge's preclusion of counsel's effort to inquire into the subject on cross-examination. Yet the reason that counsel could not make such inquiry was a state statute that made evidence of juvenile adjudications inadmissible in court. Any counsel familiar with the statute would have no doubt that it foreclosed any line of questioning pertaining to a witness' juvenile record, despite the obvious relevance of such information for impeachment purposes. The foreclosure would have been just as effective had defense counsel never sought to pursue on cross-examination the issue of the witness' probationary status. The lower court thus properly recognized that the underlying problem for defense counsel in *Davis* was the prohibition on disclosure of juvenile records.

The creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself. In this case, the foreclosure of access to prior statements of the testifying victim deprived the defendant of material crucial to the conduct of cross-examination. As we noted in *Jencks*, a witness' prior statements are essential to any effort at impeachment:

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." 353 U. S., at 667.

The right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject *accusations* to critical scrutiny. See *Ohio* v. *Roberts*, 448 U. S. 56, 65 (1980) ("underlying purpose" of Confrontation Clause is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence"). Essential to testing a witness' account of events is the ability to compare that version with other versions the witness has earlier recounted. Denial of access to a witness' prior statements thus imposes a handicap that strikes at the heart of cross-examination.

The ability to obtain material information through reliance on a due process claim will not in all cases nullify the damage of the Court's overly restrictive reading of the Confrontation Clause. As the Court notes, *ante*, at 57, evidence is regarded as material only if there is a reasonable probability that it might affect the outcome of the proceeding. Prior

statements on their face may not appear to have such force, since their utility may lie in their more subtle potential for diminishing the credibility of a witness. The prospect that these statements will not be regarded as material is enhanced by the fact that due process analysis requires that information be evaluated by the trial judge, not defense counsel. *Ante*, at 59–60. By contrast, *Jencks*, informed by confrontation and cross-examination concerns, insisted that defense counsel, not the court, perform such an evaluation, "[b]ecause only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense." *Jencks*, *supra*, at 668–669. Therefore, while Confrontation Clause and due process analysis may in some cases be congruent, the Confrontation Clause has independent significance in protecting against infringements on the right to cross-examination.

The Court today adopts an interpretation of the Confrontation Clause unwarranted by previous case law and inconsistent with the underlying values of that constitutional provision. I therefore dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE SCALIA join, dissenting.

We are a Court of limited jurisdiction. One of the basic limits that Congress has imposed upon us is that we may only review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257. The purposes of this restriction are obvious, and include notions of efficiency, judicial restraint, and federalism. See *Construction Laborers* v. *Curry*, 371 U. S. 542, 550 (1963); *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 124 (1945). Over the years the Court has consistently applied a strict test of finality to determine the reviewability of state-court decisions remanding cases for further proceedings, and the reviewability of pretrial discovery orders. Given the plethora of such decisions and orders and

the fact that they often lead to the settlement or termination of litigation, the application of these strict rules has unquestionably resulted in this Court's not reviewing countless cases that otherwise might have been reviewed. Despite that consequence—indeed, in my judgment, because of that consequence—I regard the rule as wise and worthy of preservation.

I

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), the Court recognized some limited exceptions to the general principle that this Court may not review cases in which further proceedings are anticipated in the state courts. One of these exceptions applies "where the federal claim has been finally decided, with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.*, at 481. The concern, of course, is that the petitioning party not be put in a position where he might eventually lose on the merits, but would have never had an opportunity to present his federal claims for review. *Ibid.* The most common example of this phenomenon is where a State seeks review of an appellate court's order that evidence be suppressed. In such a case, if the State were forced to proceed to trial prior to seeking review in this Court, it could conceivably lose its case at trial, and, because of the double jeopardy rule, never have a chance to use what we might have held to be admissible evidence. See, *e. g.*, *New York* v. *Quarles*, 467 U. S. 649, 651, n. 1 (1984).

This case does not fit into that exception. Were we to decline review at this time there are three possible scenarios on remand. First, the Children and Youth Services (CYS) might refuse to produce the documents under penalty of contempt, in which case appeals could be taken, and this Court could obtain proper jurisdiction. See *United States* v. *Ryan*, 402 U. S. 530 (1971). Alternatively, if CYS were to produce the documents, the trial court might find the error to be

harmless, in which case Ritchie's conviction would stand and the Commonwealth would not have been harmed by our having declined to review the case at this stage. Finally, the trial court could determine that Ritchie's lack of access to the documents was constitutionally prejudicial, and thus order a new trial. If the Commonwealth would then have no recourse but to proceed to trial with the risk of an unreviewable acquittal, I agree that the *Cox* exception would apply. Under Pennsylvania law, however, the Commonwealth would have the opportunity for an immediate interlocutory appeal of the new trial order.

Pennsylvania Rule of Appellate Procedure 311(a)(5) affords the Commonwealth a right to an interlocutory appeal in criminal cases where it "claims that the lower court committed an error of law." An argument that the trial court erred in evaluating the constitutionally harmless-error issue would certainly qualify under that provision.[1] Moreover, the Commonwealth could, if necessary, reassert the constitutional arguments that it now makes here. Although the claims would undoubtedly be rejected in Pennsylvania under the law-of-the-case doctrine, that would not bar this Court from reviewing the claims. See *Barclay* v. *Florida*, 463 U. S. 939, 946 (1983); *Hathorn* v. *Lovorn*, 457 U. S. 255, 261–262 (1982); see

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[1] See *Commonwealth* v. *Blevins*, 453 Pa. 481, 482–483, 309 A. 2d 421, 422 (1973) (whether "the testimony offered at trial by the Commonwealth was insufficient to support the jury's finding" is appealable issue of law); *Commonwealth* v. *Melton*, 402 Pa. 628, 629, 168 A. 2d 328, 329 (1961) (citing case "where a new trial is granted to a convicted defendant on the sole ground that the introduction of certain evidence at his trial was prejudicial error" as example of appealable issue of law); *Commonwealth* v. *Durah-El*, 344 Pa. Super. 511, 514, n. 2, 496 A. 2d 1222, 1224, n. 2 (1985) (whether trial counsel provided ineffective assistance of counsel is appealable as asserted "error of law"); *Commonwealth* v. *Carney*, 310 Pa. Super. 549, 551, n. 1, 456 A. 2d 1072, 1073, n. 1 (1983) (whether curative instruction was sufficient to remedy improper remark of prosecution witness is appealable as asserted "error of law").

generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 132 (6th ed. 1986).

The fact that the Commonwealth of Pennsylvania cannot irrevocably lose this case on the federal constitutional issue without having an opportunity to present that issue to this Court takes this case out of the *Cox* exception that the Court relies upon. Nonetheless, the Court makes the astonishing argument that we should hear this case now because if Ritchie's conviction is reinstated on remand, "the issue of whether defense counsel should have been given access will be moot," and the Court will lose its chance to pass on this constitutional issue. *Ante*, at 48. This argument is wholly contrary to our long tradition of avoiding, not reaching out to decide, constitutional decisions when a case may be disposed of on other grounds for legitimate reasons. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 571 (1947). Indeed, the Court has explained that it is precisely the policy against unnecessary constitutional adjudication that demands strict application of the finality requirement. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 70–71 (1948).

II

The Court also suggests that a reason for hearing the case now is that, if CYS is forced to disclose the documents, the confidentiality will be breached and subsequent review will be too late. *Ante*, at 48–49, and n. 7. This argument fails in light of the longstanding rule that if disclosure will, in and of itself, be harmful, the remedy is for the individual to decline to produce the documents, and immediately appeal any contempt order that is issued. This rule is exemplified by our decision in *United States* v. *Ryan*, 402 U. S. 530 (1971), a case in which a District Court denied a motion to quash a subpoena *duces tecum* commanding the respondent to produce certain documents located in Kenya. The Court of Appeals held that the order was appealable but we reversed, explaining:

"Respondent asserts no challenge to the continued validity of our holding in *Cobbledick* v. *United States*, 309 U. S. 323 (1940), that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey. Respondent, however, argues that *Cobbledick* does not apply in the circumstances before us because, he asserts, unless immediate review of the District Court's order is available to him, he will be forced to undertake a substantial burden in complying with the subpoena, and will therefore be 'powerless to avert the mischief of the order.' *Perlman* v. *United States*, 247 U. S. 7, 13 (1918).

"We think that respondent's assertion misapprehends the thrust of our cases. Of course, if he complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply. But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review. But we have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. *Cobbledick* v. *United States*, *supra*; *Alexander* v. *United States*, 201 U. S. 117 (1906); cf. *United States* v. *Blue*, 384 U. S. 251 (1966); *DiBella*

> v. *United States*, 369 U. S. 121 (1962); *Carroll* v. *United States*, 354 U. S. 394 (1957). Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle." *Id.*, at 532–533.

In the case before us today, the Pennsylvania Supreme Court has instructed the trial court to order CYS to produce certain documents for inspection by the trial court and respondent's counsel. Although compliance with the order might be burdensome for a different reason than the burden of obtaining documents in Kenya, the burden of disclosure is sufficiently troublesome to CYS that it apparently objects to compliance.[2] But as was true in the *Ryan* case, it has not yet been given the chance to decide whether to comply with the order and therefore has not satisfied the condition for appellate review that we had, until today, consistently imposed.[3]

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[2] It is not clear to what extent counsel for the Commonwealth in this case represents CYS, or whether he only represents the Office of the District Attorney of Allegheny County. CYS is certainly not a party to this case; in fact it has filed an *amicus curiae* brief expressing its views. That CYS is not a party to the case makes it all the more inappropriate for the Court to relax the rule of finality in order to spare CYS the need to appeal a contempt order if it fails to produce the documents.

[3] The Court has recognized a limited exception to this principle where the documents at issue are in the hands of a third party who has no independent interest in preserving their confidentiality. See *Perlman* v. *United States*, 247 U. S. 7 (1918); see also *United States* v. *Ryan*, 402 U. S. 530, 533 (1971). This case presents a far different situation. As far as the disclosure of the documents goes, it is CYS, not the prosecutor, that claims a duty to preserve their confidentiality and to implement Pennsylvania's Child Protective Services Law. See Brief for Allegheny County, Pennsylvania, on behalf of Allegheny County Children and Youth Services as *Amicus Curiae* in Support of Petitioner 2.

Nor does this case come within the exception of *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), where the Court did not require the President of the United States to subject himself to contempt in order to appeal

III

Finally, the Court seems to rest on the rationale that because this respondent has already been tried, immediate review in this particular case will expedite the termination of the litigation. See *ante*, at 48–49, n. 7. I am not persuaded that this is so—if we had not granted certiorari, the trial court might have reviewed the documents and found that they are harmless a year ago—but even if it were, the efficient enforcement of the finality rule precludes a case-by-case inquiry to determine whether its application is appropriate. Only by adhering to our firm rules of finality can we discourage time-consuming piecemeal litigation.

Of course, once the case is here and has been heard, there is natural reluctance to hold that the Court lacks jurisdiction. It is misguided, however, to strain and find jurisdiction in the name of short-term efficiency when the long-term effect of the relaxation of the finality requirement will so clearly be inefficient. If the Court's goal is expediting the termination of litigation, the worst thing it can do is to extend an open-ended invitation to litigants to interrupt state proceedings with interlocutory visits to this Court.

I would therefore dismiss the writ because the judgment of the Supreme Court of Pennsylvania is not final.

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the District Court's rejection of his assertion of executive privilege. As Judge Friendly explained, the rationale of that decision is unique to the Presidency and is "wholly inapplicable" to other government agents. See *National Super Suds, Inc.* v. *New York Mercantile Exchange*, 591 F. 2d 174, 177 (CA2 1979); see also *Newton* v. *National Broadcasting Co.*, 726 F. 2d 591 (CA9 1984); *United States* v. *Winner*, 641 F. 2d 825, 830 (CA10 1981); *In re Attorney General of the United States*, 596 F. 2d 58, 62 (CA2), cert. denied, 444 U. S. 903 (1979); but see *In re Grand Jury Proceedings (Wright II)*, 654 F. 2d 268, 270 (CA3), cert. denied, 454 U. S. 1098 (1981); *Branch* v. *Phillips Petroleum Co.*, 638 F. 2d 873, 877–879 (CA5 1981).

MARYLAND *v.* GARRISON

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 85-759. Argued November 5, 1986—Decided February 24, 1987

Baltimore police officers obtained and executed a warrant to search the person of one McWebb and "the premises known as 2036 Park Avenue third floor apartment" for controlled substances and related paraphernalia. The police reasonably believed that there was only one apartment on the described premises, but in fact the third floor was divided into two apartments, one occupied by McWebb and one by respondent. Before the officers became aware that they were in respondent's apartment, they discovered the contraband that provided the basis for respondent's conviction for violating Maryland's Controlled Substances Act. The trial court denied respondent's motion to suppress the evidence, and the Maryland Court of Special Appeals affirmed. The Maryland Court of Appeals reversed and remanded for a new trial.

Held:

1. On the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate, the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued. The validity of the warrant must be judged in light of the information available to the officers at the time they obtained the warrant. The discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. Pp. 84–86.

2. The execution of the warrant did not violate respondent's rights under the Fourth Amendment. The validity of the search of his apartment pursuant to the warrant depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable, and it unquestionably was. The objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises. Whether the premises described in the warrant are interpreted as the entire third floor or as McWebb's apartment, the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment. Pp. 86–89.

303 Md. 385, 494 A. 2d 193, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. BLACK-

MUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 89.

Stephen H. Sachs, Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Deborah K. Chasanow* and *Anne E. Singleton*, Assistant Attorney General.

Gerald A. Kroop argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

Baltimore police officers obtained and executed a warrant to search the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment."[1] When the police applied for the warrant and when they conducted the search pursuant to the warrant, they reasonably believed that there was only one apartment on the premises described in the warrant. In fact, the third floor was divided into two apartments, one occupied by McWebb and one by respondent Garrison. Before the officers executing the warrant became aware that they were in a separate apartment occupied by respondent, they had discovered the contraband that provided the basis for respondent's conviction for violating Maryland's Controlled Substances Act. The question presented is whether the seizure of that contraband was prohibited by the Fourth Amendment.

The trial court denied respondent's motion to suppress the evidence seized from his apartment, App. 46, and the Mary-

*Briefs of *amici curiae* urging reversal were filed for the State of California by *John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, and *Ronald E. Niver* and *Clifford K. Thompson, Jr.*, Deputy Attorneys General; and for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *David Crump*, *Daniel B. Hales*, and *Jack E. Yelverton*.

[1] App. 9, 41. The warrant was issued and executed on May 21, 1982. It authorized the Baltimore police to search the person of McWebb and "the premises known as 2036 Park Avenue third floor apartment" for "Marihuana, related paraphernalia, minies, books, papers, and photographs pertaining to the illegal distribution of Marihuana . . . ." *Id.*, at 9.

land Court of Special Appeals affirmed. 58 Md. App. 417, 473 A. 2d 514 (1984). The Court of Appeals of Maryland reversed and remanded with instructions to remand the case for a new trial. 303 Md. 385, 494 A. 2d 193 (1985).

There is no question that the warrant was valid and was supported by probable cause. *Id.*, at 392, 494 A. 2d, at 196. The trial court found, and the two appellate courts did not dispute, that after making a reasonable investigation, including a verification of information obtained from a reliable informant, an exterior examination of the three-story building at 2036 Park Avenue, and an inquiry of the utility company, the officer who obtained the warrant reasonably concluded that there was only one apartment on the third floor and that it was occupied by McWebb. App. 41; 58 Md. App., at 433, 473 A. 2d, at 522; 303 Md., at 387–390, 494 A. 2d, at 194–195. When six Baltimore police officers executed the warrant, they fortuitously encountered McWebb in front of the building and used his key to gain admittance to the first-floor hallway and to the locked door at the top of the stairs to the third floor. As they entered the vestibule on the third floor, they encountered respondent, who was standing in the hallway area. The police could see into the interior of both McWebb's apartment to the left and respondent's to the right, for the doors to both were open. Only after respondent's apartment had been entered and heroin, cash, and drug paraphernalia had been found did any of the officers realize that the third floor contained two apartments. App. 41–46. As soon as they became aware of that fact, the search was discontinued. *Id.*, at 32, 39. All of the officers reasonably believed that they were searching McWebb's apartment.[2] No further search of respondent's apartment was made.

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[2] While the search was in progress, an officer in respondent's apartment answered the telephone. The caller asked for "Red Cross"; that was the name by which McWebb was known to the confidential informant. *Id.*, at 6. Neither respondent nor McWebb indicated to the police during the search that there were two apartments. *Id.*, at 38, 39–40.

The matter on which there is a difference of opinion concerns the proper interpretation of the warrant. A literal reading of its plain language, as well as the language used in the application for the warrant, indicates that it was intended to authorize a search of the entire third floor.[3] This is the construction adopted by the intermediate appellate court, see 58 Md. App., at 419, 473 A. 2d, at 515, and it also appears to be the construction adopted by the trial judge. See App. 41. One sentence in the trial judge's oral opinion, however, lends support to the construction adopted by the Court of Appeals, namely, that the warrant authorized a search of McWebb's apartment only.[4] Under that interpretation, the Court of

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[3] The warrant states:

"Affidavit having been made before me by Detective Albert Marcus, Baltimore Police Department, Narcotic Unit, that he has reason to believe that on the person of Lawrence Meril McWebb . . . [and] that on the premises known as 2036 Park Avenue third floor apartment, described as a three story brick dwelling with the numerals 2–0–3–6 affixed to the front of same in the City of Baltimore, there is now being concealed certain property . . . .

"You are therefor commanded, with the necessary and proper assistants, to search forthwith the person/premises hereinabove described for the property specified, executing this warrant and making the search . . . ." *Id.*, at 9.

[4] Immediately before ruling on the suppression motions made by McWebb and Garrison, the court observed that a search of two or more apartments in the same building must be supported by probable cause for searching each apartment. The court added, "[t]here is an exception to this general rule where the multiple unit character of the premises is not externally apparent and is not known to the officer applying for or executing the warrant." *Id.*, at 45. The trial court then ruled, "It is clear that the warrant specified the premises to be searched as the third floor apartment of the Defendant McWebb . . . ." *Id.*, at 46. This statement only makes sense as a rejection of Garrison's claim that "the warrant was a general warrant as it did not specify which apartment was to be searched on the third floor," *id.*, at 40, and as a recognition that the search was not invalid for lack of specificity in the warrant as to the premises to be searched. We interpret the trial court's statement as a ruling that the search of a subunit of the building—which he referred to as "the third floor

Appeals concluded that the warrant did not authorize the search of respondent's apartment and the police had no justification for making a warrantless entry into his premises.[5]

The opinion of the Maryland Court of Appeals relies on Article 26 of the Maryland Declaration of Rights[6] and Maryland cases as well as the Fourth Amendment to the Federal Constitution and federal cases. Rather than containing any "plain statement" that the decision rests upon adequate and independent state grounds, see *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983), the opinion indicates that the Maryland constitutional provision is construed *in pari materia* with the

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apartment of the Defendant McWebb"—was authorized by the warrant. The court then found on the precise facts of this case that the search of Garrison's apartment was valid because "the officers did not know that there was more than one apartment on the third floor and nothing alerted them of such a fact until after the search had been made and the items were [seized]." *Id.*, at 46. The contrary construction adopted by the Court of Appeals fails to take into account the plain language of the warrant, which authorized a search of the person of McWebb and of the premises of 2036 Park Avenue, third floor. *Id.*, at 9.

[5] As the Court of Appeals explained:

"It is undisputed that the police were authorized to search only one apartment, McWebb's; the warrant did not authorize the search of Garrison's apartment. There is no question as to the validity of the search warrant itself. No argument was made in this Court that any of the exceptions to the warrant requirement applied here. It is clear, therefore, that the police had no authority to cross the threshold of Garrison's apartment and seize evidence.

. . . . . .

"Police had a warrant to search McWebb's apartment. They had no warrant to search Garrison's. They had no justification for entering his premises, regardless of appearances." 303 Md. 385, 392–394, 494 A. 2d, 193, 196–197 (1985).

[6] Article 26 of the Maryland Declaration of Rights provides:

"That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grevious [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted."

Fourth Amendment.[7] We therefore have jurisdiction. Because the result that the Court of Appeals reached did not appear to be required by the Fourth Amendment, we granted certiorari. 475 U. S. 1009 (1986). We reverse.

In our view, the case presents two separate constitutional issues, one concerning the validity of the warrant and the other concerning the reasonableness of the manner in which it was executed. See *Dalia* v. *United States*, 441 U. S. 238, 258 (1979). We shall discuss the questions separately.

I

The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.[8] Thus, the scope of a lawful search 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

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[7] 303 Md., at 391, 494 A. 2d, at 196. This statement indicates that the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . . ." *Michigan* v. *Long*, 463 U. S., at 1040.

[8] See *Andresen* v. *Maryland*, 427 U. S. 463, 480 (1976); *Stanley* v. *Georgia*, 394 U. S. 557, 569–572 (1969) (Stewart, J., concurring in result); *Stanford* v. *Texas*, 379 U. S. 476, 481–482, 485 (1965); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 (1931); *Marron* v. *United States*, 275 U. S. 192, 195–196 (1927).

search of a suitcase." *United States* v. *Ross*, 456 U. S. 798, 824 (1982).

In this case there is no claim that the "persons or things to be seized" were inadequately described or that there was no probable cause to believe that those things might be found in "the place to be searched" as it was described in the warrant. With the benefit of hindsight, however, we now know that the description of that place was broader than appropriate because it was based on the mistaken belief that there was only one apartment on the third floor of the building at 2036 Park Avenue. The question is whether that factual mistake invalidated a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding of the building's floor plan.

Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued.[9] Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate.[10] On the basis of that

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[9] Cf. *United States* v. *Jacobsen*, 466 U. S. 109, 115 (1984) (warrantless test of white powder; "[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred").

[10] Arguments can certainly be made that the police in this case should have been able to ascertain that there was more than one apartment on the

information, we agree with the conclusion of all three Maryland courts that the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued.

II

The question whether the execution of the warrant violated respondent's constitutional right to be secure in his home is somewhat less clear. We have no difficulty concluding that the officers' entry into the third-floor common area was legal; they carried a warrant for those premises, and they were accompanied by McWebb, who provided the key that they used to open the door giving access to the third-floor common area. If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apart-

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third floor of this building. It contained seven separate dwelling units and it was surely possible that two of them might be on the third floor. But the record also establishes that Officer Marcus made specific inquiries to determine the identity of the occupants of the third-floor premises. The officer went to 2036 Park Avenue and found that it matched the description given by the informant: a three-story brick dwelling with the numerals 2–0–3–6 affixed to the front of the premises. App. 7. The officer "made a check with the Baltimore Gas and Electric Company and discovered that the premises of 2036 Park Ave. third floor was in the name of Lawrence McWebb." *Ibid.* Officer Marcus testified at the suppression hearing that he inquired of the Baltimore Gas and Electric Company in whose name the third floor apartment was listed: "I asked if there is a front or rear or middle room. They told me, one third floor was only listed to Lawrence McWebb." *Id.*, at 36–38. The officer also discovered from a check with the Baltimore Police Department that the police records of Lawrence McWebb matched the address and physical description given by the informant. *Id.*, at 7. The Maryland courts that are presumptively familiar with local conditions were unanimous in concluding that the officer reasonably believed McWebb was the only tenant on that floor. Because the evidence supports their conclusion, we accept that conclusion for the purpose of our decision.

ment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant. The officers' conduct and the limits of the search were based on the information available as the search proceeded. While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.[11]

In *Hill* v. *California*, 401 U. S. 797 (1971), we considered the validity of the arrest of a man named Miller based on the mistaken belief that he was Hill. The police had probable cause to arrest Hill and they in good faith believed that Miller was Hill when they found him in Hill's apartment. As we explained:

> "The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.*, at 803–804.

While *Hill* involved an arrest without a warrant, its underlying rationale that an officer's reasonable misidentification

[11] "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949).

of a person does not invalidate a valid arrest is equally applicable to an officer's reasonable failure to appreciate that a valid warrant describes too broadly the premises to be searched. Under the reasoning in *Hill*, the validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises.[12]

For that reason, the officers properly responded to the command contained in a valid warrant even if the warrant is interpreted as authorizing a search limited to McWebb's apartment rather than the entire third floor. Prior to the officers' discovery of the factual mistake, they perceived McWebb's apartment and the third-floor premises as one and the same; therefore their execution of the warrant reasonably included the entire third floor.[13] Under either interpretation of the warrant, the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amend-

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[12] Nothing McWebb did or said after he was detained outside 2036 Park Avenue would have suggested to the police that there were two apartments on the third floor. McWebb provided the key that opened the doors on the first floor and on the third floor. The police could reasonably have believed that McWebb was admitting them to an undivided apartment on the third floor. When the officers entered the foyer on the third floor, neither McWebb nor Garrison informed them that they lived in separate apartments. App. 39–40, 42.

[13] We expressly distinguish the facts of this case from a situation in which the police know there are two apartments on a certain floor of a building, and have probable cause to believe that drugs are being sold out of that floor, but do not know in which of the two apartments the illegal transactions are taking place. A search pursuant to a warrant authorizing a search of the entire floor under those circumstances would present quite different issues from the ones before us in this case.

ment.[14] Cf. *Steele* v. *United States*, 267 U. S. 498, 503 (1925).

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

It is so ordered.

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

Under this Court's precedents, the search of respondent Garrison's apartment violated the Fourth Amendment. While executing a warrant specifically limited to McWebb's residence, the officers expanded their search to include re-

[14] Respondent argued that the execution of the warrant violated the Fourth Amendment at the moment when the officers "walked in through that threshold of that house . . . ." Tr. of Oral Arg. 35. At another point respondent argued that the search was illegal at the point when the police went through Garrison's apartment without probable cause for his apartment. *Id.*, at 43. For the purpose of addressing respondent's argument, the exact point at which he asserts the search became illegal is not essential. Whether the illegal threshold is viewed as the beginning of the entire premises or as the beginning of those premises that, upon closer examination, turn out to be excluded from the intended scope of the warrant, we cannot accept respondent's argument. It would brand as illegal the execution of any warrant in which, due to a mistake in fact, the premises intended to be searched vary from their description in the warrant. Yet in this case, in which the mistake in fact does not invalidate the warrant precisely because the police do not know of the mistake in fact when they apply for, receive, and prepare to execute the warrant, the police cannot reasonably know prior to their search that the warrant rests on a mistake in fact. It is only after the police begin to execute the warrant and set foot upon the described premises that they will discover the factual mistake and must reasonably limit their search accordingly.

Respondent proposes that the police conduct a preliminary survey of the premises whenever they search a building in which there are multiple dwelling units, in order to determine the extent of the premises to be searched. *Id.*, at 42. We find no persuasive reason to impose such a burden over and above the bedrock requirement that, with the exceptions we have traced in our cases, the police may conduct searches only pursuant to a reasonably detailed warrant.

spondent's adjacent apartment, an expansion made without a warrant and in the absence of exigent circumstances. In my view, Maryland's highest court correctly concluded that the trial judge should have granted respondent's motion to suppress the evidence seized as a result of this warrantless search of his apartment. Moreover, even if I were to accept the majority's analysis of this case as one involving a mistake on the part of the police officers, I would find that the officers' error, either in obtaining or in executing the warrant, was not reasonable under the circumstances.

I

The home always has received special protection in analysis under the Fourth Amendment, which protects the "right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures" (emphasis added). See *Silverman* v. *United States*, 365 U. S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"). The Fourth Amendment, in fact, was a direct response to the colonists' objection to searches of homes under general warrants or without warrants. See *Chimel* v. *California*, 395 U. S. 752, 761 (1969); *Harris* v. *United States*, 331 U. S. 145, 157–163 (1947) (Frankfurter, J., dissenting). In today's society, the protection of the Amendment of course is extended to the equivalent of the traditional single-family house, such as an apartment. See, *e. g.*, *Ker* v. *California*, 374 U. S. 23, 42 (1963).

The Court has observed that, in determining whether one has an interest protected by the Fourth Amendment, it is appropriate not to limit the analysis to the place in question, for "the Fourth Amendment protects people—and not simply 'areas.'" *Katz* v. *United States*, 389 U. S. 347, 353 (1967). As articulated by Justice Harlan in his *Katz* concurrence, the proper test under the Amendment is whether "a person [has]

exhibited an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" *Id.*, at 361. Justice Harlan noted, however, that an answer to the question concerning what protection the Fourth Amendment gave to a particular person always "requires reference to a 'place.'" *Ibid.* In his view, the home would meet this test in virtually all situations. "[A] man's home," he stated, "is, for most purposes, a place where he expects privacy." *Ibid.* The home thus has continued to occupy its special role in Fourth Amendment analysis in the post-*Katz* era. See *Payton* v. *New York*, 445 U. S. 573, 585 (1980) ("[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,'" quoting *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972)); *United States* v. *Karo*, 468 U. S. 705, 714–715 (1984) ("Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances"); *California* v. *Carney*, 471 U. S. 386, 407–408 (1985) (STEVENS, J., dissenting) ("These places [mobile homes] may be as spartan as a humble cottage when compared to the most majestic mansion . . . but the highest and most legitimate expectations of privacy associated with these temporary abodes should command the respect of this Court"); see also *Steagald* v. *United States*, 451 U. S. 204, 211 (1981); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 477–478 (1971).

The Fourth Amendment also states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or things to be seized" (emphasis added). The particularity-of-description requirement is satisfied where "the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele* v. *United States*, 267 U. S. 498, 503 (1925). In applying this requirement to searches aimed at residences within multiunit buildings, such as the search in the present case, courts have declared invalid those

warrants that fail to describe the targeted unit with enough specificity to prevent a search of all the units. See, *e. g.*, *United States* v. *Higgins*, 428 F. 2d 232 (CA7 1970); *United States* v. *Votteller*, 544 F. 2d 1355, 1362–1363 (CA6 1976). Courts have used different criteria to determine whether a warrant has identified a unit with sufficient particularity. See, *e. g.*, *United States* v. *Bedford*, 519 F. 2d 650, 655 (CA3 1975) (by name of occupant of apartment), cert. denied, 424 U. S. 917 (1976); *Haynes* v. *State*, 475 S. W. 2d 739, 741 (Tex. Crim. App. 1971) (by directions on how to reach a particular room); see generally 2 W. LaFave, Search and Seizure § 4.5, p. 79 (1978); Crais, Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure, 11 A. L. R. 3d 1330, 1340–1341, § 5 (1967 and Supp. 1986).

Applying the above principles to this case, I conclude that the search of respondent's apartment was improper. The words of the warrant were plain and distinctive: the warrant directed the officers to seize marijuana and drug paraphernalia on the person of McWebb and in *McWebb's* apartment, *i. e.*, "on the premises known as 2036 Park Avenue third floor apartment." App. 9. As the Court of Appeals observed, this warrant specifically authorized a search only of McWebb's—not respondent's—residence. 303 Md. 385, 392, 494 A. 2d 193, 196 (1985).[1] In its interpretation of the war-

[1] In reaching its conclusion, the Court of Appeals relied upon a statement by the trial judge that, pursuant to the warrant, only "the third floor apartment of the Defendant McWebb" could be searched. App. 46; 303 Md., at 392, 494 A. 2d, at 196. The majority contends that this reliance was unjustified, for, in making his statement, the trial judge was doing nothing more than rejecting respondent's contention that the warrant was general. *Ante*, at 82–83, n. 4. I fail to see how the interpretation of the Court of Appeals is inconsistent with the majority's understanding of this statement. The trial judge could have been rejecting respondent's argument about a general warrant by observing that the warrant here was limited to a single apartment, McWebb's. Such a view of the trial judge's remark does not contradict his observation that, in procuring and executing

rant, the majority suggests that the language of this document, as well as that in the supporting affidavit, permitted a search of the *entire* third floor. *Ante*, at 82, and n. 4. It escapes me why the language in question, "third floor apartment," when used with reference to a single unit in a multiple-occupancy building and in the context of one person's residence, plainly has the meaning the majority discerns, rather than its apparent and, indeed, obvious signification—one apartment located *on* the third floor.[2] Accordingly, if, as appears to be the case, the warrant was limited in its description to the third-floor apartment of McWebb, then the search of an additional apartment—respondent's—was warrantless and is presumed unreasonable "in the absence of some one of a number of well defined 'exigent circumstances.'" *Coolidge* v. *New Hampshire*, 403 U. S., at 478. Because the State has not advanced any such exception to the warrant requirement, the evidence obtained as a result of this search should have been excluded.[3]

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the warrant, the officers did not know that there were other apartments on the third floor. App. 41, 46. This lack of knowledge by the officers does not necessarily imply that they believed McWebb's apartment occupied the entire third floor. It could also suggest that, beyond knowing the location of McWebb's apartment, they were unaware of the configuration of the remaining apartments in the building. *Ibid.*

[2] The language in the supporting affidavit similarly suggests that the apartment in question was one located on, but not necessarily occupying entirely, the third floor. *Id.*, at 6 ("During the above mentioned meeting with Informant #222, the Informant stated that he/she knew a subject by the name of 'Red Cross', who was selling Marihuana out of his apartment located at 2036 Park Ave. third floor").

[3] If the officers were confused about the residence of respondent when they encountered him in the third-floor vestibule (see sketch reproduced at 303 Md., at 396, 494 A. 2d, at 199), they might have been justified in detaining him temporarily as an occupant of McWebb's apartment. See *Michigan* v. *Summers*, 452 U. S. 692, 705 (1981); Tr. of Oral Arg. 42. The officers asserted that, upon entering the vestibule, they observed marijuana lying upon a dresser in respondent's bedroom, the door to respondent's apartment being open. App. 24–25. Although it is not entirely clear that the drug could have been seized immediately under the "plain

II

Because the Court cannot justify the officers' search under the "exceptional circumstances" rubric, it analyzes the police conduct here in terms of "mistake." According to the Court, hindsight makes it clear that the officers were mistaken, first, in not describing McWebb's apartment with greater specificity in the warrant, *ante*, at 85, and, second, in including respondent's apartment within the scope of the execution of the warrant, *ante*, at 86–87. The Court's inquiry focuses on what the officers knew or should have known at these particular junctures. The Court reasons that if, in light of the officers' actual or imputed knowledge, their behavior was reasonable, then their mistakes did not constitute an infringement on respondent's Fourth Amendment rights. In this case, the Court finds no Fourth Amendment violation because the officers could not reasonably have drawn the warrant with any greater particularity and because, until the moment when the officers realized that they were in fact searching two different apartments, they had no reason to believe that McWebb's residence did not cover the entire third floor.

The majority relies upon *Hill* v. *California*, 401 U. S. 797 (1971), for its conclusion that "honest mistakes" in arrests or searches may obviate Fourth Amendment problems. *Ante*, at 87–88. It is doubtful whether *Hill* carries the precedential weight that the majority would ascribe to it. Decided after *Chimel* v. *California*, 395 U. S. 752 (1969), but involving a pre-*Chimel* incident, *Hill* presented a situation where officers, who had probable cause but no warrant to arrest

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view" exception to the warrant requirement, for this would depend upon whether the officers' "access to the object has some prior Fourth Amendment justification," *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983), the officers probably would have had probable cause to obtain a search warrant and conceivably could have impounded respondent's apartment while seeking the warrant. See *Segura* v. *United States*, 468 U. S. 796, 810 (1984). Nothing, however, justified the full-scale search of respondent's apartment in which the officers engaged.

Hill, went to Hill's apartment and found Miller instead. 401 U. S., at 799. They mistook Miller for Hill, despite the former's protestations to the contrary, and conducted a search of Hill's apartment, which produced the only substantial evidence later used to convict Hill for robbery. *Id.*, at 801. In deciding that neither the arrest nor the ensuing search constituted a Fourth Amendment violation, the Court was entertaining a challenge made by Hill. The Court here, however, is faced with a Fourth Amendment claim brought by respondent, whose position is comparable to that of Miller. It may make some sense to excuse a reasonable mistake by police that produces evidence against the intended target of an investigation or warrant if the officers had probable cause for arresting that individual or searching his residence. Similar reasoning does *not* apply with respect to one whom probable cause has not singled out and who is the victim of the officers' error. See *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949) ("These long-prevailing standards [of probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime"); cf. *Ybarra* v. *Illinois*, 444 U. S. 85, 91 (1979) ("But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . This requirement [of probable cause] cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be").

Even if one accepts the majority's view that there is no Fourth Amendment violation where the officers' mistake is reasonable,[4] it is questionable whether that standard was

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[4] Lower court cases, that deal with an exception to the particularity-of-description requirement in a warrant, may support this standard of a "reasonable mistake." Some courts have recognized an exception that applies where, to outward appearances, a building appears to be a single-occupancy structure but contains, in reality, several units, and where

met in this case. To repeat Justice Harlan's observation, although the proper question in Fourth Amendment analysis is "what protection it affords to . . . people, . . . that question requires reference to a 'place.'" *Katz* v. *United States*, 389 U. S., at 361 (concurring opinion). The "place" at issue here is a small multiple-occupancy building. Such forms of habitation are now common in this country, particularly in neighborhoods with changing populations and of declining affluence.[5] Accordingly, any analysis of the "reasonableness" of

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the officers executing the warrant could not have discovered its multiple-occupancy character despite reasonable efforts. See, *e. g.*, *United States* v. *Davis*, 557 F. 2d 1239, 1247–1248 (CA8), cert. denied, 434 U. S. 971 (1977); 2 W. LaFave, Search and Seizure § 4.5, pp. 79–80 (1978). It appears that, when ruling upon the propriety of the search, the trial judge in this case had such an exception in mind. See App. 45.

It is uncertain, however, whether this exception should apply here, where the officers may not know how many apartments are on a particular floor, but do realize that the building is multiunit. Because the officers are aware that the structure houses other residences besides the target apartment, they should be on notice that they must make an investigation adequate to draw the warrant with sufficient specificity. This means that they must clearly distinguish the target unit from the others in order to avoid infringing upon the Fourth Amendment rights of other occupants of the building. Put another way, if the above exception is to apply, officers drawing a search warrant for a unit of a multiple-occupancy building should be put to a more demanding standard of reasonableness to justify any mistake than is required for those who rely on a reasonable failure to recognize at all the multiunit nature of a structure.

[5] It is not entirely clear from the record what sort of multiple-occupancy building was at issue here, although respondent suggests that it was a single-family home converted into an apartment house. See Tr. of Oral Arg. 41; Brief for Respondent 10. As has been noted by Senator Proxmire:

"It's estimated that there are 7½ million rental units in buildings containing 4 to 50 units. It may be about 15 percent of our population.

"Approximately 4.1 million of those units are in central cities or metropolitan areas. Such units are home to a large number of lower income families and a disproportionate number of minority families." Hearing on Multifamily Housing Rehabilitation before the Subcommittee on Hous-

the officers' behavior here must be done with this context in mind.

The efforts of Detective Marcus, the officer who procured the search warrant, do not meet a standard of reasonableness, particularly considering that the detective knew the search concerned a unit in a multiple-occupancy building. See App. 34. Upon learning from his informant that McWebb was selling marijuana in his third-floor apartment, Marcus inspected the outside of the building. *Id.*, at 35. He did not approach it, however, to gather information about the configuration of the apartments. *Ibid.* Had he done so, he would have discovered, as did another officer on the day of executing the warrant, *id.*, at 13, that there were seven separate mailboxes and bells on the porch outside the main entrance to the house. Although there is some dispute over whether names were affixed near these boxes and bells, *id.*, at 13–14; Suppression Hearing Tr. M2–96 to M2–97, their existence alone puts a reasonable observer on notice that the three-story structure (with, possibly, a basement) had seven individual units. The detective, therefore, should have been aware that further investigation was necessary to eliminate the possibility of more than one unit's being located on the third floor. Moreover, when Detective Marcus' informant told him that he had purchased drugs in McWebb's apartment, App. 6, it appears that the detective never thought to ask the informant whether McWebb's apartment was the only one on the third floor. These efforts, which would have placed a slight burden upon the detective, are necessary in order to render reasonable the officer's behavior in seeking the warrant.[6]

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ing and Urban Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess., 1 (1978).

[6] The majority makes much of the fact that Detective Marcus checked with the Baltimore Gas and Electric Company in order to verify McWebb's residence and appeared to be informed that there was only one apartment on the third floor. *Ante*, at 85–86, n. 10. As would appear in the course

Moreover, even if one believed that Marcus' efforts in providing information for issuance of the warrant were reasonable, I doubt whether the officers' execution of the warrant could meet such a standard. In the Court's view, the "objective facts" did not put the officers on notice that they were dealing with two separate apartments on the third floor until the moment, considerably into the search after they had rummaged through a dresser and a closet in respondent's apartment and had discovered evidence incriminating him, when they realized their "mistake." *Ante*, at 80, 88–89. The Court appears to base its conclusion that the officers' error here was reasonable on the fact that neither McWebb nor re-

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of the search, when officers discovered separate electric bills for McWebb's and respondent's apartments, App. 28, the information Marcus received was erroneous. Given that a multiple-occupancy structure was at issue, the detective's inquiry of the gas company should not have relieved him of the obligation to pursue other, less burdensome steps to identify accurately the apartment to be searched, or to dispense with further investigation, such as inquiries directed to other utility companies, the building's owner, or the telephone company. See, *e. g.*, *United States* v. *Davis*, 557 F. 2d, at 1247 (efforts in providing affidavit justifying search warrant deemed adequate where officers had checked all utilities). Because respondent had a telephone in his apartment, App. 22—another fact discovered in the course of the search—a brief check with the telephone company would have informed the detective of the other apartment on the third floor.

It is not entirely clear, moreover, that, when Detective Marcus applied for the warrant, he believed that there was only one apartment on the third floor. In his affidavit to the issuing Magistrate, the detective explained that "no observations of the apartment were conducted due to the fact that it would again be impossible to tell which apartment the individuals would enter." *Id.*, at 7. This statement appears to be a reference to long-range, possibly telescopic, observations of McWebb's apartment while the informant purchased drugs from McWebb. If the detective believed that McWebb occupied the entire third floor of the structure, this remark makes no sense.

The State suggests that further efforts by Detective Marcus may have alerted McWebb to the interest of the investigating officer and thus might have resulted in the destruction of evidence. Reply Brief for Petitioner 6. It is difficult to understand why a discretely conducted investigation would have had this feared adverse effect.

spondent ever told the officers during the search that they lived in separate apartments. See *ante*, at 88, n. 12.

In my view, however, the "objective facts" should have made the officers aware that there were two different apartments on the third floor well before they discovered the incriminating evidence in respondent's apartment. Before McWebb happened to drive up while the search party was preparing to execute the warrant, one of the officers, Detective Shea, somewhat disguised as a construction worker, was already on the porch of the row house and was seeking to gain access to the locked first-floor door that permitted entrance into the building. App. 13.[7] From this vantage point he had time to observe the seven mailboxes and bells; indeed, he rang *all* seven bells, apparently in an effort to summon some resident to open the front door to the search party. *Id.*, at 13, 15. A reasonable officer in Detective Shea's position, already aware that this was a multiunit building and now armed with further knowledge of the number of units in the structure, would have conducted *at that time* more investigation to specify the exact location of McWebb's apartment before proceeding further. For example, he might have questioned another resident of the building.

It is surprising, moreover, that the Court places so much emphasis on the failure of McWebb to volunteer information about the exact location of his apartment. When McWebb drove up, one of the police vehicles blocked his car and the officers surrounded him and his passenger as they got out. Suppression Hearing Tr. M2–15, M2–56, M2–130 to M2–131. Although the officers had no arrest warrant for McWebb, but only a search warrant for his person and apartment,[8] and al-

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[7] It is unclear from the record whether by the time of McWebb's arrival this detective had already managed to break in the front door. App. 15.

[8] While the warrant permitted the officers to arrest any persons found in McWebb's apartment who were "then and there engaged in the commission of a crime," App. 9, it did not specifically direct the officers to arrest McWebb.

though they testified that they did not arrest him at that time, *id.*, at M2–14, M2–60,[9] it was clear that neither McWebb nor his passenger was free to leave. See App. 42, Suppression Hearing Tr. M2–157 to M2–158. In such circumstances, which strongly suggest that McWebb was already in custody, it was proper for the officers to administer to him warnings pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). It would then have been reasonable for the officers, aware of the problem, from Detective Shea's discovery, in the specificity of their warrant, to ask McWebb whether his apartment was the only one on the third floor.[10] As it is, the officers made several requests of and questioned McWebb, without giving him *Miranda* warnings, and yet failed to ask him the question, obvious in the circumstances, concerning the exact location of his apartment. Suppression Hearing Tr. M2–60, M2–131, M2–157.

Moreover, a reasonable officer would have realized the mistake in the warrant during the moments following the officers' entrance to the third floor. The officers gained access to the vestibule separating McWebb's and respondent's apartments through a locked door for which McWebb supplied the key. App. 17. There, in the open doorway to his apartment, they encountered respondent, clad in pajamas and wearing a half-body cast as a result of a recent spinal operation. *Id.*, at 16; Suppression Hearing Tr. M2–104 to M2–105. Although the facts concerning what next occurred are somewhat in dispute, see *id.*, at M2–108, M2–167, it appears that respondent, together with McWebb and the passenger from McWebb's car, were shepherded into McWebb's

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[9] When the officers confronted McWebb in the street, however, he believed that they had a warrant for his arrest. Suppression Hearing Tr. M2–131.

[10] McWebb, of course, could have refused to answer this question. But, given that the officers had him in custody, they could have pursued other avenues of discovering the exact location of his apartment without any immediate fear of the destruction of evidence.

apartment across the vestibule from his own. Once again, the officers were curiously silent. The informant had not led the officers to believe that anyone other than McWebb lived in the third-floor apartment; the search party had McWebb, the person targeted by the search warrant, in custody when it gained access to the vestibule; yet when they met respondent on the third floor, they simply asked him who he was but never where he lived. *Id.*, at M2–165. Had they done so, it is likely that they would have discovered the mistake in the warrant before they began their search.

Finally and most importantly, even if the officers had learned nothing from respondent, they should have realized the error in the warrant from their initial security sweep. Once on the third floor, the officers first fanned out through the rooms to conduct a preliminary check for other occupants who might pose a danger to them. *Id.*, at M2–63, M2–74, M2–87, M2–167. As the map of the third floor demonstrates, see 303 Md., at 396, 494 A. 2d, at 199, the two apartments were almost a mirror image of each other—each had a bathroom, a kitchen, a living room, and a bedroom. Given the somewhat symmetrical layout of the apartments, it is difficult to imagine that, in the initial security sweep, a reasonable officer would not have discerned that two apartments were on the third floor, realized his mistake, and then confined the ensuing search to McWebb's residence.[11]

Accordingly, even if a reasonable error on the part of police officers prevents a Fourth Amendment violation, the mistakes here, both with respect to obtaining and executing the warrant, are not reasonable and could easily have been avoided.

I respectfully dissent.

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[11] Having seen the marijuana located upon respondent's dresser in their initial security sweep, the officers could have secured his apartment while seeking a search warrant. See n. 3, *supra*.

ASAHI METAL INDUSTRY CO., LTD. *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST)

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 85–693. Argued November 5, 1986—Decided February 24, 1987

Petitioner manufactures tire valve assemblies in Japan and sells them to several tire manufacturers, including Cheng Shin Rubber Industrial Co. (Cheng Shin). The sales to Cheng Shin, which amounted to at least 100,000 assemblies annually from 1978 to 1982, took place in Taiwan, to which the assemblies were shipped from Japan. Cheng Shin incorporates the assemblies into its finished tires, which it sells throughout the world, including the United States, where 20 percent of its sales take place in California. Affidavits indicated that petitioner was aware that tires incorporating its assemblies would end up in California, but, on the other hand, that it never contemplated that its sales to Cheng Shin in Taiwan would subject it to lawsuits in California. Nevertheless, in 1979, a product liability suit was brought in California Superior Court arising from a motorcycle accident allegedly caused by defects in a tire manufactured by Cheng Shin, which in turn filed a cross-complaint seeking indemnification from petitioner. Although the main suit was eventually settled and dismissed, the Superior Court denied petitioner's motion to quash the summons issued against it. The State Court of Appeal then ordered that the summons be quashed, but the State Supreme Court reversed, finding that petitioner's intentional act of placing its assemblies into the stream of commerce by delivering them to Cheng Shin in Taiwan, coupled with its awareness that some of them would eventually reach California, were sufficient to support state court jurisdiction under the Due Process Clause.

Held: The judgment is reversed, and the case is remanded.

39 Cal. 3d 35, 702 P. 2d 543, reversed and remanded.

JUSTICE O'CONNOR, delivered the opinion of the Court as to Parts I and II–B, concluding that the state court's exercise of personal jurisdiction over petitioner would be unreasonable and unfair in violation of the Due Process Clause. Pp. 113–116.

(a) The burden imposed on petitioner by the exercise of state court jurisdiction would be severe, since petitioner would be required not only to traverse the distance between Japan and California, but also to submit

its dispute with Cheng Shin to a foreign judicial system. Such unique burdens should have significant weight in assessing the reasonableness of extending personal jurisdiction over national borders. Pp. 113–114.

(b) The interests of Cheng Shin and the forum State in the exercise of jurisdiction over petitioner would be slight, and would be insufficient to justify the heavy burdens placed on petitioner. The only surviving question is whether a Japanese corporation should indemnify a Taiwanese corporation on the bases of a sale made in Taiwan and a shipment of goods from Japan to Taiwan. The facts do not demonstrate that it would be more convenient for Cheng Shin to litigate its claim in California rather than in Taiwan or Japan, while California's interests are diminished by Cheng Shin's lack of a California residence and by the fact that the dispute is primarily about indemnity rather than the safety of consumers. While the possibility of being sued in California might create an additional deterrent to petitioner's manufacture of unsafe assemblies, the same effect would result from pressures placed on petitioner by Cheng Shin, whose California sales would subject it to state tort law. Pp. 114–115.

(c) The procedural and substantive policies of other nations whose interests are affected by the forum State's assertion of jurisdiction over an alien defendant must be taken into account, and great care must be exercised when considering personal jurisdiction in the international context. Although other nations' interests will differ from case to case, those interests, as well as the Federal Government's interest in its foreign relations policies, will always be best served by a careful inquiry into the reasonableness of the particular assertion of jurisdiction, and an unwillingness to find an alien defendant's serious burdens outweighed where, as here, the interests of the plaintiff and the forum State are minimal. P. 115.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA, concluded in Parts II–A and III that, even assuming, *arguendo*, that petitioner was aware that some of the assemblies it sold to Cheng Shin would be incorporated into tires sold in California, the facts do not establish minimum contacts sufficient to render the State's exercise of personal jurisdiction consistent with fair play and substantial justice as required by the Due Process Clause. Since petitioner does not do business, have an office, agents, employees, or property, or advertise or solicit business in California, and since it did not create, control, or employ the distribution system that brought its assemblies to, or design them in anticipation of sales in, California, it did not engage in any action to purposely avail itself of the California market. The "substantial connection" between a defendant and the forum State necessary for a finding of minimum contacts must derive from an action purposely directed toward the forum State, and the mere placement of a product

into the stream of commerce is not such an act, even if done with an awareness that the stream will sweep the product into the forum State absent additional conduct indicating an intent to serve the forum state market. Pp. 108–113, 116.

JUSTICE BRENNAN, joined by JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, agreed with the Court's conclusion in Part II–B that the exercise of jurisdiction over petitioner would not comport with "fair play and substantial justice," but disagreed with Part II–A's interpretation of the stream-of-commerce theory, and with the conclusion that petitioner did not purposely avail itself of the California market. As long as a defendant is aware that the final product is being marketed in the forum State, jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and no showing of additional conduct is required. Here, even though petitioner did not design or control the distribution system that carried its assemblies into California, its regular and extensive sales to a manufacturer it knew was making regular sales of the final product in California were sufficient to establish minimum contacts with California. Pp. 116–121.

JUSTICE STEVENS, joined by JUSTICE WHITE and JUSTICE BLACKMUN, agreed that the California Supreme Court's judgment should be reversed for the reasons stated in Part II–B of the Court's opinion, but did not join Part II–A, for the reasons that (1) the Court's holding that the State's exercise of jurisdiction over petitioner would be "unreasonable and unfair" alone requires reversal, and renders any examination of minimum contacts unnecessary; and (2) even assuming that the "purposeful availment" test should be formulated here, Part II–A misapplies it to the facts of this case since, in its dealings with Cheng Shin, petitioner has arguably engaged in a higher quantum of conduct than the mere placement of a product into the stream of commerce. Pp. 121–122.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I, the opinion of the Court with respect to Part II–B, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Parts II–A and III, in which REHNQUIST, C. J., and POWELL and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 116. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 121.

Graydon S. Staring argued the cause for petitioner. With him on the briefs was *Richard D. Hoffman.*

Ronald R. Haven argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR announced the judgment of the Court and delivered the unanimous opinion of the Court with respect to Part I, the opinion of the Court with respect to Part II–B, in which THE CHIEF JUSTICE, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS join, and an opinion with respect to Parts II–A and III, in which THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA join.

This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of jurisdiction "does 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).

I

On September 23, 1978, on Interstate Highway 80 in Solano County, California, Gary Zurcher lost control of his Honda motorcycle and collided with a tractor. Zurcher was severely injured, and his passenger and wife, Ruth Ann Moreno, was killed. In September 1979, Zurcher filed a product liability action in the Superior Court of the State of

*Briefs of *amici curiae* urging reversal were filed for Alcan Aluminio Do Brasil, S. A. by *Lawrence A. Salibra II;* for the American Chamber of Commerce in the United Kingdom et al. by *Douglas E. Rosenthal, Donald I. Baker,* and *Andreas F. Lowenfeld;* and for Cassiar Mining Corp. by *David Booth Beers* and *Wendy S. White.*

George E. Murphy filed a brief for the California Manufacturers Association as *amicus curiae* urging affirmance.

California in and for the County of Solano. Zurcher alleged that the 1978 accident was caused by a sudden loss of air and an explosion in the rear tire of the motorcycle, and alleged that the motorcycle tire, tube, and sealant were defective. Zurcher's complaint named, *inter alia*, Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube. Cheng Shin in turn filed a cross-complaint seeking indemnification from its codefendants and from petitioner, Asahi Metal Industry Co., Ltd. (Asahi), the manufacturer of the tube's valve assembly. Zurcher's claims against Cheng Shin and the other defendants were eventually settled and dismissed, leaving only Cheng Shin's indemnity action against Asahi.

California's long-arm statute authorizes the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code Ann. § 410.10 (West 1973). Asahi moved to quash Cheng Shin's service of summons, arguing the State could not exert jurisdiction over it consistent with the Due Process Clause of the Fourteenth Amendment.

In relation to the motion, the following information was submitted by Asahi and Cheng Shin. Asahi is a Japanese corporation. It manufactures tire valve assemblies in Japan and sells the assemblies to Cheng Shin, and to several other tire manufacturers, for use as components in finished tire tubes. Asahi's sales to Cheng Shin took place in Taiwan. The shipments from Asahi to Cheng Shin were sent from Japan to Taiwan. Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States are in California. Cheng Shin purchases valve assemblies from other suppliers as well, and sells finished tubes throughout the world.

In 1983 an attorney for Cheng Shin conducted an informal examination of the valve stems of the tire tubes sold in one cycle store in Solano County. The attorney declared that of the approximately 115 tire tubes in the store, 97 were purportedly manufactured in Japan or Taiwan, and of those 97, 21 valve stems were marked with the circled letter "A", apparently Asahi's trademark. Of the 21 Asahi valve stems, 12 were incorporated into Cheng Shin tire tubes. The store contained 41 other Cheng Shin tubes that incorporated the valve assemblies of other manufacturers. Declaration of Kenneth B. Shepard in Opposition to Motion to Quash Subpoena, App. to Brief for Respondent 5–6. An affidavit of a manager of Cheng Shin whose duties included the purchasing of component parts stated: "'In discussions with Asahi regarding the purchase of valve stem assemblies the fact that my Company sells tubes throughout the world and specifically the United States has been discussed. I am informed and believe that Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California.'" 39 Cal. 3d 35, 48, n. 4, 702 P. 2d 543, 549–550, n. 4 (1985). An affidavit of the president of Asahi, on the other hand, declared that Asahi "'has never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California.'" *Ibid.* The record does not include any contract between Cheng Shin and Asahi. Tr. of Oral Arg. 24.

Primarily on the basis of the above information, the Superior Court denied the motion to quash summons, stating: "Asahi obviously does business on an international scale. It is not unreasonable that they defend claims of defect in their product on an international scale." Order Denying Motion to Quash Summons, *Zurcher* v. *Dunlop Tire & Rubber Co.*, No. 76180 (Super. Ct., Solano County, Cal., Apr. 20, 1983).

The Court of Appeal of the State of California issued a peremptory writ of mandate commanding the Superior Court to quash service of summons. The court concluded that "it

would be unreasonable to require Asahi to respond in California solely on the basis of ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world including California." App. to Pet. for Cert. B5–B6.

The Supreme Court of the State of California reversed and discharged the writ issued by the Court of Appeal. 39 Cal. 3d 35, 702 P. 2d 543 (1985). The court observed: "Asahi has no offices, property or agents in California. It solicits no business in California and has made no direct sales [in California]." *Id.*, at 48, 702 P. 2d, at 549. Moreover, "Asahi did not design or control the system of distribution that carried its valve assemblies into California." *Id.*, at 49, 702 P. 2d, at 549. Nevertheless, the court found the exercise of jurisdiction over Asahi to be consistent with the Due Process Clause. It concluded that Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in California, and that Asahi benefited indirectly from the sale in California of products incorporating its components. The court considered Asahi's intentional act of placing its components into the stream of commerce—that is, by delivering the components to Cheng Shin in Taiwan—coupled with Asahi's awareness that some of the components would eventually find their way into California, sufficient to form the basis for state court jurisdiction under the Due Process Clause.

We granted certiorari, 475 U. S. 1044 (1986), and now reverse.

II

A

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the

forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 474 (1985), quoting *International Shoe Co.* v. *Washington*, 326 U. S., at 316. Most recently we have reaffirmed the oft-quoted reasoning of *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958), that minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U. S., at 475. "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Ibid.*, quoting *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 223 (1957) (emphasis in original).

Applying the principle that minimum contacts must be based on an act of the defendant, the Court in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286 (1980), rejected the assertion that a *consumer's* unilateral act of bringing the defendant's product into the forum State was a sufficient constitutional basis for personal jurisdiction over the defendant. It had been argued in *World-Wide Volkswagen* that because an automobile retailer and its wholesale distributor sold a product mobile by design and purpose, they could foresee being haled into court in the distant States into which their customers might drive. The Court rejected this concept of foreseeability as an insufficient basis for jurisdiction under the Due Process Clause. *Id.*, at 295–296. The Court disclaimed, however, the idea that "foreseeability is wholly irrelevant" to personal jurisdiction, concluding that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.*, at 297–298 (citation omitted). The Court reasoned:

> "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson* v. *Denckla*, 357 U. S. [235,] 253 [(1958)], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others." *Id.*, at 297.

In *World-Wide Volkswagen* itself, the state court sought to base jurisdiction not on any act of the defendant, but on the foreseeable unilateral actions of the consumer. Since *World-Wide Volkswagen*, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum State. Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.

The reasoning of the Supreme Court of California in the present case illustrates the former interpretation of *World-Wide Volkswagen*. The Supreme Court of California held that, because the stream of commerce eventually brought

some valves Asahi sold Cheng Shin into California, Asahi's awareness that its valves would be sold in California was sufficient to permit California to exercise jurisdiction over Asahi consistent with the requirements of the Due Process Clause. The Supreme Court of California's position was consistent with those courts that have held that mere foreseeability or awareness was a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum State while still in the stream of commerce. See *Bean Dredging Corp.* v. *Dredge Technology Corp.*, 744 F. 2d 1081 (CA5 1984); *Hedrick* v. *Daiko Shoji Co.*, 715 F. 2d 1355 (CA9 1983).

Other courts, however, have understood the Due Process Clause to require something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce in order for the State to exert jurisdiction over the defendant. In the present case, for example, the State Court of Appeal did not read the Due Process Clause, as interpreted by *World-Wide Volkswagen*, to allow "mere foreseeability that the product will enter the forum state [to] be enough by itself to establish jurisdiction over the distributor and retailer." App. to Pet. for Cert. B5. In *Humble* v. *Toyota Motor Co.*, 727 F. 2d 709 (CA8 1984), an injured car passenger brought suit against Arakawa Auto Body Company, a Japanese corporation that manufactured car seats for Toyota. Arakawa did no business in the United States; it had no office, affiliate, subsidiary, or agent in the United States; it manufactured its component parts outside the United States and delivered them to Toyota Motor Company in Japan. The Court of Appeals, adopting the reasoning of the District Court in that case, noted that although it "does not doubt that Arakawa could have foreseen that its product would find its way into the United States," it would be "manifestly unjust" to require Arakawa to defend itself in the United States. *Id.*, at 710–711, quoting 578 F. Supp. 530, 533 (ND Iowa 1982). See also *Hutson* v. *Fehr Bros.*,

Inc., 584 F. 2d 833 (CA8 1978); see generally *Max Daetwyler Corp.* v. *R. Meyer*, 762 F. 2d 290, 299 (CA3 1985) (collecting "stream of commerce" cases in which the "manufacturers involved had made deliberate decisions to market their products in the forum state").

We now find this latter position to be consonant with the requirements of due process. The "substantial connection," *Burger King*, 471 U. S., at 475; *McGee*, 355 U. S., at 223, between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State. Burger King*, *supra*, at 476; *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 774 (1984). The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Assuming, *arguendo*, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. Cf. *Hicks* v. *Kawasaki Heavy Indus-*

tries, 452 F. Supp. 130 (MD Pa. 1978). There is no evidence that Asahi designed its product in anticipation of sales in California. Cf. *Rockwell International Corp.* v. *Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328 (ED Pa. 1982). On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California* exceeds the limits of due process.

B

The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would offend "'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S., at 316, quoting *Milliken* v. *Meyer*, 311 U. S., at 463.

We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen*, 444 U. S., at 292 (citations omitted).

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*We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits. See *Max Daetwyler Corp.* v. *R. Meyer*, 762 F. 2d 290, 293–295 (CA3 1985); *DeJames* v. *Magnificence Carriers, Inc.*, 654 F. 2d 280, 283 (CA3 1981); see also Born, Reflections on Judicial Jurisdiction in International Cases, to be published in 17 Ga. J. Int'l & Comp. L. 1 (1987); Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 127–145 (1983).

A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce.

Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant. In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Tawainese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.

Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished. The Supreme Court of California argued that the State had an interest in "protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards." 39 Cal. 3d, at 49, 702 P. 2d, at 550. The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety

standards. Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan. *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 821–822 (1985); *Allstate Insurance Co.* v. *Hague*, 449 U. S. 302, 312–313 (1981). The possibility of being haled into a California court as a result of an accident involving Asahi's components undoubtedly creates an additional deterrent to the manufacture of unsafe components; however, similar pressures will be placed on Asahi by the purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the application of California tort law.

World-Wide Volkswagen also admonished courts to take into consideration the interests of the "several States," in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *United States* v. *First National City Bank*, 379 U. S. 378, 404 (1965) (Harlan, J., dissenting). See Born, Reflections on Judicial Jurisdiction in International Cases, to be published in 17 Ga. J. Int'l & Comp. L. 1 (1987).

Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.

III

Because the facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice, the judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I do not agree with the interpretation in Part II–A of the stream-of-commerce theory, nor with the conclusion that Asahi did not "purposely avail itself of the California market." *Ante*, at 112. I do agree, however, with the Court's conclusion in Part II–B that the exercise of personal jurisdiction over Asahi in this case would not comport with "fair play and substantial justice," *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945). This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 477–478 (1985). I therefore join Parts I and II–B of the Court's opinion, and write separately to explain my disagreement with Part II–A.

Part II–A states that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed to-

ward the forum State." *Ante*, at 112. Under this view, a plaintiff would be required to show "[a]dditional conduct" directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause. *Ibid.* I see no need for such a showing, however. The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.[1]

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[1] See, *e. g.*, *Bean Dredging Corp.* v. *Dredge Technology Corp.*, 744 F. 2d 1081 (CA5 1984); *Hedrick* v. *Daiko Shoji Co.*, 715 F. 2d 1355 (CA9 1983); *Nelson* v. *Park Industries, Inc.*, 717 F. 2d 1120, 1126 (CA7 1983), cert. denied, 465 U. S. 1024 (1984); *Stabilisierungsfonds fur Wein* v. *Kaiser Stuhl Wine Distributors Pty. Ltd.*, 207 U. S. App. D. C. 375, 378, 647 F. 2d 200, 203 (1981); *Poyner* v. *Erma Werke Gmbh*, 618 F. 2d 1186, 1190–1191 (CA6), cert. denied, 449 U. S. 841 (1980); cf. *Fidelity & Casualty Co. of New York* v. *Philadelphia Resins Corp.*, 766 F. 2d 440 (CA10 1985) (endorsing stream-of-commerce theory but finding it inapplicable in instant case), cert. denied, 474 U. S. 1082 (1986); *Montalbano* v. *Easco Hand Tools, Inc.*, 766 F. 2d 737 (CA2 1985) (noting potential applicability of stream-of-commerce theory, but remanding for further factual findings). See generally Currie, The Growth of the Long-Arm: Eight

The endorsement in Part II–A of what appears to be the minority view among Federal Courts of Appeals[2] represents a marked retreat from the analysis in *World-Wide Volkswagen* v. *Woodson*, 444 U. S. 286 (1980). In that case, "respondents [sought] to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." *Id.*, at 295. The Court held that the possibility of an accident in Oklahoma, while to some extent foreseeable in light of the inherent mobility of the automobile, was not enough to establish

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Years of Extended Jurisdiction in Illinois, 1963 U. Ill. Law Forum 533, 546–560 (approving and tracing development of the stream-of-commerce theory); C. Wright & A. Miller, Federal Practice and Procedure § 1069, pp. 259–261 (1969) (recommending in effect a stream-of-commerce approach); Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1168–1172 (1966) (same).

[2] The Court of Appeals for the Eighth Circuit appears to be the only Court of Appeals to have expressly adopted a narrow construction of the stream-of-commerce theory analogous to the one articulated in Part II–A today, although the Court of Appeals for the Eleventh Circuit has implicitly adopted it. See *Humble* v. *Toyota Motor Co., Ltd.*, 727 F. 2d 709 (CA8 1984); *Banton Industries, Inc.* v. *Dimatic Die & Tool Co.*, 801 F. 2d 1283 (CA11 1986). Two other Courts of Appeals have found the theory inapplicable when only a single sale occurred in the forum State, but do not appear committed to the interpretation of the theory that the Court adopts today. *E. g.*, *Chung* v. *NANA Development Corp.*, 783 F. 2d 1124 (CA4), cert. denied, 479 U. S. 948 (1986); *Dalmau Rodriguez* v. *Hughes Aircraft Co.*, 781 F. 2d 9 (CA1 1986). Similarly, the Court of Appeals for the Third Circuit has not interpreted the theory as JUSTICE O'CONNOR's opinion has, but has rejected stream-of-commerce arguments for jurisdiction when the relationship between the distributor and the defendant "remains in dispute" and "evidence indicating that [defendant] could anticipate either use of its product or litigation in [the forum State] is totally lacking," *Max Daetwyler Corp.* v. *R. Meyer*, 762 F. 2d 290, 298, 300, n. 13, cert. denied, 474 U. S. 980 (1985), and when the defendant's product was not sold in the forum State and the defendant "did not take advantage of an indirect marketing scheme," *DeJames* v. *Magnificence Carriers, Inc.*, 654 F. 2d 280, 285, cert. denied, 454 U. S. 1085 (1981).

minimum contacts between the forum State and the retailer or distributor. *Id.*, at 295–296. The Court then carefully explained:

> "[T]his is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there." *Id.*, at 297.

The Court reasoned that when a corporation may reasonably anticipate litigation in a particular forum, it cannot claim that such litigation is unjust or unfair, because it "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State." *Ibid.*

To illustrate the point, the Court contrasted the foreseeability of litigation in a State to which a consumer fortuitously transports a defendant's product (insufficient contacts) with the foreseeability of litigation in a State where the defendant's product was regularly *sold* (sufficient contacts). The Court stated:

> "Hence if the *sale* of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased*

by consumers in the forum State." *Id.*, at 297–298 (emphasis added).

The Court concluded its illustration by referring to *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), a well-known stream-of-commerce case in which the Illinois Supreme Court applied the theory to assert jurisdiction over a component-parts manufacturer that sold no components directly in Illinois, but did sell them to a manufacturer who incorporated them into a final product that was sold in Illinois. 444 U. S., at 297–298.

The Court in *World-Wide Volkswagen* thus took great care to distinguish "between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there." *Id.*, at 306–307 (BRENNAN, J., dissenting).[3] The California Supreme Court took note of this distinction, and correctly concluded that our holding in *World-Wide Volkswagen* preserved the stream-of-commerce theory. See App. to Pet. for Cert. C–9, and n. 3, C–13—C–15; cf. Comment, Federalism, Due Process, and Minimum Contacts: *World-Wide Volkswagen Corp* v. *Woodson*, 80 Colum. L. Rev. 1341, 1359–1361, and nn. 140–146 (1980).

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[3] In dissent, I argued that the distinction was without constitutional significance, because in my view the foreseeability that a customer would use a product in a distant State was a sufficient basis for jurisdiction. 444 U. S., at 306–307, and nn. 11, 12. See also *id.*, at 315 (MARSHALL, J., dissenting) ("I cannot agree that jurisdiction is necessarily lacking if the product enters the State not through the channels of distribution but in the course of its intended use by the consumer"); *id.*, at 318–319 (BLACKMUN, J., dissenting) ("[F]oreseeable use in another State seems to me little different from foreseeable resale in another State"). But I do not read the decision in *World-Wide Volkswagen* to establish a *per se* rule against the exercise of jurisdiction where the contacts arise from a consumer's use of the product in a given State, but only a rule against jurisdiction in cases involving "one, isolated occurrence [of consumer use, amounting to] . . . the fortuitous circumstance . . . ." *Id.*, at 295. See *Hedrick* v. *Daiko Shoji Co.*, 715 F. 2d, at 1358–1359.

In this case, the facts found by the California Supreme Court support its finding of minimum contacts. The court found that "[a]lthough Asahi did not design or control the system of distribution that carried its valve assemblies into California, Asahi was aware of the distribution system's operation, and it knew that it would benefit economically from the sale in California of products incorporating its components." App. to Pet. for Cert. C–11.[4] Accordingly, I cannot join the determination in Part II–A that Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California is insufficient to establish minimum contacts with California.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

The judgment of the Supreme Court of California should be reversed for the reasons stated in Part II–B of the Court's opinion. While I join Parts I and II–B, I do not join Part II–A for two reasons. First, it is not necessary to the Court's decision. An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional. See *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 476–478 (1985). Part II–B establishes, after considering the factors set forth in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 292 (1980), that California's exercise of jurisdiction over Asahi in this case would be "unreasonable and unfair." *Ante*, at 116. This finding alone requires reversal; this case fits within the rule that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat

[4] Moreover, the Court found that "at least 18 percent of the tubes sold in a particular California motorcycle supply shop contained Asahi valve assemblies," App. to Pet. for Cert. C–11, n. 5, and that Asahi had an ongoing business relationship with Cheng Shin involving average annual sales of hundreds of thousands of valve assemblies, *id.*, at C–2.

the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Burger King*, 471 U. S., at 477–478 (quoting *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945)). Accordingly, I see no reason in this case for the plurality to articulate "purposeful direction" or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.

Second, even assuming that the test ought to be formulated here, Part II–A misapplies it to the facts of this case. The plurality seems to assume that an unwavering line can be drawn between "mere awareness" that a component will find its way into the forum State and "purposeful availment" of the forum's market. *Ante*, at 112. Over the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than "[t]he placement of a product into the stream of commerce, without more . . . ." *Ibid.* Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.

Syllabus

WESTERN AIR LINES, INC., ET AL. *v.* BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH DAKOTA

No. 85–732. Argued November 3, 1986—Decided February 24, 1987

A provision of the Airport and Airway Improvement Act of 1982, 49 U. S. C. App. § 1513(d)(1), prohibits the imposition of discriminatory state or local property taxes on air carriers. However, § 1513(d)(3) provides that the prohibition does not apply to any "in lieu tax which is wholly utilized for airport and aeronautical purposes." The South Dakota Airline Flight Property Tax, enacted in 1961, is imposed on air carriers on the basis of the value of their aircraft and provides for allocation of the taxes to the airports used by the carriers, and for use of the taxes exclusively by the airports for airport purposes. This tax, which is centrally assessed, was an exception from the general state scheme of local property tax assessment at the county level. In 1978 the State exempted from ad valorem taxation all personal property that was locally rather than centrally assessed. Appellant airline companies paid their flight property taxes in 1983 under protest, unsuccessfully sought refunds from appropriate county and state authorities, and ultimately sought relief on appeals to a South Dakota Circuit Court on the ground that, because airline flight property was subject to taxation while most other personal property was exempt, the state tax violated § 1513(d)(1). The court consolidated the actions and held that the state tax was permitted under § 1513(d)(3). Although disagreeing with that holding, the South Dakota Supreme Court affirmed on an alternative ground based on its interpretation of other provisions of § 1513(d).

Held: The South Dakota tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes" under § 1513(d)(3), and thus does not violate the antidiscrimination provisions of § 1513(d). The question whether a state tax is an "in lieu tax" under § 1513(d)(3) is one of federal law, and the purpose and effect of the state tax must be examined in light of the policy embodied in the federal law. Section 1513(d)(3)'s requirement that the state tax be "wholly utilized for airport and aeronautical purposes" reflects the federal policy of preventing state and local governments from excessively taxing nonvoting, nonresident businesses in order to subsidize general welfare services for state residents. The phrase "in lieu tax" restricts § 1513(d)(3)'s protection to property taxes applied to the exclusion of any other tax on the property—that is, to

taxes applied in lieu of any other possible property tax—and reinforces the policy reflected in the "wholly utilized for airport and aeronautical purposes" phrase. The South Dakota Airline Flight Property Tax establishes a method of taxing a particular type of property to the exclusion of any other tax on that property. It therefore stands in lieu of the generally applicable ad valorem property tax that had been assessed on most other commercial and industrial property in the State at the time the airline flight property tax was established. It is not necessary that in order to be exempted under § 1513(d)(3) the state tax must take the place of another tax that historically had been applied to the airline property. Pp. 129–134.

372 N. W. 2d 106, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, *post*, p. 135.

Raymond J. Rasenberger argued the cause for appellants. With him on the briefs were *Rachel B. Trinder* and *C. Westbrook Murphy*.

Mark V. Meierhenry, Attorney General of South Dakota, argued the cause for appellees. With him on the brief was *John Dewell*, Assistant Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether the South Dakota Airline Flight Property Tax, S. D. Codified Laws, ch. 10–29 (1982), violates the Airport and Airway Improvement Act of 1982, 49 U. S. C. App. § 1513(d). We conclude that because the South Dakota Airline Flight Property Tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes," 49 U. S. C. App. § 1513(d)(3), the tax does not violate § 1513(d).

I

The federal provision at issue is part of a series of congressional actions dedicated to improving the Nation's air transportation system. *Aloha Airlines, Inc.* v. *Director of*

James E. Landry filed a brief for the Air Transport Association of America as *amicus curiae* urging reversal.

James W. McBride and *Gregory G. Fletcher* filed a brief for the Railway Progress Institute et al. as *amici curiae*.

Taxation, 464 U. S. 7, 8–10 (1983). In 1970, following findings that "substantial expansion and improvement of the airport and airway system is *[sic]* required to meet the demands of interstate commerce, the postal service, and the national defense," H. R. Conf. Rep. No. 91–1074, p. 29 (1970), Congress required the Secretary of Transportation to prepare a plan for the development of public airports, and authorized the Secretary to make grants to States and localities for airport development. Airport and Airway Development Act of 1970, Pub. L. 91–258, 84 Stat. 219. Congress also established an Airport and Airway Trust Fund, maintained by federal aviation taxes, to finance airport development projects. § 208, 84 Stat. 250. Soon afterward, Congress acted to limit state taxation of air transportation. Concluding that state passenger use taxes placed "an unnecessary burden on interstate commerce," and had "a stifling effect on air transportation," H. R. Rep. No. 93–157, p. 4 (1973), Congress prohibited such taxes in the Airport Development Acceleration Act of 1973, Pub. L. 93–44, § 7(a), 87 Stat. 90.

In the Airport and Airway Improvement Act of 1982, 96 Stat. 701, Congress added a § 7(d) to the Airway Development Acceleration Act of 1973, prohibiting the imposition of discriminatory property taxes on air carriers. That prohibition, as codified at 49 U. S. C. App. § 1513(d), reads:

> "(d) Acts which unreasonably burden and discriminate against interstate commerce; definitions
>
> "(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> "(A) assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;

"(B) levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or

"(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

"(2) In this subsection—

. . . . . .

"(D) 'commercial and industrial property' means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to commercial and industrial use and subject to a property tax levy; . . .

. . . . . .

"(3) This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes."

The South Dakota Airline Flight Property Tax, which appellants allege violates § 1513(d), was enacted in 1961. Flight property is defined as "all aircraft fully equipped ready for flight used in air commerce." S. D. Codified Laws § 10–29–1(4) (1982). The portion of the value of flight property subject to the tax is based on flight tonnage, flight time, and revenue ton miles, § 10–29–10, and this value is taxed at the "average mill rate," § 10–29–14. The statute also provides that "[t]he taxes imposed by this chapter shall be allocated by the secretary of revenue to the airports where such airlines companies make regularly scheduled landings and shall be used exclusively by such airports for airport purposes . . . ." § 10–29–15.

The South Dakota statute provides that "[f]light property of airline companies operating in the state shall be assessed for the purpose of taxation by the department of revenue and not otherwise," § 10–29–2. Airline flight property is 1 of 10 specific categories of property that are centrally assessed for

purposes of taxation. (The other categories are certain property of railroads, private car-line companies, express companies, telephone companies, telegraph companies, electric, heating, water and gas companies, rural electric companies, rural water supply companies, and pipeline companies. See S. D. Codified Laws chs. 10–28 through 10–37.) Each of these categories was an exception from the general South Dakota scheme of local property tax assessment at the county level. S. D. Codified Laws § 10–3–16 (1982). In 1978, South Dakota exempted from ad valorem taxation all personal property that was locally rather than centrally assessed, § 10–4–6.1.

In May 1983, appellants, four airline companies operating in South Dakota, paid their flight property taxes for the first six months of 1983 under protest. Appellants then sued the appropriate county treasurers for a refund. Appellants alleged that, because airline flight property was subject to taxation while most other personal property was exempt, the South Dakota flight property tax violated §§ 1513(d)(1)(A) and (C). In each case the county answered that the state flight property tax was "utilized wholly for airport and aeronautical purposes and is in lieu of property taxes and is therefore permitted by 49 U. S. C. [App. §] 1513(d)(3)." App. 10–11. Following an unsuccessful request to seven county boards of commissioners to abate and refund flight property taxes paid after the effective date of the Airport and Airway Improvement Act of 1982, appellants sued the county commissions for abatement and refund. App. 17. Finally, appellants appealed the property tax assessment to the South Dakota State Board of Equalization. The Board of Equalization unanimously denied the appeal, holding that "the airline flight property tax is in lieu of personal property tax and is totally utilized for airport and aeronautical purposes, therefore, in conformity with Section [1513](d)(3), this tax is lawful and not a violation of Federal law." *Id.*, at 31. All the lawsuits described above were consolidated in the Circuit Court

for the Sixth Judicial Circuit in Hughes County, South Dakota. That court agreed with the counties and the Board of Equalization that the flight property tax was permitted under § 1513(d)(3). App. to Juris. Statement 19a–21a.

On appeal, the Supreme Court of South Dakota disagreed with the conclusion that the flight property tax was authorized under § 1513(d). 372 N. W. 2d 106 (1985). In order to be an "in lieu tax," the court reasoned, the flight property tax must be a substitute for another tax on flight property. "In the case at bar, however, the tax is not a substitute for an ad valorem personal property tax. It is in fact the first imposition of personal property tax on the airline flight property." *Id.*, at 109. The State Supreme Court affirmed the Circuit Court, however, on an alternative ground. Under §§ 1513(d)(1)(A) and (C), the discriminatory nature of assessment ratios or tax rates applied to airline property is determined by comparison to the ratios and rates applied to other "commercial and industrial property." "Commercial and industrial property" is defined as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to commercial and industrial use *and subject to a property tax levy.*" § 1513(d)(2)(D) (emphasis supplied). Because locally assessed personal property was not subject to a property tax levy, the State Supreme Court concluded that such property "cannot be included as commercial or industrial property for comparison under either" §§ 1513(d)(1)(A) or (C). 372 N. W. 2d, at 110. Because appellants' claims under § 1513(d) were based on a comparison between flight property and property no longer subject to a tax levy, the court concluded that the claims must be rejected.

South Dakota Supreme Court Justice Henderson concurred in the court's interpretation of the "in lieu tax" provision, but dissented from the court's interpretation of "'commercial and industrial property.'" The State Supreme Court holding, Justice Henderson observed, permitted "'greater discrimina-

tion when the [commercial and industrial] property is completely exempt than when it is taxed, but at a lower rate.'" *Id.*, at 112, quoting *Northwest Airlines* v. *State Board of Equalization*, 358 N. W. 2d 515, 517 (1984). Such an interpretation of the federal antidiscrimination provisions was unreasonable, Justice Henderson concluded. "Since the level of assessment on commercial and industrial personal property is zero, the level of assessment of the airlines' personal property must be reduced to zero." 372 N. W. 2d, at 112.

In their jurisdictional statement to this Court appellants challenged the Supreme Court of South Dakota's interpretation of "commercial and industrial property" under § 1513(d). Appellees defended the judgment on the basis of the same reasoning used by the Supreme Court of South Dakota. We noted probable jurisdiction, 475 U. S. 1008 (1986). Following oral argument, we requested supplemental briefing from the parties, and called for the views of the United States, on the following questions: (1) Is the question whether a state tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes," one of state or federal law, and "(2) If federal law governs the question whether a tax is an in lieu tax under § 1513(d)(3), is the South Dakota Airline Flight Property Tax . . . an 'in lieu tax' under § 1513(d)(3)?" 479 U. S. 958 (1986). Because our conclusions on these two questions resolve this case, we do not reach the question of the interpretation of "commercial and industrial property" under § 1513(d).

II

The parties and the United States agree that the question whether a state tax is an "in lieu tax which is wholly utilized for airport and aeronautical purposes," under § 1513 (d)(3), is ultimately one of federal law. The general principle that, absent a clear indication to the contrary, the meaning of words in a federal statute is a question of federal law has especial force when the purpose of the federal statute

is to eliminate discriminatory state treatment of interstate commerce. Indeed, in *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U. S., at 13–14, this Court held that a state legislature's characterization of a tax could not shield the tax from application of another subsection of § 1513. In the present case, as in *Aloha Airlines*, *supra*, we must examine the "purpose and effect" of the state tax in light of the policy embodied in the federal provision.

Congress has given us little material with which to interpret the in lieu tax exception. The provision was added to the Act at conference, and there is no legislative history specifically discussing it.* The language of § 1513(d)(3) it-

*The United States and appellants have directed our attention to a 1975 Report of the House Committee on Interstate and Foreign Commerce on H. R. 10979, the Railroad Revitalization and Regulatory Reform Act of 1976 (4–R Act). As we note *infra*, at 131, the antidiscrimination provisions of 49 U. S. C. App. § 1513(d) were modeled on a similar provision in the 4–R Act. This Report used the phrase "in lieu tax" to describe special taxes on common carriers that operate differently from the generally applicable property tax schemes. H. R. Rep. No. 94–725, pp. 77, 78 (1975). The House Report seems to have used the phrase "in lieu tax" to describe a broad range of taxes. This sliver of legislative history supports our interpretation of the phrase, see *infra*, at 131–132.

Appellants submit an affidavit of John L. Zorack, an attorney who "represent[s] clients in a variety of legislative matters before the United States Congress." App. to Supplemental Brief for Appellants in No. 14560 (Sup. Ct. S. D.) B–1, B–2. Affiant Zorack states that he was "involved"—in an unexplained capacity—in the passage of the legislation that ultimately became § 1513(d). According to affiant Zorack, the "in lieu" provision "was intended to ensure that the Act would not invalidate state taxes which are a legitimate substitute for other taxes on air carrier transportation property and which are not imposed in an effort to tax such property at rates higher than those imposed on other comparable commercial and industrial property." This would be an incongruous justification for the "in lieu" provision, however, since airline property taxes that are not imposed at rates higher than those imposed on other comparable commercial and industrial property are not threatened by the antidiscrimination provisions of § 1513(d). Mr. Zorack adds that the in lieu provision "was inserted to take care of Minnesota's objection to an earlier version." "To my knowledge no other state made any representation at the time that it

self, and the policies reflected in the Airport and Airway Improvement Act of 1982, however, lead us to the conclusion that the in lieu tax provision exempts the South Dakota Airline Flight Property Tax from the restrictions of § 1513(d).

Section 1513(d)(3) uses two characteristics to identify a group of airline property taxes that are exempted from the restrictions of § 1513(d)(1). First, and perhaps most important, to fall under the protection of § 1513(d)(3) a tax must be "wholly utilized for airport and aeronautical purposes." Section 1513(d) is modeled on similar provisions in the 4–R Act and the Motor Carrier Act of 1980. See 49 U. S. C. §§ 11503, 11503a. The legislative history of the antidiscrimination provision in the 4–R Act demonstrates Congress' awareness that interstate carriers "are easy prey for State and local tax assessors" in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality. S. Rep. No. 91–630, p. 3 (1969). The Department of Transportation had observed that "[s]tate and local governments derive substantial revenues from taxes on property owned by common carriers." *Id.*, at 4. It is this temptation to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents that made federal legislation in this area necessary. The ability to use taxes levied on an interstate carrier to subsidize general welfare spending does not exist, of course, when the proceeds are allocated directly and entirely to the benefit of the carrier. Not only is the possibility of discriminatory benefits to state residents

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wished to be protected by the in lieu provision," Mr. Zorack concludes. *Id.*, at B–2, B–3. On the basis of this affidavit, appellants argue that to be covered by the in lieu provision a state tax must resemble the Minnesota airflight property tax, which was a substitute for other property taxes previously imposed on airlines. As we note, *infra*, at 133, the interpretation of an "in lieu tax" as a tax that actually replaced a tax previously imposed is admittedly a possible one. Appellants' attempt at the creation of legislative history through the *post hoc* statements of interested onlookers is entitled to no weight, however.

eliminated, but also the specter of discriminatory burdens on the carrier is avoided by the recycling of the tax revenues into the specific facilities used by the carrier.

Second, the phrase "in lieu tax" restricts the protection of § 1513(d)(3) to property taxes applied to the exclusion of any other tax on the property, in other words, to taxes applied in lieu of any other possible property tax. This requirement reinforces the policy reflected in the "wholly utilized for airport and aeronautical purposes" phrase. If the revenues collected pursuant to a property tax are specifically used for the benefit of those from whom the tax was collected, then, as explained above, the tax does not discriminatorily take from some in order to benefit others. If the same property is also subjected to tax used to subsidize general state expenditures, however, then the potential for abuse remains. Two individually nondiscriminatory taxes—a tax used for general welfare spending that meets the assessment ratio and rate restrictions of § 1513(d)(1), and a tax the proceeds of which are devoted entirely to the industry from which it is collected—obviously can become discriminatorily burdensome when combined.

South Dakota levies a tax on airline flight property, the proceeds of which are wholly utilized for airport and aeronautical purposes. See S. D. Codified Laws § 10–29–15 (1982), quoted *supra*, at 126. The South Dakota Airline Flight Property Tax establishes a method of taxing a particular type of property to the exclusion of any other tax on that property. It therefore stands in lieu of the generally applicable ad valorem property tax that had been assessed on most other commercial and industrial property in the State at the time the airline flight property tax was established. The language and logic of § 1513(d)(3), therefore, lead to the conclusion that the South Dakota Airline Flight Property Tax falls under the in lieu tax exemption.

Appellants argue, however, that these characteristics alone are not sufficient for a tax to be exempted by

§ 1513(d)(3). Appellants advocate the position taken by the Supreme Court of South Dakota, that in order to be exempted under this provision a tax must take the place of another tax that historically had been applied to the airline property. The fact that a property tax is applied to the exclusion of all other property taxes is immaterial, appellants assert, unless some past tax was actually replaced by the present tax. Because South Dakota's taxation of airline flight property has always taken the form of the taxation scheme at issue in this case, appellants argue, the South Dakota Airline Flight Property Tax is not a true "in lieu tax."

Admittedly the phrase "in lieu tax" is open to this interpretation. The illogical results of applying such an interpretation, however, argue strongly against the conclusion that Congress intended these results when it drafted § 1513(d)(3).

Under the interpretation appellants advocate, the question whether a tax would be exempted under the in lieu tax provision would, at best, turn on historical fortuity. The identical taxation scheme South Dakota utilizes would be exempted under § 1513(d)(3) if South Dakota had at one time applied some other taxation scheme to airline flight property. Thus, if at one time the proceeds of the airline flight property tax had gone to general state expenditures rather than directly to the benefit of airports and airlines, the present tax would be exempted. Because South Dakota has always chosen to devote its taxes on airline flight property solely to the benefit of those airlines, it is not exempted, according to appellants. Why a State that has consistently chosen to levy, to the exclusion of all other property taxes, a tax utilized wholly for aeronautical purposes should be penalized for its consistency is unexplained.

At worst, appellants' interpretation of § 1513(d)(3) would do no more than place a meaningless hurdle before state legislatures seeking to conform their tax scheme to the requirements of this provision. A closer examination of how this proposed replacement requirement would operate in

practice illustrates the point. Appellants do not suggest—and have no basis upon which to suggest—that in order to be an "in lieu tax" under § 1513(d)(3) the airline flight property tax must have replaced some other tax by the effective date of the federal provision. If one tax must replace another, therefore, the replacement could take place at any time. Moreover, it could not be a condition of § 1513(d)(3) coverage that the "in lieu tax" replace a tax that had met the antidiscrimination restrictions of § 1513(d). If the tax described in § 1513(d)(3) could replace only a tax that met all the requirements of § 1513(d)(1), then § 1513(d)(3) would not be an exemption at all; it would simply add a restriction on how the taxes could be spent with no corresponding latitude on how they may be collected. Ultimately, therefore, South Dakota could satisfy appellants' interpretation of § 1513(d)(3) by simply amending its tax code so that its airline flight property tax took some other form, then the following session substituting for that tax a tax utilized wholly for aeronautical purposes. This exercise of replacing one tax with another, while contributing somewhat to a state legislature's workload, would contribute nothing to the policies of the Airport and Airway Improvement Act.

In sum, the language of § 1513(d)(3), while at first glance ambiguous, should be interpreted in a manner that comports with the policies of the Airport and Airway Improvement Act. That interpretation is that § 1513(d)(3) exempts from the antidiscrimination provisions of § 1513(d)(1) a tax on airline flight property, applied to the exclusion of any other possible tax on that property, the proceeds of which are wholly utilized for airport and aeronautical purposes. Because the South Dakota Airline Flight Property Tax fits this description, it does not violate the antidiscrimination provisions of § 1513(d). For this reason, the judgment of the Supreme Court of South Dakota is

Affirmed.

JUSTICE WHITE, concurring.

Neither in responding to appellants' jurisdictional statement nor in their brief on the merits did appellees defend the airlines tax as an in-lieu tax; and as my dissenting vote indicated, I thought it inappropriate to call for further briefing and *sua sponte* pose the in-lieu issue rather than to address what I thought to be the plainly improvident ground on which the South Dakota Supreme Court sustained the tax. But the Court's action is surely within its power, for the in-lieu issue was raised and decided in the South Dakota courts. That question is now before us, and the Court having correctly decided it, I join its opinion.

HOBBIE *v.* UNEMPLOYMENT APPEALS COMMISSION OF FLORIDA ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

No. 85–993. Argued December 10, 1986—Decided February 25, 1987

After 2½ years, appellant informed her employer that she was joining the Seventh-day Adventist Church and that, for religious reasons, she would no longer be able to work at the employer's jewelry store on her Sabbath. When she refused to work scheduled shifts on Friday evenings and Saturdays, she was discharged. She then filed a claim for unemployment compensation, which was denied by a claims examiner for "misconduct connected with [her] work" under the applicable Florida statute, and the Unemployment Appeals Commission (Appeals Commission) affirmed. The Florida Fifth District Court of Appeal affirmed the Appeals Commission's order.

Held: Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment. *Sherbert* v. *Verner*, 374 U. S. 398; *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707. Pp. 139–146.

(a) When a State denies receipt of a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, that denial must be subjected to strict scrutiny and can be justified only by proof of a compelling state interest. The Appeals Commission did not seriously contend that its infringement could withstand strict scrutiny, and there is no merit to its contention that justification for the infringement should be determined under the less rigorous standard of demonstrating that the challenged requirement for governmental benefits was a reasonable means of promoting a legitimate public interest. Pp. 141–142.

(b) The denial of benefits to appellant cannot be justified on the ground that, under Florida law, appellant was not completely ineligible for benefits but was disqualified only for a limited time. Pp. 142–143.

(c) Nor can the denial of benefits be upheld on the ground that the conflict between work and religious belief was not caused by the employer's alteration of the conditions of employment after appellant was hired, but was caused, instead, by appellant's conversion during the course of her employment. Pp. 143–144.

(d) There is no merit to the Appeals Commission's argument that awarding benefits to appellant would violate the Establishment Clause

of the First Amendment. The accommodation of religious practices here would not entangle the State in an unlawful fostering of religion. Pp. 144–145.

475 So. 2d 711, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. POWELL, J., *post*, p. 146, and STEVENS, J., *post*, p. 147, filed opinions concurring in the judgment. REHNQUIST, C. J., filed a dissenting statement, *post*, p. 146.

Walter E. Carson argued the cause for appellant. With him on the briefs were *Mitchell A. Tyner* and *Frank M. Palmour*.

John D. Maher argued the cause and filed a brief for appellee Unemployment Appeals Commission.*

JUSTICE BRENNAN delivered the opinion of the Court.

Appellant's employer discharged her when she refused to work certain scheduled hours because of sincerely held religious convictions adopted after beginning employment. The question to be decided is whether Florida's denial of unemployment compensation benefits to appellant violates the Free Exercise Clause of the First Amendment of the Constitution, as applied to the States through the Fourteenth Amendment.[1]

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*Briefs of *amici curiae* urging reversal were filed for The American Jewish Congress et al. by *Ronald A. Krauss*, *Marc D. Stern*, and *Jack D. Novik;* for the Baptist Joint Committee on Public Affairs et al. by *Donald R. Brewer;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Council on Religious Freedom by *Lee Boothby*, *James M. Parker*, and *Robert W. Nixon;* and for the Rutherford Institute et al. by *W. Charles Bundren*, *James J. Knicely*, *Alfred J. Lindh*, and *William B. Hollberg*.

Solicitor General Fried, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Ayer*, *Deputy Assistant Attorney General Carvin*, and *Roger Clegg* filed a brief for the United States as *amicus curiae*.

[1] An employer's duty to accommodate the religious beliefs of employees is governed by Title VII of the Civil Rights Act of 1964. 42 U. S. C. § 2000e *et seq*. Hobbie has not sought relief pursuant to Title VII in this action.

I

Lawton and Company (Lawton), a Florida jeweler, hired appellant Paula Hobbie in October 1981. She was employed by Lawton for 2½ years, first as a trainee and then as assistant manager of a retail jewelry store. In April 1984, Hobbie informed her immediate supervisor that she was to be baptized into the Seventh-day Adventist Church and that, for religious reasons, she would no longer be able to work on her Sabbath, from sundown on Friday to sundown on Saturday.[2] The supervisor devised an arrangement with Hobbie: she agreed to work evenings and Sundays, and he agreed to substitute for her whenever she was scheduled to work on a Friday evening or a Saturday.

This arrangement continued until the general manager of Lawton learned of it in June 1984. At that time, after a meeting with Hobbie and her minister, the general manager informed appellant that she could either work her scheduled shifts or submit her resignation to the company. When Hobbie refused to do either, Lawton discharged her.

On June 4, 1984, appellant filed a claim for unemployment compensation with the Florida Department of Labor and Employment Security. Under Florida law, unemployment compensation benefits are available to persons who become "unemployed through no fault of their own." Fla. Stat. § 443.021 (1985). Lawton contested the payment of benefits on the ground that Hobbie was "disqualified for benefits" because she had been discharged for "misconduct connected with [her] work." § 443.101(1)(a).[3]

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[2] It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held. See Record 70, 100.

[3] The Florida statute defines "misconduct" as follows:

"'Misconduct' includes, but is not limited to, the following, which shall not be construed in pari materia with each other:

"(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

A claims examiner for the Bureau of Unemployment Compensation denied Hobbie's claim for benefits, and she appealed that determination. Following a hearing before a referee, the Unemployment Appeals Commission (Appeals Commission) affirmed the denial of benefits, agreeing that Hobbie's refusal to work scheduled shifts constituted "misconduct connected with [her] work." App. 3.

Hobbie challenged the Appeals Commission's order in the Florida Fifth District Court of Appeal. On September 10, 1985, that court summarily affirmed the Appeals Commission.[4] We postponed jurisdiction, 475 U. S. 1117 (1985), and we now reverse.[5]

II

Under our precedents, the Appeals Commission's disqualification of appellant from receipt of benefits violates the Free Exercise Clause of the First Amendment, applicable to the

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"(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." Fla. Stat. § 443.036(24) (1985).

[4] The Fifth District Court of Appeal issued an order stating: "PER CURIAM. AFFIRMED." App. 6. See 475 So. 2d 711 (1985). Under Florida law, a *per curiam* affirmance issued without opinion cannot be appealed to the State Supreme Court. See Fla. Rule App. Proc. 9.030(a)(2)(A)(i–iv). Hobbie therefore sought review directly in this Court.

[5] The parties initially disagreed about whether an appeal lay under 28 U. S. C. § 1257(2). The Appeals Commission maintained that the decision of the Fifth District Court of Appeal did not draw into question the constitutionality of the state statute and, therefore, that an appeal did not lie. See Motion to Dismiss or Affirm 7–11. However, the Appeals Commission now concedes that the appeal is proper. Brief for Appellee Appeals Commission 4–6. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 112 (6th ed. 1986) (appeal lies under 28 U. S. C. § 1257(2) even if the state court has not been explicit in its rejection of the constitutional claim raised); cf. *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282–283 (1932).

States through the Fourteenth Amendment.[6] *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981). In *Sherbert* we considered South Carolina's denial of unemployment compensation benefits to a Sabbatarian who, like Hobbie, refused to work on Saturdays. The Court held that the State's disqualification of Sherbert

> "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." 374 U. S., at 404.

We concluded that the State had imposed a burden upon Sherbert's free exercise rights that had not been justified by a compelling state interest.

In *Thomas*, too, the Court held that a State's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion. Thomas, a Jehovah's Witness, held religious beliefs that forbade his participation in the production of armaments. He was forced to leave his job when the employer closed his department and transferred him to a division that fabricated turrets for tanks. Indiana then denied Thomas unemployment compensation benefits. The Court found that the employee had been "put to a choice between fidelity to religious belief or cessation of work" and that the coercive impact of the forfeiture of benefits in this situation was undeniable:

> "'Not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of

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[6] See *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

> . . . religion, but the pressure upon [the employee] to forego that practice is unmistakable.'" *Thomas*, *supra*, at 717 (quoting *Sherbert*, *supra*, at 404).

We see no meaningful distinction among the situations of Sherbert, Thomas, and Hobbie. We again affirm, as stated in *Thomas:*

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, *or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." 450 U. S., at 717–718 (emphasis added).

Both *Sherbert* and *Thomas* held that such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest. The Appeals Commission does not seriously contend that its denial of benefits can withstand strict scrutiny; rather it urges that we hold that its justification should be determined under the less rigorous standard articulated in Chief Justice Burger's opinion in *Bowen* v. *Roy*, 476 U. S. 693, 707–708 (1986): "[T]he Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." Five Justices expressly rejected this argument in *Roy*. See *id.*, at 715–716 (BLACKMUN, J., concurring in part); *id.*, at 728 (O'CONNOR, J., joined by BRENNAN and MARSHALL, JJ., concurring in part and dissenting in part); *id.*, at 733 (WHITE, J., dissenting). We reject the argument again today. As JUSTICE O'CONNOR pointed out in *Roy*, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection

Clause already provides." *Id.*, at 727. See also *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").[7]

The Appeals Commission also suggests two grounds upon which we might distinguish *Sherbert* and *Thomas* from the present case. First, the Appeals Commission points out that in *Sherbert* the employee was deemed completely ineligible for benefits under South Carolina's unemployment insurance scheme because she would not accept work that conflicted with her Sabbath. The Appeals Commission contends that,

[7] In *Bowen* v. *Roy*, 476 U. S. 693 (1986), the Court considered a free exercise challenge to the statutory requirement that a Social Security number be supplied by any applicant seeking certain welfare benefits. In his opinion Chief Justice Burger expressly reaffirmed *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), and distinguished those cases from *Roy*. He observed that the statutes at issue in *Sherbert* and *Thomas* provided:

"[A] person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion. . . . In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." 476 U. S., at 708 (citations omitted).

Thus, even if the Court had accepted the reasoning of the Chief Justice's opinion in *Roy*—which it did not—we would apply strict scrutiny in this case. Although the purpose of the statute is to provide benefits to those persons who become "unemployed through no fault of their own," Fla. Stat. § 443.021 (1985), Florida nonetheless views a religiously motivated choice which leads to dismissal as "misconduct connected with . . . work." § 443.101. This scheme—which labels and penalizes behavior dictated by religious belief as intentional misconduct—exhibits greater hostility toward religion than one deeming such resignations to be "without good cause."

under Florida law, Hobbie faces only a limited disqualification from receipt of benefits,[8] and that once this fixed term has been served, she will again "be on an equal footing with all other workers, provided she avoids employment that conflicts with her religious beliefs." Brief for Appellee Appeals Commission 12. The Appeals Commission argues that such a disqualification provision is less coercive than the ineligibility determination in *Sherbert*, and that the burden it imposes on free exercise is therefore permissible.

This distinction is without substance. The immediate effects of ineligibility and disqualification are identical, and the disqualification penalty is substantial. Moreover, *Sherbert* was given controlling weight in *Thomas*, which involved a disqualification provision similar in all relevant respects to the statutory section implicated here. See *Thomas*, 450 U. S., at 709–710, n. 1.

The Appeals Commission also attempts to distinguish this case by arguing that, unlike the employees in *Sherbert* and *Thomas*, Hobbie was the "agent of change" and is therefore responsible for the consequences of the conflict between her job and her religious beliefs. In *Sherbert* and *Thomas*, the employees held their respective religious beliefs at the time of hire; subsequent changes in the conditions of employment made *by the employer* caused the conflict between work and belief. In this case, Hobbie's beliefs changed during the course of her employment, creating a conflict between job and faith that had not previously existed. The Appeals Commission contends that "it is . . . unfair for an employee to

[8] When an employee voluntarily leaves a position without good cause attributable to the employer, he or she is disqualified from receipt of benefits for the week of the departure and until he or she becomes reemployed and earns 17 times the weekly benefit amount. § 443.101(1)(a)(1). The penalty for discharge due to misconduct connected with work—the relevant provision here—is identical to that for voluntary departure, except that an *additional* penalty of a specified number of weeks may be added depending upon the severity of the employee's offense. § 443.101(1)(a)(2).

adopt religious beliefs that conflict with existing employment and expect to continue the employment without compromising those beliefs" and that this "intentional disregard of the employer's interests . . . constitutes misconduct." Brief for Appellee Appeals Commission 20–21.

In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired.[9] The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved. In *Sherbert*, *Thomas*, and the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice.

Finally, we reject the Appeals Commission's argument that the awarding of benefits to Hobbie would violate the Establishment Clause. This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the

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[9] Cf. *United States* v. *Ballard*, 322 U. S. 78, 87 (1944) (In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs); *Callahan* v. *Woods*, 658 F. 2d 679, 687 (CA9 1981) ("If judicial inquiry into the truth of one's religious beliefs would violate the free exercise clause, an inquiry into one's reasons for adopting those beliefs is similarly intrusive. So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible") (citation omitted).

Establishment Clause.[10] See, *e. g.*, *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) (judicial exemption of Amish children from compulsory attendance at high school); *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970) (tax exemption for churches). As in *Sherbert*, the accommodation at issue here does not entangle the State in an unlawful fostering of religion:

> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshipers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." 374 U. S., at 409.[11]

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[10] In the unemployment benefits context, the majorities *and* those dissenting have concluded that, were a State voluntarily to provide benefits to individuals in Hobbie's situation, such an accommodation would not violate the Establishment Clause. See *Thomas*, 450 U. S., at 719–720 (quoting *Sherbert*, 374 U. S., at 409); 450 U. S., at 723 (REHNQUIST, J., dissenting); *Sherbert*, *supra*, at 422–423 (Harlan, J., dissenting).

[11] The Appeals Commission contends that this Court's recent decision in *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985), reveals that the accommodation sought by Hobbie would constitute an unlawful establishment of religion. In *Thornton*, we held that a Connecticut statute that provided employees with an absolute right not to work on their Sabbath violated the Establishment Clause. The Court determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly advance[d] a particular religious practice," *id.*, at 710, and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.

In contrast, Florida's provision of unemployment benefits to religious observers does not single out a particular class of such persons for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief. Rather, the provision of unemployment benefits generally available within the State to religious observers who must leave their employment due to an irreconcilable conflict between the demands of work

III

We conclude that Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment. Here, as in *Sherbert* and *Thomas*, the State may not force an employee "to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work." *Sherbert*, 374 U. S., at 404. The judgment of the Florida Fifth District Court of Appeal is therefore

Reversed.

CHIEF JUSTICE REHNQUIST, dissenting.

I adhere to the views I stated in dissent in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 720–727 (1981). Accordingly, I would affirm.

JUSTICE POWELL, concurring in the judgment.

The Court properly concludes that *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), control the decision in this case. In both of those cases, the Court applied strict scrutiny analysis to a State's decision to deny unemployment benefits to an employee forced to leave a job because of his or her religious convictions. In each of these cases, the Court found that the State's action was not justified by a compelling interest and therefore violated the Free Exercise Clause of the First Amendment. The situation in this case is remarkably similar: The State denied Hobbie unemployment compensation, even though she was forced to leave her job because of sincerely held religious beliefs. As the Court recognizes, there is "no meaningful distinction among the situations of Sherbert, Thomas, and

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and conscience neutrally accommodates religious beliefs and practices, without endorsement.

Hobbie." *Ante*, at 141. Accordingly, the established analysis of *Sherbert* and *Thomas* should apply to this case.

This Court's decision last Term in *Bowen* v. *Roy*, 476 U. S. 693 (1986), did nothing to undercut the applicability of *Sherbert* and *Thomas* to the present case. A plurality in *Roy* indicated that "some incidental neutral restraints on the free exercise of religion," such as the requirement that applicants for Social Security benefits use assigned numbers, need not be supported by a compelling justification. 476 U. S., at 712. The plurality distinguished *Sherbert* and *Thomas* as cases where the statute at issue "created a mechanism for individualized exemptions." 476 U. S., at 708. The plurality noted:

> "If a [S]tate creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. . . . In *[Sherbert* and *Thomas]*, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." *Ibid.*

Thus, the decision in *Roy* makes explicitly clear that its reasoning does not apply to the state conduct in this case.

The Court recognizes in a footnote that the reasoning of *Roy* does not apply to this case. *Ante*, at 142, n. 7. Instead of relying on this distinction, however, the Court reaches out to reject the reasoning of *Roy in toto*. This strikes me as inappropriate and unnecessary. Given its context, the Court's rejection of *Roy*'s reasoning is dictum. The proper approach in this case is to apply the established precedent of *Sherbert* and *Thomas*. Because the Court goes further, I concur only in the judgment.

JUSTICE STEVENS, concurring in the judgment.

As the Court concludes, *ante*, at 141–142, this case is controlled by *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981). The State of Florida provides

unemployment benefits to those persons who become "unemployed through no fault of their own," Fla. Stat. § 443.021 (1985), but singles out the religiously motivated choice that subjected Paula Hobbie to dismissal as her fault and indeed as "misconduct connected with . . . work." § 443.101. The State thus regards her "religious claims less favorably than other claims," see *Bowen* v. *Roy*, 476 U. S. 693, 707, n. 17 (1986) (STEVENS, J., concurring in part and concurring in result). In such an instance, granting unemployment benefits is necessary to protect religious observers against unequal treatment. See *United States* v. *Lee*, 455 U. S. 252, 264, n. 3 (1982) (STEVENS, J., concurring in judgment). I also agree with the Court's explanation, *ante*, at 142–143, of why the two grounds upon which we might distinguish *Sherbert* and *Thomas* must be rejected. Accordingly, I concur in the judgment.

Syllabus

UNITED STATES *v.* PARADISE ET AL.

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

No. 85-999. Argued November 12, 1986—Decided February 25, 1987

In 1972, upon finding that, for almost four decades, the Alabama Department of Public Safety (Department) had systematically excluded blacks from employment as state troopers in violation of the Fourteenth Amendment, the District Court issued an order imposing a hiring quota and requiring the Department to refrain from engaging in discrimination in its employment practices, including promotions. By 1979, no blacks had attained the upper ranks of the Department. The court therefore approved a partial consent decree in which the Department agreed to develop within one year a procedure for promotion to corporal that would have no adverse impact on blacks and would comply with the Uniform Guidelines on Employee Selection Procedures (Guidelines), and thereafter to develop similar procedures for the other upper ranks (1979 Decree). As of 1981, however, more than a year after the 1979 Decree's deadline, no black troopers had been promoted. The court approved a second consent decree in which the parties agreed that the Department's proposed corporal promotion test would be administered to applicants, that the results would be reviewed to determine any adverse impact on blacks under the Guidelines, that the determination of a procedure would be submitted to the court if the parties were unable to agree thereon, and that no promotions would occur until the parties agreed or the court ruled upon the promotion method to be used (1981 Decree). Of the 60 blacks to whom the test was administered, only 5 (8.3%) were listed in the top half of the promotional register, and the highest ranked black was number 80. The Department then declared that it had an immediate need for between 8 and 10 new corporals and stated its intention to elevate between 16 and 20 individuals before constructing a new list. The United States objected to any use of the list in making promotions. In 1983, the District Court held that the test had an adverse impact on blacks, and ordered the Department to submit a plan to promote at least 15 qualified candidates to corporal in a manner that would not have an adverse racial impact. The Department proposed to promote 4 blacks among the 15 new corporals, but the court rejected that proposal and ordered that "for a period of time," at least 50% of those promoted to corporal must be black, if qualified black candidates were available, and imposed a 50% promotional requirement in the other upper ranks, but only

if there were qualified black candidates, *if* a particular rank were less than 25% black, and *if* the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank. The Department was also ordered to submit a realistic schedule for the development of promotional procedures for all ranks above the entry level. Subsequently, the Department promoted eight blacks and eight whites under the court's order, and submitted its proposed corporal and sergeant promotional procedures, at which times the court suspended the 50% requirement for those ranks. The United States appealed the court's order on the ground that it violated the Fourteenth Amendment's equal protection guarantee. The Court of Appeals affirmed the order.

Held: The judgment is affirmed.

767 F. 2d 1514, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL, concluded that, even under a strict scrutiny analysis, the one-black-for-one-white promotion requirement is permissible under the Equal Protection Clause of the Fourteenth Amendment. Pp. 166–186.

1. The race-conscious relief ordered by the District Court is justified by a compelling governmental interest in eradicating the Department's pervasive, systematic, and obstinate discriminatory exclusion of blacks. The contention that promotion relief is unjustified because the Department has been found to have committed only hiring discrimination is without merit, since promotion, like hiring, has been a central concern of the District Court since the action's commencement. The Department's intentional hiring discrimination had a profound effect on the force's upper ranks by precluding blacks from competing for promotions. Moreover, the record amply demonstrates that the Department's promotional procedure is itself discriminatory, resulting in an upper rank structure that totally excludes blacks. Pp. 166–170.

2. The District Court's enforcement order is also supported by the societal interest in compliance with federal-court judgments. The Department has had a consistent history of resistance to the District Court's orders, and relief was imposed only after the Department failed to live up to its court-approved commitments. Pp. 170–171.

3. The one-for-one promotional requirement is narrowly tailored to serve its purposes, both as applied to the initial corporal promotions and as a continuing contingent order with respect to the upper ranks. Pp. 171–186.

(a) The one-for-one requirement is necessary to eliminate the effects of the Department's long-term, open, and pervasive discrimination, including the absolute exclusion of blacks in the upper ranks; to ensure

expeditious compliance with the 1979 and 1981 Decrees by inducing the implementation of a promotional procedure that would not have an adverse racial impact; and to eradicate the ill effects of the Department's delay in producing such a procedure. The option proffered by the Department—to promote 4 blacks and 11 whites as a stopgap measure, and to allow additional time for the development and submission of a nondiscriminatory procedure—would not have satisfied any of the above purposes. Furthermore, the heavy fines and fees suggested by the Government as an alternative were never actually proposed to the District Court; were likely to be ineffective since the imposition of attorney's fees and costs in the past had not prevented delays; would not have compensated the plaintiffs for the delays; and would not have satisfied the Department's need to make 15 promotions immediately. Pp. 171–177.

(b) The one-for-one requirement is flexible in application at all ranks, in that it applies only when the Department needs to make promotions and does not require gratuitous promotions. Furthermore, the requirement may be waived by the court if there are no qualified black troopers, and, in fact, this has already happened with respect to lieutenant and captain positions. Moreover, the requirement is temporary, its term being contingent upon the Department's successful implementation of valid promotional procedures. It was, in fact, suspended upon the timely submission of procedures for promotion to corporal and sergeant. Pp. 177–178.

(c) The numerical relief ordered bears a proper relation to the percentage of nonwhites in the relevant work force, since the District Court ordered 50% black promotions until each rank is 25% black, whereas blacks constitute 25% of the relevant labor market. The one-for-one requirement is not arbitrary when compared to the 25% minority labor pool, since the 50% figure is not itself the goal but merely represents the speed at which the 25% goal will be achieved, some promptness being justified by the Department's history of discrimination and delays. Although the 50% figure necessarily involves a degree of imprecision, it represents the District Court's informed attempt to balance the rights and interests of the plaintiffs, the Department, and white troopers. Pp. 179–182.

(d) The one-for-one requirement does not impose an unacceptable burden on innocent white promotion applicants. The requirement is temporary and limited in nature, has only been used once, and may never be used again. It does not bar, but simply postpones, advancement by some whites, and does not require the layoff or discharge of whites or the promotion of unqualified blacks over qualified whites. Pp. 182–183.

(e) District judges, having firsthand experience with the parties and the particular situation, are given broad discretion to fashion appropriate

remedies to cure Fourteenth Amendment violations, and the exercise of that discretion is entitled to substantial respect. Pp. 183–185.

JUSTICE STEVENS concluded that *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, sets forth the appropriate governing standards for district court remedial orders in cases such as the present that involve racially discriminatory state actions violative of the Fourteenth Amendment. Because the record here discloses an egregious violation of the Equal Protection Clause, the District Court had broad and flexible authority to fashion race-conscious relief under the *Swann* standards. There has been no showing that the District Judge abused his discretion in doing so. Pp. 189–195.

BRENNAN, J., announced the judgment of the Court and delivered an opinion in which MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 186. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 189. WHITE, J., filed a dissenting statement, *post*, p. 196. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 196.

Solicitor General Fried argued the cause for the United States. With him on the briefs were *Assistant Attorney General Reynolds*, *Deputy Solicitor General Lauber*, *Deputy Assistant Attorney General Carvin*, *Roger Clegg*, *Walter W. Barnett*, *David K. Flynn*, and *Clint Bolick*.

J. Richard Cohen argued the cause for respondents. With him on the brief for respondents Paradise et al. were *Morris S. Dees, Jr.*, and *Arthur Z. Lazarus, Jr.* *Edward L. Hardin, Jr.*, filed a brief for respondents Alabama Department of Public Safety et al. under this Court's Rule 19.6. *James S. Ward* filed a brief for respondents McClellan et al. under this Court's Rule 19.6.*

**Ronald A. Zumbrun*, *John H. Findley*, and *Anthony T. Caso* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Robert Abrams*, Attorney General, *O. Peter Sherwood*, Solicitor General, *Lawrence S. Kahn*, Deputy Solicitor General, and *Suzanne M. Lynn*, *Jon C. Dubin*, and *Elvia Rosales Arriola*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *John K. Van de Kamp* of California, *Neil F. Hartigan* of Illinois, *William J. Guste, Jr.*, of Louisiana, *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Charles G. Brown* of West Virginia, and *Bronson C. La Follette* of Wisconsin; for the

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL join.

The question we must decide is whether relief awarded in this case, in the form of a one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety (Department), is permissible under the equal protection guarantee of the Fourteenth Amendment.

In 1972 the United States District Court for the Middle District of Alabama held that the Department had systematically excluded blacks from employment in violation of the Fourteenth Amendment. Some 11 years later, confronted with the Department's failure to develop promotion procedures that did not have an adverse impact on blacks, the District Court ordered the promotion of one black trooper for each white trooper elevated in rank, as long as qualified black candidates were available, until the Department implemented an acceptable promotion procedure. The United States challenges the constitutionality of this order.[1]

I

Because the Department's prior employment practices and conduct during this lawsuit bear directly on the constitution-

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city of Birmingham, Alabama, by *James P. Alexander* and *James K. Baker;* for the NAACP Legal Defense & Educational Fund, Inc., by *Julius L. Chambers, Ronald L. Ellis, Eric Schnapper,* and *Clyde E. Murphy;* and for the Lawyers' Committee for Civil Rights Under Law et al. by *Robert D. Joffe, Thomas D. Barr, Robert F. Mullen, Harold R. Tyler, Jr., James Robertson, Norman Redlich, William L. Robinson, Richard T. Seymour,* and *Stephen L. Spitz.*

Daniel B. Edelman, James R. Murphy, Charles L. Reischel, Frederick N. Merkin, and *Robert Cramer* filed a brief for the city of Detroit et al. as *amici curiae.*

[1] The Department and its Director, Colonel Byron Prescott, and the intervenors, a class of white applicants for promotion within the Department, have filed briefs in support of the United States, but they did not themselves petition for certiorari.

ality of any race-conscious remedy imposed upon it, we must relate the tortuous course of this litigation in some detail.

A

In 1972 the National Association for the Advancement of Colored People (NAACP) brought this action challenging the Department's longstanding practice of excluding blacks from employment. The United States was joined as a party plaintiff, and Phillip Paradise, Jr., intervened on behalf of a class of black plaintiffs. District Judge Frank M. Johnson, Jr., determined:

> "Plaintiffs have shown without contradiction that the defendants have engaged in a blatant and continuous pattern and practice of discrimination in hiring in the Alabama Department of Public Safety, both as to troopers and supporting personnel. In the thirty-seven year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment." *NAACP* v. *Allen*, 340 F. Supp. 703, 705 (MD Ala. 1972).

He concluded:

> "Under such circumstances . . . the courts have the authority and the duty not only to order an end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination. The racial discrimination in this instance has so permeated the Department['s] employment policies that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects." *Id.*, at 705–706 (citations omitted).

As a result, the court issued an order (1972 order), enjoining the Department to hire one black trooper for each white

trooper hired until blacks constituted approximately 25% of the state trooper force.[2] Judge Johnson also enjoined the Department from "engaging in any employment practices, including recruitment, examination, appointment, training, *promotion*, retention or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color." *Id.*, at 706 (emphasis added). The court further required that "eligible and promotional registers heretofore used for the purpose of hiring troopers be and they are hereby abrogated to the extent necessary to comply with this decree." *Id.*, at 707.[3]

The defendants appealed,[4] but the Fifth Circuit upheld the hiring requirement:

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[2] In *United States* v. *Frazer*, 317 F. Supp. 1079 (MD Ala. 1970), Judge Johnson found that certain state agencies, including the personnel department, which supplies support staff to the department, were engaged in systematic violations of the constitutional rights of black applicants and employees. In *NAACP* v. *Allen*, 340 F. Supp. 703 (MD Ala. 1972), the decree in *United States* v. *Frazer* was amended to require the personnel department to ensure that, until blacks constituted 25% of the Department's support personnel, 50% of the individuals hired for those positions were black. 340 F. Supp., at 706.

[3] The court awarded attorney's fees to the plaintiffs. Judge Johnson found that the defendants "unquestionably knew and understood that their discriminatory practices violated the Fourteenth Amendment" and that, as a consequence, "their defense of th[e] lawsuit amount[ed] to unreasonable and obdurate conduct which necessitated the expense of litigation." *Id.*, at 708.

[4] While the appeal was pending, the Court of Appeals ordered the District Judge to supplement the record and to reconsider his decree. After discovery, Judge Johnson decided not to alter his order. He explicitly compared the results achieved by the injunction prohibiting discrimination in *United States* v. *Frazer*, *supra*, and the hiring order in *NAACP* v. *Allen*, *supra:*

"The contrast in results achieved to this point in the *Allen* case and the *Frazer* case under the two orders entered in those cases is striking indeed. Even though the agencies affected by the *Frazer* order and the Department of Public Safety draw upon the same pool of black applicants—that is, those who have been processed through the Department of Person-

> "The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit." *NAACP* v. *Allen*, 493 F. 2d 614, 621 (1974).

The Court of Appeals also held that white applicants who had higher eligibility rankings than blacks were not denied due process or equal protection of the laws by the one-for-one hiring order. The Department's use of unvalidated selection procedures that disproportionately excluded blacks precluded any argument that "quota hiring produces unconstitutional 'reverse' discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons." *Id.*, at 618.[5]

In 1974, only shortly after the Court of Appeals' decision, the plaintiffs found it necessary to seek further relief from the District Court. Judge Johnson found that "defendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper

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nel—*Allen* has seen substantial black hiring, while the progress under *Frazer* has been slow and, in many instances, nonexistent. . . .

"[T]his Court's experience reflects that the decrees that are entered must contain hiring goals; otherwise effective relief will not be achieved." *United States* v. *Dothard*, 373 F. Supp. 504, 506–507 (MD Ala.), aff'd *sub nom. NAACP* v. *Allen*, 493 F. 2d 614 (CA5 1974).

[5] None of the parties sought certiorari review of the Court of Appeals' determination that the 50% hiring quota at issue was constitutional.

force and the number of new troopers hired." *Paradise* v. *Dothard*, Civ. Action No. 3561–N (MD Ala., Aug. 5, 1975). The court also addressed the disproportionate failure of blacks hired to achieve permanent trooper status:[6]

> "[T]he high attrition rate among blacks resulted from the selection of other than the best qualified blacks from the eligibility rosters, some social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing, and discipline of blacks harsher than that given whites for similar misconduct while on the force." *Ibid.*

The court reaffirmed the 1972 hiring order, enjoining any further attempts by the Department to delay or frustrate compliance.

B

In September 1977 the plaintiffs again had to return to the District Court for supplemental relief, this time specifically on the question of the Department's *promotion* practices. Following extensive discovery, the parties entered into a partial consent decree (1979 Decree), approved by the court in February 1979.[7] In this decree, the Department agreed to develop within one year a promotion procedure that would be fair to all applicants and have "little or no adverse impact upon blacks seeking promotion to corporal." App. 40. In the decree, the Department also agreed that the promotion procedure would conform with the 1978 Uniform Guidelines

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[6] At this time, 40 blacks had been hired as a result of the 1972 District Court order; only 27 remained on the force. All 29 whites hired during the same period had retained their positions. *Paradise* v. *Dothard*, Civ. Action No. 3561–N (MD Ala., Aug. 5, 1975).

[7] Judge Johnson presided in this litigation until he assumed his position on the former Fifth Circuit in 1979. At that time, the case was transferred to District Judge Varner; subsequently, it was reassigned to Judge Myron Thompson in October 1980.

on Employee Selection Procedures, 28 CFR § 50.14 (1978).[8] Once such a procedure was in place for the rank of corporal, the decree required the defendants to develop similar procedures for the other upper ranks—sergeant, lieutenant, captain, and major. The decree expressly provided that the plaintiffs might apply to the court for enforcement of its terms or for other appropriate relief. App. 41.[9]

Five days after approval of the 1979 Decree, the defendants sought clarification of the 1972 *hiring* order. The Department maintained that its goal—a 25% black trooper force—applied only to officers in entry-level positions and not to the upper ranks. The court responded:

> "On this point, there is no ambiguity. The Court's [1972] order required that one-to-one hiring be carried out until approximately twenty-five percent of the *state trooper force* is black. It is perfectly clear that the order did not distinguish among troopers by rank." *Paradise* v. *Shoemaker*, 470 F. Supp. 439, 440 (MD Ala. 1979) (emphasis in original).

The Department also argued that because the 25% objective could not be achieved unless 37.5% of entry-level positions were held by blacks, "more qualified white applicants" were passed over than was constitutionally permissible. *Id.*, at 441. The District Court rejected the argument, stating:

> "To modify this order would be to do less than the law requires, which is to eradicate the continuing effects of past unlawful practices. In 1972, defendants were not just found guilty of discriminating against blacks in hir-

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[8] The Uniform Guidelines are "designed to provide a framework for determining the proper use of tests and other [employee] selection procedures consistent with Federal law." 28 CFR § 50.14, pt. 1, § 1 (1978).

[9] In the interim the parties agreed to utilize the existing state merit system for promotions to the rank of corporal, provided that at least three black troopers were promoted. The details of this procedure were set forth in an "Agreement of Counsel for the Parties." App. 46.

> ing to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper *at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, there is still not one black.* The [hiring] quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest. . . . The order in this case is but the necessary remedy for an intolerable wrong." *Id.*, at 442 (emphasis added).

In April 1981, more than a year after the deadline set in the 1979 Decree, the Department proposed a selection procedure for promotion to corporal and sought approval from the District Court. The United States and the plaintiff class both objected to implementation of the procedure, arguing that it had not been validated and that its use would be impermissible if it had an adverse impact on blacks. To resolve this dispute the parties executed a second consent decree (1981 Decree) which the District Court approved on August 18, 1981.

In the 1981 Decree, the Department reaffirmed its commitment made in 1979 to implement a promotion procedure with little or no adverse impact on blacks. The parties then agreed to the administration of the proposed promotion procedure and that its results would be "reviewed to determine whether the selection procedure has an adverse impact against black applicants." App. 51. Whether there was adverse impact was to be determined by reference to the "four-fifths" rule of § 4 of the Uniform Guidelines. See 28 CFR § 50.14 (1978).[10] If the parties proved unable to agree on

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[10] According to § 4 of the Uniform Guidelines, "[a] selection rate for any racial, ethnic or sex group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally

a procedure, its determination would be submitted to the District Court. No promotions would occur until the "parties . . . agreed in writing or the Court . . . ruled upon the method to be used for making promotions with little or no adverse impact." App. 53.

The defendants administered the test to 262 applicants of whom 60 (23%) were black. Of the 60 blacks who took the test, only 5 (8.3%) were listed in the top half of the promotion register; the highest ranked black candidate was number 80. *Id.*, at 119. In response to an inquiry from the United States, the Department indicated that there was an immediate need to make between 8 and 10 promotions to corporal and announced its intention to elevate between 16 and 20 individuals before construction of a new list. 1 Record 222.

The United States objected to any rank-ordered use of the list, stating that such use "would result in substantial adverse impact against black applicants" and suggested that the defendants submit an alternative proposal that would comply with the requirements of the 1979 and 1981 Decrees. *Id.*, at 220–221. No proposal was submitted, and no promotions were made during the next nine months.

In April 1983, plaintiffs returned to District Court and sought an order enforcing the terms of the two consent decrees. Specifically, they requested that defendants be required to *promote* blacks to corporal "at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotional procedure." *Id.*, at 112. The plaintiff class contended that such an order would "encourage defendants to develop a valid promotional procedure as soon as possible," and would "help to alleviate the gross underrepresentation of blacks in the supervisory

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be regarded as evidence of adverse impact." 28 CFR § 50.14, pt. 1, § 4 (1978). In other words, if 60% of the white troopers who take a promotion test pass it, then 48% of the black troopers to whom it is administered must pass.

ranks of the Department"[11]—an underrepresentation caused by the Department's past discrimination and exacerbated by its continuing refusal to implement a fair procedure. *Ibid.*

Although it opposed the one-for-one promotion requirement, the United States agreed that the consent decrees should be enforced. It stated that defendants had failed to offer "any reason[s] why promotions should not be made," nor had they offered an explanation as to why they had halted "progress towards remedying the effects of past discrimination." *Id.*, at 199–201. The United States further observed that the Department's failure to produce a promotion plan in compliance with the 1979 and 1981 Decrees "suggests that a pattern of discrimination against blacks in the Department . . . may be continuing." *Id.*, at 200.[12]

After the motion to enforce was filed, four white applicants for promotion to corporal sought to intervene on behalf of a class composed of those white applicants who took the proposed corporal's examination and ranked number 1 through number 79. App. 81–87. They argued that the 1979 and 1981 Decrees and the relief proposed by the plaintiffs in their motion to enforce were "unreasonable, illegal, unconstitutional or against public policy." *Id.*, at 99.

In an order entered October 28, 1983, the District Court held that the Department's selection procedure had an adverse impact on blacks. *Paradise* v. *Prescott*, 580 F. Supp. 171, 174 (MD Ala.).[13] Observing that even if 79 corporals

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[11] In fact, the only black candidates who had been promoted since 1972 were the four promoted pursuant to the counsels' sidebar to the 1979 Decree. See n. 9, *supra*.

[12] The Department opposed the motion to enforce, arguing that the relief sought by the plaintiffs was unconstitutional. The Department requested an opportunity to demonstrate that the proposed procedure was valid and that it did not adversely impact upon black candidates within the meaning of the consent decrees and the Uniform Guidelines.

[13] In a separate order issued that same day, the District Court permitted the white intervenors to participate in the case on a prospective basis only. The court held that intervention was untimely as to prior orders, judgments, and decrees. App. 116.

were promoted in rank order, rather than the 15 contemplated, none would be black, the court concluded that "[s]hort of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact." *Id.*, at 173.[14] The Department was ordered to submit, by November 10, 1983, "a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact." *Id.*, at 175.

The Department subsequently submitted a proposal to promote 15 persons to the rank of corporal, of whom 4 would be black. In addition, the Department requested that the department of personnel be given more time to develop and submit for court approval a nondiscriminatory promotion procedure.

The United States did not oppose the Department's proposal, but the plaintiffs did. They argued that the proposal "totally disregards the injury plaintiffs have suffered due to the defendants' four-and-a-half year delay [since the 1979 Decree] and fails to provide any mechanism that will insure the present scenario will not reoccur." 2 Record 382.

On December 15, 1983, the District Court granted the plaintiffs' motion to enforce the 1979 and 1981 Decrees. *Paradise* v. *Prescott*, 585 F. Supp. 72 (MD Ala.). Confronted with the Department's immediate need to promote 15 troopers to corporal and the parties' inability to agree, the court was required by the 1979 and 1981 Decrees to fashion a promotion procedure. The District Judge summarized the situation:

> "On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Never-

[14] The District Court also rejected the Department's argument that the one-for-one hiring order was a "special program" within the meaning of the Uniform Guidelines that would insulate the Department from any finding of adverse impact in its promotion procedures. 580 F. Supp., at 174.

theless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black*. Of the 25 captains, *there is still not one black*. Of the 35 lieutenants, *there is still not one black*. Of the 65 sergeants, *there is still not one black*. Of the 66 corporals, *only four are black*. Thus, the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers." *Id.*, at 74 (emphasis in original).

The court then fashioned the relief at issue here. It held that "for a period of time," at least 50% of the promotions to corporal must be awarded to black troopers, if qualified black candidates were available. The court also held that "if there is to be within the near future an orderly path for black troopers to enter the upper ranks, any relief fashioned by the court must address the department's delay in developing acceptable promotion procedures for all ranks." *Id.*, at 75. Thus, the court imposed a 50% promotional quota in the upper ranks, but only *if* there were qualified black candidates, *if* the rank were less than 25% black, and *if* the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank. The court concluded that the effects of past discrimination in the Department "will not wither away of their own accord" and that "without promotional quotas the continuing effects of this discrimination cannot be eliminated." *Id.*, at 75 and 76. The court highlighted the temporary nature and flexible

design of the relief ordered, stating that it was "specifically tailored" to eliminate the lingering effects of past discrimination, to remedy the delayed compliance with the consent decrees, and to ensure prompt implementation of lawful procedures. *Ibid.*

Finally, the Department was ordered to submit within 30 days a schedule for the development of promotion procedures for all ranks above the entry level. The schedule was to be "based upon realistic expectations" as the court intended that "the use of the quotas . . . be a one-time occurrence." *Ibid.* The District Court reasoned that, under the order it had entered, the Department had "the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures." *Id.*, at 76.

Numerous motions for reconsideration of the court's order and for the alteration or amendment of the court's judgment were denied by the District Court. In its motion, the Department set forth the "new contention" that it was "without legal authority and sufficiently trained personnel to design any promotional procedures" because "this function is allocated by statute to the Department of Personnel." *Paradise* v. *Prescott*, Civ. Action No. 3561–N (MD Ala., Jan. 13, 1984). The District Court responded that the Department had signed consent decrees in 1979 and 1981 mandating development of an acceptable procedure and that Department counsel had represented at the January 5, 1984, hearing that "it was anticipated that the development of these procedures would take only a few months." *Ibid.* The judge concluded:

> "It is now years later and this court will not entertain the excuse that the department is now without legal authority to meet its obligations under the consent decrees. . . . [T]he Department of Personnel, which is also a party to these proceedings, assured the court at the January 5, [1984] hearing that it would work closely with the Public Safety Department to develop acceptable promotion

procedures. The Public Safety Department's contention that it is without legal authority is not only meritless, it is frivolous.

"Moreover, that the Department of Public Safety would even advance this argument *dramatically demonstrates the need for the relief imposed by this court. Such frivolous arguments serve no purpose other than to prolong the discriminatory effects of the department's 37-year history of racial discrimination.*" *Ibid.* (emphasis added).

In February 1984, the Department promoted eight blacks and eight whites to corporal pursuant to the District Court's order enforcing the consent decrees.

Four months later, the Department submitted for the court's approval its proposed procedure for promotions to the rank of corporal. The District Court ruled that the Department could promote up to 13 troopers utilizing this procedure and suspended application of the one-for-one requirement for that purpose. App. 163–164. In October 1984, following approval of the Department's new selection procedure for promotion to sergeant, the court similarly suspended application of the quota at that rank. *Id.*, at 176–177.[15]

On appeal the Court of Appeals for the Eleventh Circuit affirmed the District Court's order. The Court of Appeals concluded that the relief at issue was designed to remedy the present effects of past discrimination—"effects which, as the history of this case amply demonstrates, 'will not wither away of their own accord.'" *Paradise* v. *Prescott*, 767 F. 2d 1514, 1533 (1985) (quoting 585 F. Supp., at 75). In addition, the relief awarded was deemed to "exten[d] no further than necessary to accomplish the objective of remedying the 'egre-

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[15] In addition, the Department has been permitted to promote only white troopers to lieutenant and captain because no blacks have qualified, as of yet, for promotion to those ranks. *Paradise* v. *Prescott*, 767 F. 2d 1514, 1538, n. 19 (CA11 1985).

gious' and longstanding racial imbalances in the upper ranks of the Department." 767 F. 2d, at 1532–1533.

We granted certiorari. 478 U. S. 1019 (1986). We affirm.

II

The United States maintains that the race-conscious relief ordered in this case violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[16]

It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. See *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 480 (1986), and cases cited therein. See also *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 286 (1986) ("The Court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program") (O'CONNOR, J., concurring in part and concurring in judgment). But although this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis.[17] We need not do

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[16] The Government framed the issue presented as "[w]hether the one-black-for-one-white promotion quota adopted by the district court . . . is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution." Brief for United States I. Because the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth, we need not decide whether the race-conscious relief ordered in this case would violate the former as well as the latter constitutional provision.

[17] See *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 274 (1986) (opinion of POWELL, J.) (the means chosen must be "narrowly tailored" to achieve a "compelling government interest"); *id.*, at 285 (O'CONNOR, J., concurring) (same); *id.*, at 301–302 (MARSHALL, J., dissenting, joined by BRENNAN, J. and BLACKMUN, J.) (remedial use of race permissible if it

so in this case, however, because we conclude that the relief ordered survives even strict scrutiny analysis: it is "narrowly tailored" to serve a "compelling [governmental] purpose." *Id.*, at 274 (opinion of POWELL, J.).

The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor. See *ibid.*; *id.*, at 286 (O'CONNOR, J., concurring); *Sheet Metal Workers*, *supra*, at 480 (opinion of BRENNAN, J.). See also *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763 (1976) (prevention and remedying of racial discrimination and its effects is a national policy of "highest priority"). In 1972 the District Court found, and the Court of Appeals affirmed, that for almost four decades the Department had excluded blacks from all positions, including jobs in the upper ranks. Such egregious discriminatory conduct was "unquestionably a violation of the Fourteenth Amendment." *NAACP* v. *Allen*, 340 F. Supp., at 705. As the United States concedes, Brief for United States 21, the pervasive, systematic, and obstinate discriminatory conduct of the Department created a profound need and a firm justification for the race-conscious relief ordered by the District Court.[18]

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serves "'important governmental objectives'" and is "'substantially related to achievement of those objectives'") (quoting *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (1978)); 476 U. S., at 313 (STEVENS, J., dissenting) (both public interest served by racial classification and means employed must justify adverse effects on the disadvantaged group); *Fullilove* v. *Klutznick*, 448 U. S. 448, 507 (1980) (POWELL, J., concurring) (expressing concern first articulated in *Bakke*, *supra*, at 362, that review not be "'strict' in theory and fatal in fact").

[18] *Amici*, the city of Birmingham, the city of Detroit, the city of Los Angeles, and the District of Columbia, state that the operations of police departments are crippled by the lingering effects of past discrimination. They believe that race-conscious relief in hiring and promotion restores community trust in the fairness of law enforcement and facilitates effective police service by encouraging citizen cooperation. See also *Wygant*, *supra*, at 314 (STEVENS, J., dissenting) ("[I]n a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that

The Department and the intervenors, however, maintain that the Department was found guilty only of discrimination in hiring, and not in its promotional practices. They argue that no remedial relief is justified in the promotion context because the intentional discrimination in hiring was without effect in the upper ranks, and because the Department's promotional procedure was not discriminatory. There is no merit in either premise.

Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by nonminorities. The lower courts determined that this situation was explicable only by reference to the Department's past discriminatory conduct.[19] In 1972 the Department was "not just found guilty of discriminating against blacks in hiring to entry-level positions. The court found that in 37 years there had never been a black trooper at any rank." *Paradise* v.

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an integrated police force could develop a better relationship with the community and do a more effective job of maintaining law and order than a force composed only of white officers"); *NAACP* v. *Allen*, 493 F. 2d, at 621 ("This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement" (citation omitted)). *Amicus* NAACP Legal Defense and Educational Fund, Inc., suggests that the governmental interest in a racially integrated Department is amplified here due to community perceptions of, and reactions to the Department's historical role in defense of segregation and its active opposition to the civil rights movement. We need not decide if either the generalized governmental interest in effective law enforcement or the more particularized need to overcome any impediments to law enforcement created by perceptions arising from the egregious discriminatory conduct of the Department is compelling. In this case the judicial determinations of prior discriminatory policies and conduct satisfy the first prong of the strict scrutiny test.

[19] Compare this situation with that described in *Wygant*, *supra*, at 276 (opinion of POWELL, J.) ("There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind").

Shoemaker, 470 F. Supp., at 442. In 1979 the District Judge stated that one continuing effect of the Department's historical discrimination was that, "as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*." *Ibid.* The court explained that the *hiring* quota it had fashioned was intended to provide "an impetus to promote blacks into those positions" and that "[t]o focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Ibid.* The District Court crafted the relief it did due to "the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination." 585 F. Supp., at 75, n. 1. It is too late for the Department to attempt to segregate the results achieved by its hiring practices and those achieved by its promotional practices.

The argument that the Department's promotion procedure was not discriminatory is belied by the record. In 1979, faced with additional allegations of discrimination, the Department agreed to adopt promotion procedures without an adverse impact on black candidates within one year. See 767 F. 2d, at 1532. By 1983 the Department had promoted only four blacks, and these promotions had been made pursuant to the 1979 Decree, and "not the voluntary action of the Department." *Id.*, at 1533, n. 16. In December 1983, the District Court found, despite the commitments made in the consent decrees, that the Department's proposed promotion plan would have an adverse impact upon blacks, 580 F. Supp., at 174, and that "the department *still* operate[d] an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons." 585 F. Supp., at 74 (emphasis in original). On appeal, the Eleventh Circuit summarily rejected the argument of the Department and the intervenors:

> "[I]t is no answer in this case to say that plaintiffs have not proven that the Department has discriminated

> against blacks above the entry-level seeking promotions. . . . [I]t cannot be gainsaid that white troopers promoted *since 1972* were the specific beneficiaries of *an official policy which systematically excluded all blacks*." 767 F. 2d, at 1533, n. 16 (emphasis added).

Promotion, like hiring, has been a central concern of the District Court since the commencement of this action; since 1972, the relief crafted has included strictures against promotion procedures that have a discriminatory purpose or effect. The race-conscious relief at issue here is justified by a compelling interest in remedying the discrimination that permeated entry-level hiring practices and the promotional process alike.[20]

Finally, in this case, as in *Sheet Metal Workers*, 478 U. S., at 485 (POWELL, J., concurring in part and concurring in judgment), the District Court's enforcement order is "supported not only by the governmental interest in eradicating [the Department's] discriminatory practices, it is also supported by the societal interest in compliance with the judgments of federal courts." The relief at issue was imposed upon a defendant with a consistent history of resistance to

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[20] We also reject the argument of the United States, the Department, and the intervenors that the purpose of the order enforcing the consent decrees was the imposition of a particular racial balance on the upper ranks of the Department. The one-for-one mechanism was employed not to punish the Department's failure to achieve racial balance, but to remedy the Department's refusal to fulfill the commitment made in the consent decrees to implement a promotion procedure without adverse impact on blacks and to eradicate the effects of its past delay and discrimination. The racial imbalances in the Department are properly characterized as the effects of the Department's past discriminatory actions and of its failure to develop a promotion procedure without adverse impact as required by the previous court orders and the consent decrees. Cf. *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 487 (1986) (POWELL, J., concurring in part and concurring in judgment) ("The contempt order was not imposed for the Union's failure to achieve the goal, but for its failure to take the prescribed steps that would facilitate achieving the goal").

the District Court's orders, and only *after* the Department failed to live up to its court-approved commitments.

III

While conceding that the District Court's order serves a compelling interest, the Government insists that it was not narrowly tailored to accomplish its purposes—to remedy past discrimination and eliminate its lingering effects, to enforce compliance with the 1979 and 1981 Decrees by bringing about the speedy implementation of a promotion procedure that would not have an adverse impact on blacks, and to eradicate the ill effects of the Department's delay in producing such a procedure. We cannot agree.

In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. *Sheet Metal Workers*, 478 U. S., at 481 (opinion of BRENNAN, J.); *id.*, at 486 (POWELL, J., concurring in part and concurring in judgment). When considered in light of these factors, it was amply established, and we find that the one-for-one promotion requirement was narrowly tailored to serve its several purposes, both as applied to the initial set of promotions to the rank of corporal and as a continuing contingent order with respect to the upper ranks.

A

To evaluate the District Court's determination that it was *necessary* to order the promotion of eight whites and eight blacks to the rank of corporal at the time of the motion to enforce, we must examine the purposes the order was intended to serve. First, the court sought to eliminate the effects of the Department's "long term, open, and pervasive" discrimination, including the absolute exclusion of blacks from

its upper ranks. Second, the judge sought to ensure expeditious compliance with the 1979 and 1981 Decrees by inducing the Department to implement a promotion procedure that would not have an adverse impact on blacks. Finally, the court needed to eliminate so far as possible the effects of the Department's delay in producing such a procedure. Confronted by the Department's urgent need to promote at least 15 troopers to corporal, see *Paradise* v. *Prescott*, 580 F. Supp., at 173, the District Court determined that all of its purposes could be served only by ordering the promotion of eight blacks and eight whites, as requested by the plaintiff class.

The options proffered by the Government and the Department would not have served the court's purposes. The Department proposed, as a stopgap measure, to promote 4 blacks and 11 whites and requested additional time to allow the department of personnel to develop and submit a nondiscriminatory promotion procedure. The United States argues that the Department's proposal would have allowed this round of promotions to be made without adverse impact on black candidates.

The Department's proposal was inadequate because it completely failed to address two of the purposes cited above. The Department's ad hoc offer to make one round of promotions without an adverse impact ignored the court's concern that an acceptable procedure be adopted with alacrity. As early as 1972, the Department had been enjoined from engaging in any promotional practices "for the purpose or with the effect of discriminating against any employee . . . on the ground of race or color." *NAACP* v. *Allen*, 340 F. Supp., at 706. In 1979, the Department had promised in a court-approved consent decree to develop and implement a *procedure* without adverse impact by 1980. By 1983, such a procedure still had not been established, and Paradise sought enforcement of the consent decrees. Given the record of delay, we find it astonishing that the Department should sug-

gest that in 1983 the District Court was constitutionally required to settle for yet another promise that such a procedure would be forthcoming "as soon as possible." 2 Record 358.

Moreover, the Department's proposal ignored the injury to the plaintiff class that resulted from its delay in complying with the terms of the 1972 order and the 1979 and 1981 Decrees.[21] As the Eleventh Circuit pointed out, no blacks were promoted between 1972 and 1979; the four blacks promoted in 1979 were elevated pursuant to the 1979 Decree and not as a result of the voluntary action of the Department; and, finally, the whites promoted *since 1972* "were the specific beneficiaries of an official policy which systematically excluded all blacks." 767 F. 2d, at 1533, n. 16. To permit ad hoc decisionmaking to continue and allow only 4 of 15 slots to

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[21] The Government contends that "the Department in reality had acted with reasonable diligence to devise a new corporal's examination" and that both Paradise and the District Judge "failed to appreciate how difficult it is to develop and implement selection procedures that satisfy the rigorous standards of the *Uniform Guidelines*" because "the validation of selection procedures is an expensive and time-consuming process usually extending over several years" and because the tests, besides being validated, had to be without adverse impact. Brief for United States 24–25, n. 13.

This argument is without merit. Since the District Court order at issue here was rendered, the Department has timely proposed and the court has tentatively approved, procedures for promotion to corporal and sergeant. App. 163–164, 176–177. Although these procedures have not yet been validated (and, according to the Government, may not be for some time, Tr. of Oral Arg. 41–42), the use of the one-for-one promotion requirement was suspended by the court both times the Department proposed a procedure that appeared to be without adverse impact. It is therefore clear that any inevitable delay in validating the procedures will not result in reimposition of the one-for-one requirement so long as the Department implements a procedure without apparent adverse impact. The difficulties of validating a procedure do not excuse the Department's delay in developing a test without adverse impact.

In addition, it was the Department that initially proposed to implement a validated procedure within one year; this time period was not imposed by the court. Surely the Department was in the best position to assess the practicality of its own proposal.

be filled by blacks would have denied relief to black troopers who had irretrievably lost promotion opportunities.[22] Thus, adoption of the Department's proposal would have fallen far short of the remedy necessary to eliminate the effects of the Department's past discrimination, would not have ensured adoption of a procedure without adverse impact, and would not have vitiated the effects of the defendant's delay.[23]

The Government suggests that the trial judge could have imposed heavy fines and fees on the Department pending compliance. This alternative was never proposed to the District Court. Furthermore, the Department had been ordered to pay the plaintiffs' attorney's fees and costs throughout this lengthy litigation; these court orders had done little

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[22] JUSTICE O'CONNOR's dissent suggests that the District Court's order could not have been intended to eradicate the effects of the Department's delay since it was suspended once the Department developed a promotion procedure that did not have an adverse impact on blacks. *Post*, at 197–198. But JUSTICE O'CONNOR's dissent overlooks that the District Court balanced its several goals, none of which was permitted to dominate at the expense of the others. The court ordered the immediate promotion of eight blacks to the rank of corporal, eliminating in part the ill effect of the Department's past delay, and required further promotions of qualified blacks, indicating its willingness to *order* such promotions unless the Department implemented a fair promotion procedure. The court's order was carefully constructed to ensure that some qualified black candidates would be promoted immediately and that other promotions would follow in the near future, preferably by a procedure of the Department's own design. The conditional or limited nature of the remedial order does not raise doubts about whether the District Court intended to eliminate so far as possible the effects of past delay and discrimination; rather it reveals that the District Court sought to achieve this goal while interfering as little as possible with the rights of nonminority troopers.

[23] The merit of the District Court's determination in 1983 that it could not accept the Department's promise to develop a promotion procedure without adverse impact is illustrated by the Department's petition for reconsideration of the court's order enforcing the consent decrees. The Department argued that it was without legal authority to comply with the court's order; the District Court stated that this argument was yet another delaying tactic. See *supra*, at 164–165, and App. 139.

to prevent future foot-dragging.[24] See, *e. g.*, *United States* v. *Frazer*, 317 F. Supp. 1079, 1093 (1970); *NAACP* v. *Allen*, 340 F. Supp., at 708–710. In addition, imposing fines on the defendant does nothing to compensate the plaintiffs for the long delays in implementing acceptable promotion procedures. Finally, the Department had expressed an immediate and urgent need to make 15 promotions, and the District Court took this need into consideration in constructing its remedy.[25] As we observed only last Term, "a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between unacceptable alterna-

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[24] Indeed, the Department had shown itself willing to sacrifice a great deal of money to avoid the court's orders. See *Paradise* v. *Dothard*, Civ. Action No. 3561–N (MD Ala., Aug. 5, 1975) ("The evidence outlined above establishes and this Court now finds that, at the time of and in the years following the Court's 1972 order, the administration and the heads of the Department of Public Safety perceived a need for additional troopers—a need characterized as critical; that there were appropriated and available to the defendants funds in excess of $3 million, a substantial portion of which could have been used for salaries and ancillary expenses for new troopers; and that this money was not spent for the critically needed additional troopers but went unspent or was diverted to other uses. These findings, when combined with the considerable testimony regarding the defendants' reluctance to implement the Court's remedial order by placing black troopers on the state's highways, necessitate the conclusion that the defendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired").

[25] Fining the defendant lacks even the lone virtue of the Department's proposal to promote four blacks: that at least a step would be taken toward the eradication of past discrimination by elevating blacks in the hierarchy. Furthermore, it does nothing to compensate plaintiffs for the past and future delay in implementation of procedures without adverse effect. While fines vindicate the court's authority, here they would not fulfill the court's additional responsibility to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965).

tives: an outright ban on hiring or promotions . . . [or] continued use of a discriminatory selection procedure," or, we might add, use of no selection procedure at all.[26]

By 1984 the District Court was plainly justified in imposing the remedy chosen. Any order allowing further delay by the Department was entirely unacceptable. Cf. *Green* v. *New Kent County School Board*, 391 U. S. 430, 438, 439 (1968) ("[A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*"). Not only was the immediate promotion of blacks to the rank of corporal essential, but, if the need for continuing judicial oversight was to end, it was also essential that the Department be required to develop a procedure without adverse impact on blacks, and that the effect of past delays be eliminated.[27]

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[26] The United States also suggests that the District Court could have made the promotion decisions itself or appointed a trustee to supervise the Department's progress. Again neither of these alternatives were proposed to the judge. The suggestions appear rather beside the point as the United States would presumably object if the District Court or the trustee simply selected 50% blacks to be promoted each time vacancies occurred until a test without adverse impact was created, rather than ordering the Department to select 50% blacks. If the United States is actually suggesting that the court come up with an ad hoc proposal for each batch of promotions, this solution is subject to the same deficiencies noted with respect to the Department's proposal to the court. See *supra*, at 172–173.

[27] The imposition of the District Court's requirement with respect to the ranks beyond corporal was also clearly justified. At the time the District Court imposed the corporal-promotion ratio, it had required the Department to submit for its approval a schedule for the development of promotion procedures for all ranks above the entry-level position "based upon realistic expectations." *Paradise* v. *Prescott*, 585 F. Supp. 72, 75 (MD Ala. 1983). The Department complied, proposing periods of time ranging from 5 months for the position of corporal to 24 months for the position of major. 2 Record 569–570. Thus far, all procedures have been submitted in a timely manner preventing any imposition of the one-for-one requirement in

We conclude that in 1983, when the District Judge entered his order, "it is doubtful, given [the Department's] history in this litigation, that the District Court had available to it any other effective remedy." *Sheet Metal Workers*, 478 U. S., at 486 (POWELL, J., concurring in part and concurring in judgment).[28]

B

The features of the one-for-one requirement and its actual operation indicate that it is flexible in application at all ranks. The requirement may be waived if no qualified black candidates are available. The Department has, for example, been permitted to promote only white troopers to the ranks of lieutenant and captain since no black troopers have qualified for those positions. Further, it applies only when the Depart-

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the upper ranks. The record indicates that, while the order itself is a continuing one, its application is entirely contingent on the repetition of the exact circumstances that prompted its initial formulation. The District Court will resort to the quota again only if confronted with further delay by the Department in implementing a neutral promotion procedure according to the schedule the Department itself proposed. Thus, any future use of the one-for-one requirement will be lawful for the same reason that justified the District Judge in ordering the promotion of eight blacks and eight whites to the rank of corporal: only in the event the Department fails to meet its court-approved commitments. We cannot anticipate that this will occur.

[28] JUSTICE O'CONNOR's dissent states that the District Court's order was issued "after no evident consideration of the available alternatives," *post*, at 201, and asserts that a trustee could have been appointed to develop an acceptable promotion procedure or that a combination of other penalties could have been imposed, achieving the same results without the imposition of race-conscious relief. Again we note that these "alternatives" were never proposed to the court. And, although we will not repeat the history detailed, *supra*, at 153–166, we think JUSTICE O'CONNOR's dissent overlooks the District Judge's patient accommodation of the Department's asserted needs and the long history of recalcitrance that preceded the race-conscious order. Finally, as noted in text, *supra*, at 173–174, any alternative that did not allow the Department to make immediate promotions and that did not compensate the plaintiffs for the delay in implementing the promotion procedure was inadequate.

ment needs to make promotions. Thus, if external forces, such as budget cuts, necessitate a promotion freeze, the Department will not be required to make gratuitous promotions to remain in compliance with the court's order.[29]

Most significantly, the one-for-one requirement is ephemeral; the term of its application is contingent upon the Department's own conduct. The requirement endures only until the Department comes up with a procedure that does not have a discriminatory impact on blacks—something the Department was enjoined to do in 1972 and expressly promised to do by 1980. As noted at n. 21, *supra*, the court has taken into account the difficulty of validating a test and does not require validation as a prerequisite for suspension of the promotional requirement. The one-for-one requirement evaporated at the ranks of corporal and sergeant upon implementation of promotion procedures without an adverse impact, demonstrating that it is not a disguised means to achieve racial balance. Cf. *Sheet Metal Workers*, *supra*, at 487 (POWELL, J., concurring in part and concurring in judgment).

Finally, the record reveals that this requirement was flexible, waivable, and temporary in application. When the District Court imposed the provision, the judge expressed the hope that its use would be "a one-time occurrence." 585 F. Supp., at 76. The court believed that this hope would be fulfilled: at the January 15, 1984, hearing on the plaintiffs' mo-

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[29] Cf. *Sheet Metal Workers*, 478 U. S., at 478 (opinion of BRENNAN, J.) ("The [district] court has twice adjusted the deadline for achieving the [membership] goal, and has continually approved of changes in the size of the apprenticeship classes to account for the fact that economic conditions prevented petitioners from meeting their membership targets; there is every reason to believe that both the court and the administrator will continue to accommodate *legitimate* explanations for petitioners' failure to comply with the court's orders"); *id.*, at 487–488 (POWELL, J., concurring in part and concurring in judgment) ("Additional flexibility is evidenced by the fact that this goal, originally set to be achieved by 1981, has been twice delayed and is now set for 1987").

tion to enforce the consent decrees, "the Personnel Department pledged that it would *now* devote its full resources to assisting the Public Safety Department in not only developing acceptable promotion procedures as required by the two consent decrees, but in doing so within the near future." App. 141. The Department has since timely submitted procedures for promotions to corporal and sergeant, and the court has consequently suspended application of the promotional order with respect to those ranks. In the higher ranks, the Department has been permitted to promote only white troopers. It now appears that the effect of the order enforcing the decrees will be "the development of acceptable promotion procedures for all ranks and the nullification of the promotion quota." 767 F. 2d, at 1538, n. 19. The remedy chosen has proved both effective and flexible.

C

We must also examine the relationship between the numerical relief ordered and the percentage of nonwhites in the relevant work force. The original hiring order of the District Court required the Department to hire 50% black applicants until 25% of the state trooper force was composed of blacks; the latter figure reflects the percentage of blacks in the relevant labor market. 585 F. Supp., at 75, n. 2. The enforcement order at issue here is less restrictive: it requires the Department to promote 50% black candidates until 25% of the rank in question is black, but *only* until a promotion procedure without an adverse impact on blacks is in place. Thus, had the promotion order remained in effect for the rank of corporal, it would have survived only until 25% of the Department's corporals were black.

The Government suggests that the one-for-one requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved. The

interim requirement of one-for-one promotion (had it continued) would simply have determined how quickly the Department progressed toward this ultimate goal. This requirement is therefore analogous to the imposition in *Sheet Metal Workers* of an end date, which regulated the speed of progress toward fulfillment of the hiring goal. *Sheet Metal Workers*, 478 U. S., at 487–488 (POWELL, J., concurring in part and concurring in judgment).

To achieve the goal of 25% black representation in the upper ranks, the court was not limited to ordering the promotion of only 25% blacks at any one time. Some promptness in the administration of relief was plainly justified in this case, and use of deadlines or end dates had proved ineffective. In these circumstances, the use of a temporary requirement of 50% minority promotions, which, like the end date in *Sheet Metal Workers*, was crafted and applied flexibly, was constitutionally permissible.

The District Court did not accept the argument that in order to achieve a goal of 25% representation, it could order only 25% of any particular round of promotions to be awarded to minorities. Had it done so, the court would have implemented the Department's proposal to promote 4 blacks and 11 whites when it issued its order enforcing the consent decree, because this proposal approximated the 25% figure.[30] Again, however, this proposal completely ignores the fact and the effects of the Department's past discrimination and its delay in implementing the necessary promotion proce-

[30] Following adoption of the plaintiffs' proposal that 8 blacks and 8 whites should be promoted, the corporal rank was composed of 14 black and 73 white troopers (16% black). Under the Department's proposal that 4 blacks and 11 whites should be promoted, the corporal rank would have been composed of 8 black and 79 white troopers (9.2% black). Neither proposal would have raised the percentage of blacks in the corporal rank to the 25% mark set as an alternative goal by the District Court (the other alternative being the adoption of a promotion procedure without adverse impact). Obviously, however, the plaintiffs' proposal provided an accelerated approach to achieving that goal to compensate for past delay.

dure. Here the District Court considered both the Department's proposal and the possibility of promoting blacks to all 15 corporal positions "[i]n light of the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination and to develop acceptable promotion procedures and in light of the severity of the existing racial imbalances." 585 F. Supp., at 75, n. 1. The court rejected both of these alternatives and, upon consideration of the Department's behavior and of the interests and the purposes to be served, arrived at an intermediate figure. Although the appropriate ratio here "necessarily involve[d] a degree of approximation and imprecision," *Teamsters* v. *United States*, 431 U. S. 324, 372 (1977), the District Court, with its firsthand experience of the parties and the potential for resistance, imposed the requirement that it determined would compensate for past delay and prevent future recalcitrance, while not unduly burdening the interests of white troopers.[31]

It would have been improper for the District Judge to ignore the effects of the Department's delay and its continued default of its obligation to develop a promotion procedure, and to require only that, commencing in 1984, the Department promote one black for every three whites promoted. The figure selected to compensate for past discrimination and delay necessarily involved a delicate calibration of the rights

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[31] We have previously recognized the importance of expediting elimination of the vestiges of longstanding discrimination. In *United States* v. *Montgomery County Bd. of Education*, 395 U. S. 225 (1969), we upheld a District Court's imposition of a black-to-white faculty goal against modifications made by the Court of Appeals, saying that the District Court order "was adopted in the spirit of this Court's opinion in *Green* v. *County School Board*, [391 U. S. 430, 439 (1968)], in that his plan 'promises realistically to work, and promises realistically to work *now*.' The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . ." *Id.*, at 235.

and interests of the plaintiff class, the Department, and the white troopers. The Government concedes that a one-to-three requirement would have been lawful, Tr. of Oral Arg. 43; the District Court determined that more stringent measures were necessary. This Court should not second-guess the lower court's carefully considered choice of the figure necessary to achieve its many purposes, especially when that figure is hedged about with specific qualifying measures designed to prevent any unfair impact that might arise from rigid application.[32]

D

The one-for-one requirement did not impose an unacceptable burden on innocent third parties. As stated above, the temporary and extremely limited nature of the requirement substantially limits any potential burden on white applicants for promotion. It was used only once at the rank of corporal and may not be utilized at all in the upper ranks. Nor has the court imposed an "absolute bar" to white advancement. *Sheet Metal Workers*, *supra*, at 481. In the one instance in which the quota was employed, 50% of those elevated were white.

The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*, 476 U. S., at 283 (opinion of POWELL, J.) ("[L]ayoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of

[32] JUSTICE O'CONNOR's dissent suggests that the percentage of minority individuals benefited by this race-conscious remedial order should not exceed the percentage of minority groups members in the relevant population or work force. *Post*, at 198. We disagree. Even within the narrow confines of strict scrutiny, there remains the requirement that the District Court not only *refrain* from ordering relief that violates the Constitution, but also that it *order* the relief necessary to cure past violations and to obtain compliance with its mandate. There will be cases—this is one—where some accelerated relief is plainly justified. To say that it is not overlooks the history of this litigation.

their lives"); *id.*, at 295 (WHITE, J., concurring) (same). Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotions of qualified whites. Consequently, like a hiring goal, it "impose[s] a diffuse burden, . . . foreclosing only one of several opportunities." *Id.*, at 283. "Denial of a future employment opportunity is not as intrusive as loss of an existing job," *id.*, at 282–283 (opinion of POWELL, J.), and plainly postponement imposes a lesser burden still.[33]

Finally, the basic limitation, that black troopers promoted must be qualified, remains. Qualified white candidates simply have to compete with qualified black candidates. To be sure, should the District Court's promotion requirement be applied, black applicants would receive some advantage. But this situation is only temporary, and is subject to amelioration by the action of the Department itself.

Accordingly, the one-for-one promotion requirement imposed in this case does not disproportionately harm the interests, or unnecessarily trammel the rights, of innocent individuals.

E

In determining whether this order was "narrowly tailored," we must acknowledge the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. A district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is

[33] In the promotion procedure proposed by the Department in 1981, seniority counted as 10% of the candidate's score. App. 56. But, under the point system established, *differences* in seniority among candidates could affect scores by no more than 3%. *Id.*, at 50–51. Greater seniority did not, therefore, by itself create an expectation of promotion.

broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 15 (1971).

Nor have we in all situations "required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Fullilove* v. *Klutznick*, 448 U. S. 448, 508 (1980) (POWELL, J., concurring) (quoting *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 794 (POWELL, J., concurring in part and dissenting in part)). Cf. *Green* v. *New Kent County School Board*, 391 U. S., at 439 ("The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to the complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance").

The district court has firsthand experience with the parties and is best qualified to deal with the "flinty, intractable realities of day-to-day implementation of constitutional commands." *Swann*, *supra*, at 6. In this case, as in *Sheet Metal Workers*, "[the] court having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective in ending [the] discriminatory practices." 478 U. S., at 486 (POWELL, J., concurring). The District Judge determined that the record demonstrated that "without promotional quotas the continuing effects of [the Department's] discrimination cannot be eliminated." 585 F. Supp., at 76. His proximate position and broad equitable powers mandate substantial respect for this judgment.

Plainly the District Court's discretion in remedying the deeply rooted Fourteenth Amendment violations here was limited by the rights and interests of the white troopers seeking promotion to corporal. But we conclude that the District Judge properly balanced the individual and collective interests at stake, including the interests of the white troopers eligible for promotion, in shaping this remedy. See *Swann*, *supra*, at 16 ("The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution"). While a remedy must be narrowly tailored, that requirement does not operate to remove all discretion from the District Court in its construction of a remedial decree.[34]

IV

The remedy imposed here is an effective, temporary, and flexible measure. It applies only if qualified blacks are available, only if the Department has an objective need to make promotions, and only if the Department fails to implement a promotion procedure that does not have an adverse impact on blacks. The one-for-one requirement is the product of the considered judgment of the District Court which, with its knowledge of the parties and their resources, properly determined that strong measures were required in light of the Department's long and shameful record of delay and resistance.

The race-conscious relief imposed here was amply justified and narrowly tailored to serve the legitimate and laudable

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[34] See also *Fullilove*, 448 U. S., at 527 (Stewart, J., dissenting) (contrasting legislative branch with court of equity and suggesting that the latter has the "dispassionate objectivity" and the "flexibility" necessary "to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination"); *International Salt Co.* v. *United States*, 332 U. S. 392, 400 (1947) (Jackson, J.) ("The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to the exigencies of the particular case") (citations and footnote omitted).

purposes of the District Court. The judgment of the Court of Appeals, upholding the order of the District Court, is

Affirmed.

JUSTICE POWELL, concurring.

In many respects this case is similar to *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421 (1986). Here, as in that case, racial discrimination had been continued for many years in contravention of repeated decisions of the District Court. *NAACP* v. *Allen*, 340 F. Supp. 703, 705 (MD Ala. 1972); *Paradise* v. *Dothard*, Civ. Action No. 3561–N (MD Ala., Aug 5, 1975); *Paradise* v. *Shoemaker*, 470 F. Supp. 439, 442 (MD Ala. 1979); *Paradise* v. *Prescott*, 585 F. Supp. 72, 74 (MD Ala. 1983). There are differences. *Sheet Metal Workers* involved an action under Title VII, and here the courts below found a violation of the Equal Protection Clause.[1] Also, in *Sheet Metal Workers* the District Court had finally cited the union for contempt. This difference is of no importance where, as here, it has been established beyond question that the Department of Public Safety had engaged in persistent violation of constitutional rights and repeatedly failed to carry out court orders. In such circumstances there is a "compelling governmental interest sufficient to justify the imposition of a racially classified remedy." *Sheet Metal Workers* v. *EEOC*, *supra*, at 485.

I therefore agree with the plurality that the protracted history of this litigation justifies the conclusion that the "one-for-one" promotion to corporal was appropriate. It is reasonable to conclude that the District Court would have been "powerless to provide an effective remedy" if it had lacked authority to establish a benchmark against which to measure progress in remedying the effects of the discrimination. *Sheet Metal Workers* v. *EEOC*, 478 U. S., at 487.

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[1] Although we need not resolve the question in this case, I have not thought the standards of analysis in Title VII and equal protection cases—though similar—are identical.

In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal, I have thought that five factors may be relevant: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties. *Id.*, at 485–486; *Fullilove* v. *Klutznick*, 448 U. S. 448, 510–511, 514 (1980) (opinion of POWELL, J.).[2] The plurality opinion today makes clear that the affirmative action ordered by the Dis-

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[2] Our decisions make clear that all government-imposed, affirmative-action plans must be closely scrutinized because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove* v. *Klutznick*, 448 U. S., at 537 (STEVENS, J., dissenting). Because racial distinctions are inherently suspect whether they are imposed by a legislature or a court, we have never measured court-ordered, affirmative-action remedies against a less demanding standard.

JUSTICE STEVENS' opinion concurring in the judgment relies primarily on school desegregation decisions such as *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). See *post*, at 194–195. Although these cases are broadly relevant, they differ significantly from the Court's subsequent affirmative-action decisions. To be sure, a pupil who is bused from a neighborhood school to a comparable school in a different neighborhood may be inconvenienced. Indeed, I have said that "[e]xtensive pupil transportation may threaten liberty or privacy interests." *Washington* v. *Seattle School District No. 1*, 458 U. S. 457, 492, n. 6 (1982). But the position of bused pupils is far different from that of employees who are laid off or denied promotion. Court-ordered busing does not deprive students of any race of an equal opportunity for an education. Cf. *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 300 n. 39 (1978) (opinion of POWELL, J.) (distinguishing bused pupil from applicant denied admission to medical school). Moreover, as the Court noted in *Swann*, busing had been common for years in many schools districts throughout the country. 402 U. S., at 29–30. See also *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 243, n. 22 (1973) (POWELL, J., concurring in part and dissenting in part).

trict Court and approved by the Court of Appeals for the Eleventh Circuit was narrowly drawn to achieve the goal of remedying the proven and continuing discrimination. In view of the plurality's thorough opinion, I will mention only certain aspects of the plan before us.

The District Court imposed the one-for-one promotion requirement only on one occasion, when it ordered the promotion of eight blacks and eight whites to the rank of corporal in February 1984. Because the Department urgently needed at least 15 additional corporals, see *Paradise* v. *Prescott*, 580 F. Supp. 171, 173 (MD Ala. 1983), there appears to have been no alternative remedy that would have met the then-existing need. Given the findings of persistent discrimination, the Department's longstanding resistance to necessary remedies, and the exigent circumstances presented to the District Court, the imposition of a one-for-one requirement for the particular promotions at issue did not violate the Equal Protection Clause.

The District Court's order contains significant elements of flexibility and fairness. First, it applies only if qualified black candidates are available for promotion. Second, the court suspended the order when the Department proposed procedures that appeared likely to have no adverse impact on minority applicants. It thus appears that the court's order is based upon "realistic expectations," and that the one-for-one requirement is likely to be, as the court intended, a "one-time occurrence." *Paradise* v. *Prescott*, *supra*, at 75–76. The court's actions indicate that the order will be enforced in a constitutional manner if it is reimposed. As in *Sheet Metal Workers*, "[a]n examination of what *has occurred* in this litigation over the years makes plain that the District Court has not enforced the goal in [a] rigid manner." 478 U. S., at 489, n. 4 (emphasis in original).

Finally, and particularly important, the effect of the order on innocent white troopers is likely to be relatively diffuse. Unlike layoff requirements, the promotion requirement at

issue in this case does not "impose the entire burden of achieving racial equality on particular individuals," and does not disrupt seriously the lives of innocent individuals. See *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 283 (1986) (opinion of POWELL, J.).[3] Although the burden of a narrowly prescribed promotion goal, as in this case, is not diffused throughout society generally, the burden is shared by the nonminority employees over a period of time. As noted above, only qualified minority applicants are eligible for promotion, and qualified nonminority applicants remain eligible to compete for the available promotions. Although some white troopers will have their promotions delayed, it is uncertain whether any individual trooper, white or black, would have achieved a different rank, or would have achieved it at a different time, but for the promotion requirement.

In view of the purpose and indeed the explicit language of the Equal Protection Clause, court-ordered or government-adopted, affirmative-action plans must be most carefully scrutinized. The plurality in its opinion today has done this. I therefore join the opinion.

JUSTICE STEVENS, concurring in the judgment.

In 1971, one year before the District Court found in this case that the State of Alabama had persistently maintained a deliberately segregated police force, this Court issued a unanimous opinion setting forth the guidelines for district judges in fashioning remedies to eliminate the effects of racial segregation in public schools. *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1 (1971). The central theme of that opinion is that race-conscious remedies are obviously required to remedy racially discriminatory actions by the State that violate the Fourteenth Amendment.

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[3] See generally Fallon & Weiler, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 S. Ct. Rev. 1, 28–32 (contending that allocating the costs of affirmative-action remedies raises separate issues of fairness).

Because *Swann* explained the appropriate governing standard, it must have provided guidance to the District Court in this case and it should now guide our deliberations. Chief Justice Burger wrote:

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> "'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944), cited in *Brown* [v. *Board of Education*, 349 U. S.], at 300." 402 U. S., at 15.

In this case, the record discloses an egregious violation of the Equal Protection Clause. It follows, therefore, that the District Court had broad and flexible authority to remedy the wrongs resulting from this violation—exactly the opposite of the Solicitor General's unprecedented suggestion that the judge's discretion is constricted by a "narrowly tailored to achieve a compelling governmental interest" standard. Brief for United States 17.[1]

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[1] JUSTICE O'CONNOR's dissenting opinion also advances the novel theory that in reviewing the validity of a federal district court's remedial order, the Court must first decide whether the order is "'supported by a compelling [governmental] purpose.'" *Post*, at 196 (quoting *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 274 (1986)). The substitution of the word "governmental" for the word "state" in the quotation from *Wygant* emphasizes the novelty of the suggestion that a test that may be appropriate for determining the constitutionality of state executive or legislative action should also be used in reviewing federal judicial decrees. In *Wygant* the Court was confronted with the question whether certain *state*

The notion that this Court should craft special and narrow rules for reviewing judicial decrees in racial discrimination cases was soundly rejected in *Swann*. Chief Justice Burger wrote for a unanimous Court:

> "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.
>
> . . . . . .
>
> "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." 402 U. S., at 15–16.

The Court was equally unambiguous in its rejection of the argument that a different standard of review is required when a remedial decree employs mathematical ratios.

> "We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green* [v. *County School Bd.*, 391 U. S.

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action violated the Equal Protection Clause of the Fourteenth Amendment. Here the State's violation of that Clause is established—the State's purpose in maintaining an all-white police force was obviously illegitimate. In contrast, the *federal* purpose that is served by the District Court's decree is to eliminate the consequences of the State's pervasive, systematic, and obstinate discriminatory conduct. There is nothing in the District Court's decree that is even arguably inconsistent with this *federal* purpose. Because the decree is neither "overinclusive" nor "underinconclusive," the metaphor of narrow tailoring that is often used in considering the merits of claims based on the Equal Protection Clause simply does not fit the issue before the Court.

430 (1968),] a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." *Id.*, at 25.

"Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Id.*, at 28.

"The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term 'reasonableness.' In *Green*, *supra*, this Court used the term 'feasible' and by implication, 'workable,' 'effective,' and 'realistic' in the mandate to develop 'a plan that promises realistically to work, and . . . to work *now*.' On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to sug-

gest the nature of limitations without frustrating the appropriate scope of equity." *Id.*, at 31.

A party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of "reasonableness."[2] The burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), and *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), which did not involve any proven violations of law.[3] In such cases the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them. No such burden rests on a federal district judge who has found that the governmental unit before him is

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[2] Inevitably, promotions of the white officers who have been beneficiaries of the past illegal conduct may be delayed even though they are "innocent victims" in the sense that they are not individually responsible for the past illegal conduct. But it is most incongruous to imply, as JUSTICE O'CONNOR's dissent does, that this impact on white "victims" requires that the Federal District Court's decree be judged by the same standards as the State's policy of discriminating against black employees in promotion and against black applicants in hiring. Given the violation of law disclosed by the record, the District Court's use of a racial classification to remedy that violation was presumptively valid; in contrast, the State's racial classification was presumptively invalid.

[3] The law violator who would oppose a remedy imposed against him as itself a violation of the law does not stand in the same position as an innocent party; those whom the court has found in the wrong may not oppose a remedy on the ground that it would constitute a wrong if leveled at a nonparticipant in the litigation. "In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying" the violations. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 697–698 (1978). See also *International Salt Co.* v. *United States*, 332 U. S. 392, 400–401 (1947); *Teachers* v. *Hudson*, 475 U. S. 292, 309–310, n. 22 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large") (citations omitted).

guilty of racially discriminatory conduct that violates the Constitution.

The relief that the district judge has a duty to fashion must unavoidably consider race. A unanimous Court held in *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43 (1971), a case decided on the same day as *Swann* v. *Charlotte-Mecklenburg Board of Education*, that the State's Anti-Busing Law, which prohibited assignment of any student on account of race or for the purpose of creating a racial balance in the schools, conflicted with the State's duty to remedy constitutional violations. We observed:

> "[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.
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> "Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy." 402 U. S., at 45–46.

The District Court, like the school authority in *North Carolina State Board of Education* v. *Swann*, may, and in some instances must, resort to race-conscious remedies to

vindicate federal constitutional guarantees. Because the instant employment discrimination case "does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right," *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S., at 15–16, and because there has been no showing that the District Judge abused his discretion in shaping a remedy, I concur in the Court's judgment.[4]

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[4] For reasons that are not entirely clear to me, JUSTICE POWELL assumes that the standard to be applied in reviewing the court-ordered action a State must take to correct its violations of the Equal Protection Clause is different when the violations take place in the administration of a public school system than when they occur in the operation of a public law enforcement agency. *Ante*, at 187, n. 2. Dismissing the inconvenience of being bused as a relatively inconsequential by-product of the remedial decree, JUSTICE POWELL suggests that desegregation decisions upholding the District Court's broad remedial powers are less than fully applicable to this case; he seems to regard the possibility that some white troopers will have their promotions delayed, see *ante*, at 188–189, as mandating a different and more exacting standard of review.

I cannot agree that the applicability of the school desegregation cases in determining the validity of any particular remedial solution fashioned by a district court and imposed on a State depends on detailed and inevitably imprecise calculations of hardship. For me the relevant fact in this case is that the remedial order was directed against a proven violator of the Constitution. Just as I believe that a uniform standard should govern our review of the merits of an equal protection claim, see *Craig* v. *Boren*, 429 U. S. 190, 211 (1976) (STEVENS, J., concurring), so do I believe that a uniform standard should govern our review of all such decrees entered by district courts. Of course, different violations require different remedies, but they should be reviewed under the principles of equitable discretion set forth in the school desegregation cases. "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 15–16 (1971). The district court's task in each case is to "be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of the traditional attributes of equity power." *Brown* v. *Board of Education*,

JUSTICE WHITE, dissenting.

Agreeing with much of what JUSTICE O'CONNOR has written in this case, I find it evident that the District Court exceeded its equitable powers in devising a remedy in this case. I therefore dissent from the judgment of affirmance.

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

In *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 273 (1986), we concluded that the level of Fourteenth Amendment "scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." Thus, in evaluating the constitutionality of the District Court order in this case under the Fourteenth Amendment, we must undertake a two-part inquiry. First, we must decide whether the order is "supported by a compelling [governmental] purpose." *Ibid.* Second, we must scrutinize the order to ensure that "the means chosen to accomplish that purpose are narrowly tailored." *Ibid.*

One cannot read the record in this case without concluding that the Alabama Department of Public Safety had undertaken a course of action that amounted to "pervasive, systematic, and obstinate discriminatory conduct." *Ante*, at 167. Because the Federal Government has a compelling interest in remedying past and present discrimination by the Department, the District Court unquestionably had the authority to fashion a remedy designed to end the Department's egregious history of discrimination. In doing so, however, the District Court was obligated to fashion a remedy that was narrowly tailored to accomplish this purpose. The plurality

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349 U. S. 294, 300 (1955) (footnotes omitted). Thus, the remedial issue in these cases is dramatically different from the question whether a statutory racial classification can be justified as a response to a past societal wrong. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 537–539 (1980) (STEVENS, J., dissenting).

today purports to apply strict scrutiny, and concludes that the order in this case was narrowly tailored for its remedial purpose. Because the Court adopts a standardless view of "narrowly tailored" far less stringent than that required by strict scrutiny, I dissent.

As JUSTICE POWELL notes, this case is similar to *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421 (1986). In *Sheet Metal Workers*, I observed that "it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." *Id.*, at 494. Thus, a rigid quota is impermissible because it adopts "an unjustified conclusion about the precise extent to which past discrimination has lingering effects, or . . . an unjustified prediction about what would happen in the future in the absence of continuing discrimination." *Id.*, at 494–495. Even more flexible "goals," however, also may trammel unnecessarily the rights of nonminorities. Racially preferential treatment of nonvictims, therefore, should only be ordered "where such remedies are truly necessary." *Id.*, at 496. Thus, "the creation of racial preferences by courts, even in the more limited form of goals rather than quotas, must be done sparingly and only where manifestly necessary." *Id.*, at 496–497.

In my view, whether characterized as a goal or a quota, the District Court's order was not "manifestly necessary" to achieve compliance with that court's previous orders. The order at issue in this case clearly had one purpose, and one purpose only—to compel the Department to develop a promotion procedure that would not have an adverse impact on blacks. Although the plurality and the courts below suggest that the order also had the purpose of "eradicat[ing] the ill effects of the Department's delay in producing" such a promotion procedure, *ante*, at 171, the District Court's subsequent implementation of the order makes clear that the order cannot be defended on the basis of such a purpose.

The order imposed the promotion quota only until the Department developed a promotion procedure that complied with the consent decrees. If the order were truly designed to eradicate the effects of the Department's delay, the District Court would certainly have continued the use of the one-for-one quota even after the Department had complied with the consent decrees. Consistent with the terms of the order, once the Department developed a promotion procedure that did not have an adverse impact on blacks, the District Court suspended application of the quota. Under the approved promotion procedure, 13 troopers were promoted to corporal, of whom 3 (23.1%) were black. App. 160. The result of this new procedure was the promotion of a *lower* percentage of blacks than the purported goal of 25% black representation in the upper ranks, and the promotion of *fewer* blacks than even the Department's promotion proposal rejected by the District Court. To say the least, it strains credibility to view the one-for-one promotion quota as designed to eradicate the past effects of the Department's delay when the quota was suspended once the Department developed a promotion procedure that promoted a *lower* percentage of blacks than the 25% black representation goal.

Moreover, even if the one-for-one quota had the purpose of eradicating the effects of the Department's delay, this purpose would not justify the quota imposed in this case. "[T]he relationship between the percentage of minority workers to be [promoted] and the percentage of minority group members in the relevant population or work force" is of vital importance in considering the validity of a racial goal. *Sheet Metal Workers* v. *EEOC*, *supra*, at 486 (POWELL, J., concurring in part and concurring in judgment). The one-for-one promotion quota used in this case far exceeded the percentage of blacks in the trooper force, and there is no evidence in the record that such an extreme quota was necessary to eradicate the effects of the Department's delay. The plurality attempts to defend this one-for-one promotion quota as

merely affecting the speed by which the Department attains the goal of 25% black representation in the upper ranks. *Ante*, at 179–180. Such a justification, however, necessarily eviscerates any notion of "narrowly tailored" because it has no stopping point; even a 100% quota could be defended on the ground that it merely "determined how quickly the Department progressed toward" some ultimate goal. *Ante*, at 180. If strict scrutiny is to have any meaning, therefore, a promotion goal must have a closer relationship to the percentage of blacks eligible for promotions. This is not to say that the percentage of minority individuals benefited by a racial goal may never exceed the percentage of minority group members in the relevant work force. But protection of the rights of nonminority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant population or work force absent compelling justification. In this case the District Court—and indeed this Court—provide no such compelling justification for the choice of a one-for-one promotion quota rather than a lower quota. In my view, therefore, the order in this case must stand or fall on its stated purpose of coercing the Department to develop a promotion procedure without an adverse impact on black troopers.

Given the singular *in terrorem* purpose of the District Court order, it cannot survive strict scrutiny. There is simply no justification for the use of racial preferences if the purpose of the order could be achieved without their use because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove* v. *Klutznick*, 448 U. S. 448, 537 (1980) (STEVENS, J., dissenting). Thus, to survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727, n. 26 (1974). The District Court had available several alternatives that would have achieved full compliance

with the consent decrees without trammeling on the rights of nonminority troopers. The court, for example, could have appointed a trustee to develop a promotion procedure that would satisfy the terms of the consent decrees. By imposing the trustee's promotion procedure on the Department until the Department developed an alternative promotion procedure that complied with the consent decrees, the District Court could have enforced the decrees without the use of racial preferences. Alternatively, the District Court could have found the recalcitrant Department in contempt of court, and imposed stiff fines or other penalties for the contempt. Surely, some combination of penalties could have been designed that would have compelled compliance with the consent decrees.

The District Court, however, did not discuss these options or *any* other alternatives to the use of a racial quota. Not a single alternative method of achieving compliance with the consent decrees is even mentioned in the District Court's opinion—with the exception of an even more objectionable *100% racial quota.* See *Paradise* v. *Prescott*, 585 F. Supp. 72, 75, n. 1 (MD Ala 1983). What is most disturbing about the District Court's order, therefore, is not merely that it implicitly or explicitly rejected two particular options, but that the District Court imposed the promotion quota *without consideration of any of the available alternatives.* Even in *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421 (1986), the District Court had "considered the efficacy of alternative remedies" before imposing a racial quota. *Id.*, at 481; see also *id.*, at 486–487 (POWELL, J., concurring in part and concurring in judgment). Thus, the Court was able to evaluate the claim that the racial quota was "necessary." Without any exploration of the available alternatives in the instant case, no such evaluation is possible. Remarkably, however, the plurality—purporting to apply "strict scrutiny"—concludes that the order in this case was narrowly tailored for a remedial purpose.

Although the plurality states that it is merely "respect-[ing]" the "balancing process" of the District Court, *ante*, at 184, it wholly ignores the fact that no such "balancing process" took place in this case. For even if, as the plurality insists, the District Court "'was in the best position to judge whether an alternative remedy, such as a simple injunction, would have been effective in ending [the] discriminatory practices,'" *ibid.* (quoting *Sheet Metal Workers*, *supra*, at 486 (POWELL, J., concurring in part and concurring in judgment)), the *least* that strict scrutiny requires is that the District Court expressly evaluate the available alternative remedies. If a District Court order that is imposed after no evident consideration of the available alternatives can survive strict scrutiny as narrowly tailored, the requirement that a racial classification be "narrowly tailored" for a compelling governmental purpose has lost most of its meaning.

I have no quarrel with the plurality's conclusion that the recalcitrance of the Department of Public Safety in complying with the consent decrees was reprehensible. In its understandable frustration over the Department's conduct, however, the District Court imposed a racial quota without first considering the effectiveness of alternatives that would have a lesser effect on the rights of nonminority troopers. Because the District Court did not even consider the available alternatives to a one-for-one promotion quota, and because these alternatives would have successfully compelled the Department to comply with the consent decrees, I must respectfully dissent.

CALIFORNIA ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–1708. Argued December 9, 1986—Decided February 25, 1987

Appellee Indian Tribes (the Cabazon and Morongo Bands of Mission Indians) occupy reservations in Riverside County, Cal. Each Band, pursuant to its federally approved ordinance, conducts on its reservation bingo games that are open to the public. The Cabazon Band also operates a card club for playing draw poker and other card games. The gambling games are open to the public and are played predominantly by non-Indians coming onto the reservations. California sought to apply to the Tribes its statute governing the operation of bingo games. Riverside County also sought to apply its ordinance regulating bingo, as well as its ordinance prohibiting the playing of draw poker and other card games. The Tribes instituted an action for declaratory relief in Federal District Court, which entered summary judgment for the Tribes, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed.

Held:

1. Although state laws may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by Pub. L. 280 or by the Organized Crime Control Act of 1970 (OCCA). Pp. 207–214.

(a) In Pub. L. 280, the primary concern of which was combating lawlessness on reservations, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State but more limited, nonregulatory civil jurisdiction. When a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the state law is criminal in nature and thus fully applicable to the reservation, or civil in nature and applicable only as it may be relevant to private civil litigation in state court. There is a fair basis for the Court of Appeals' conclusion that California's statute, which permits bingo games to be conducted only by certain types of organizations under certain restrictions, is not a "criminal/prohibitory" statute falling within Pub. L. 280's grant of criminal jurisdiction, but instead is a "civil/regulatory" statute not authorized by Pub. L. 280 to be enforced on Indian reservations. That an otherwise regulatory law is enforceable (as here) by

criminal as well as civil means does not necessarily convert it into a criminal law within Pub. L. 280's meaning. Pp. 207–212.

(b) Enforcement of OCCA, which makes certain violations of state and local gambling laws violations of federal criminal law, is an exercise of federal rather than state authority. There is nothing in OCCA indicating that the States are to have any part in enforcing the federal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. California may not make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes. Pp. 212–214.

2. Even though not expressly authorized by Congress, state and local laws may be applied to on-reservation activities of tribes and tribal members under certain circumstances. The decision in this case turns on whether state authority is pre-empted by the operation of federal law. State jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. The federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development, are important, and federal agencies, acting under federal laws, have sought to implement them by promoting and overseeing tribal bingo and gambling enterprises. Such policies and actions are of particular relevance in this case since the tribal games provide the sole source of revenues for the operation of the tribal governments and are the major sources of employment for tribal members. To the extent that the State seeks to prevent all bingo games on tribal lands while permitting regulated off-reservation games, the asserted state interest in preventing the infiltration of the tribal games by organized crime is irrelevant, and the state and county laws are pre-empted. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted since the asserted state interest is not sufficient to escape the pre-emptive force of the federal and tribal interests apparent in this case. Pp. 214–222.

783 F. 2d 900, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which O'CONNOR and SCALIA, JJ., joined, *post*, p. 222.

Roderick E. Walston, Supervising Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *John K. Van de Kamp*, Attorney General,

Steve White, Chief Assistant Attorney General, *Frederick R. Millar, Jr.*, Supervising Deputy Attorney General, *Rudolph Corona, Jr.*, Deputy Attorney General, *Gerald J. Geerlings*, *Peter H. Lyons*, and *Glenn R. Salter*.

Glenn M. Feldman argued the cause for appellees. With him on the brief were *Barbara A. Karshmer* and *George Forman*.*

JUSTICE WHITE delivered the opinion of the Court.

The Cabazon and Morongo Bands of Mission Indians, federally recognized Indian Tribes, occupy reservations in Riverside County, California.[1] Each Band, pursuant to an

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, *Anthony B. Ching*, Solicitor General, *Ian A. Macpherson*, *Brian McKay*, Attorney General of Nevada, and *Paul Bardacke*, Attorney General of New Mexico; and for the State of Washington et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Timothy R. Malone*, Assistant Attorney General, *Bronson C. La Follette*, Attorney General of Wisconsin, and *John J. Kelly*, Chief State's Attorney of Connecticut.

Briefs of *amici curiae* urging affirmance were filed for the Chehalis Indian Tribe et al. by *Henry J. Sockbeson* and *Stephen V. Quesenberry;* for the Jicarilla Apache Tribe et al. by *Alan R. Taradash;* for the Oneida Indian Nation of New York by *William W. Taylor III* and *Christine Nicholson;* for the Pueblo of Sandia et al. by *L. Lamar Parrish*, *Theodore W. Barudin*, *Michael D. Bustamante*, and *Scott E. Borg;* for the San Manuel Band of Mission Indians by *Jerome L. Levine* and *David A. Lash;* and for the Seminole Tribe of Florida et al. by *Bruce S. Rogow*.

Briefs of *amici curiae* were filed for the State of Minnesota by *Hubert H. Humphrey III*, Attorney General, and *James M. Schoessler*, Assistant Attorney General; for the Pueblo of Laguna et al. by *W. Richard West, Jr.*, *Thomas W. Fredericks*, *Rodney B. Lewis*, *Carol L. Barbero*, *John Bell*, *Rodney J. Edwards*, and *Art Bunce;* and for the Tulalip Tribes of Washington et al. by *Allen H. Sanders*.

[1]The Cabazon Reservation was originally set apart for the "permanent use and occupancy" of the Cabazon Indians by Executive Order of May 15, 1876. The Morongo Reservation also was first established by Executive Order. In 1891, in the Mission Indian Relief Act, 26 Stat. 712, Congress declared reservations "for the sole use and benefit" of the Cabazon and Morongo Bands. The United States holds the land in trust for the Tribes.

ordinance approved by the Secretary of the Interior, conducts bingo games on its reservation.[2] The Cabazon Band has also opened a card club at which draw poker and other card games are played. The games are open to the public and are played predominantly by non-Indians coming onto the reservations. The games are a major source of employment for tribal members, and the profits are the Tribes' sole source of income. The State of California seeks to apply to the two Tribes Cal. Penal Code Ann. § 326.5 (West Supp. 1987). That statute does not entirely prohibit the playing of bingo but permits it when the games are operated and staffed by members of designated charitable organizations who may not be paid for their services. Profits must be kept in special accounts and used only for charitable purposes; prizes may not exceed $250 per game. Asserting that the bingo games on the two reservations violated each of these restrictions, California insisted that the Tribes comply with state law.[3] Riverside

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The governing bodies of both Tribes have been recognized by the Secretary of the Interior. The Cabazon Band has 25 enrolled members and the Morongo Band has approximately 730 enrolled members.

[2] The Cabazon ordinance authorizes the Band to sponsor bingo games within the reservation "[i]n order to promote economic development of the Cabazon Indian Reservation and to generate tribal revenues" and provides that net revenues from the games shall be kept in a separate fund to be used "for the purpose of promoting the health, education, welfare and well being of the Cabazon Indian Reservation and for other tribal purposes." App. to Brief for Appellees 1b–3b. The ordinance further provides that no one other than the Band is authorized to sponsor a bingo game within the reservation, and that the games shall be open to the public, except that no one under 18 years old may play. The Morongo ordinance similarly authorizes the establishment of a tribal bingo enterprise and dedicates revenues to programs to promote the health, education, and general welfare of tribal members. *Id.*, at 1a–6a. It additionally provides that the games may be conducted at any time but must be conducted at least three days per week, that there shall be no prize limit for any single game or session, that no person under 18 years old shall be allowed to play, and that all employees shall wear identification.

[3] The Tribes admit that their games violate the provision governing staffing and the provision setting a limit on jackpots. They dispute the

County also sought to apply its local Ordinance No. 558, regulating bingo, as well as its Ordinance No. 331, prohibiting the playing of draw poker and the other card games.

The Tribes sued the county in Federal District Court seeking a declaratory judgment that the county had no authority to apply its ordinances inside the reservations and an injunction against their enforcement. The State intervened, the facts were stipulated, and the District Court granted the Tribes' motion for summary judgment, holding that neither the State nor the county had any authority to enforce its gambling laws within the reservations. The Court of Appeals for the Ninth Circuit affirmed, 783 F. 2d 900 (1986), the State and the county appealed, and we postponed jurisdiction to the hearing on the merits. 476 U. S. 1168.[4]

State's assertion that they do not maintain separate funds for the bingo operations. At oral argument, counsel for the State asserted, contrary to the position taken in the merits brief and contrary to the stipulated facts in this case, App. 65, ¶ 24, 82–83, ¶ 15, that the Tribes are among the charitable organizations authorized to sponsor bingo games under the statute. It is therefore unclear whether the State intends to put the tribal bingo enterprises out of business or only to impose on them the staffing, jackpot limit, and separate fund requirements. The tribal bingo enterprises are apparently consistent with other provisions of the statute: minors are not allowed to participate, the games are conducted in buildings owned by the Tribes on tribal property, the games are open to the public, and persons must be physically present to participate.

[4] The Court of Appeals "affirm[ed] the summary judgment and the permanent injunction restraining the County and the State from applying their gambling laws on the reservations." 783 F. 2d, at 906. The judgment of the District Court declared that the state statute and county ordinance were of no force and effect within the two reservations, that the State and the county were without jurisdiction to enforce them, and that they were therefore enjoined from doing so. Since it is now sufficiently clear that the state and county laws at issue were held, as applied to the gambling activities on the two reservations, to be "invalid as repugnant to the Constitution, treaties or laws of the United States" within the meaning of 28 U. S. C. § 1254(2), the case is within our appellate jurisdiction.

I

The Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975), and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 154 (1980). It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided. Here, the State insists that Congress has twice given its express consent: first in Pub. L. 280 in 1953, 67 Stat. 588, as amended, 18 U. S. C. § 1162, 28 U. S. C. § 1360 (1982 ed. and Supp. III), and second in the Organized Crime Control Act in 1970, 84 Stat. 937, 18 U. S. C. § 1955. We disagree in both respects.

In Pub. L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country[5] within the States and provided for the assumption of jurisdiction by other States. In § 2, California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State.[6] Section 4's grant of civil jurisdiction was more lim-

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[5] "Indian country," as defined at 18 U. S. C. § 1151, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." This definition applies to questions of both criminal and civil jurisdiction. *DeCoteau* v. *District County Court*, 420 U. S. 425, 427, n. 2 (1975). The Cabazon and Morongo Reservations are thus Indian country.

[6] Section 2(a), codified at 18 U. S. C. § 1162(a), provides:

"Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal

ited.[7] In *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), we interpreted § 4 to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. *Id.*, at 385, 388–390. We held, therefore, that Minnesota could not apply its personal property tax within the reservation. Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations. *Id.*, at 379–380. The Act plainly was not intended to effect total assimilation of Indian tribes into mainstream American society. *Id.*, at 387. We recognized that a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

The Minnesota personal property tax at issue in *Bryan* was unquestionably civil in nature. The California bingo statute is not so easily categorized. California law permits bingo

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laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . :

. . . . . .

"California ..... All Indian country within the State."

[7] Section 4(a), codified at 28 U. S. C. § 1360(a) (1982 ed. and Supp. III) provides:

"Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

. . . . . .

"California ..... All Indian country within the State."

games to be conducted only by charitable and other specified organizations, and then only by their members who may not receive any wage or profit for doing so; prizes are limited and receipts are to be segregated and used only for charitable purposes. Violation of any of these provisions is a misdemeanor. California insists that these are criminal laws which Pub. L. 280 permits it to enforce on the reservations.

Following its earlier decision in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal.* v. *Duffy*, 694 F. 2d 1185 (1982), cert. denied, 461 U. S. 929 (1983), which also involved the applicability of § 326.5 of the California Penal Code to Indian reservations, the Court of Appeals rejected this submission. 783 F. 2d, at 901–903. In *Barona*, applying what it thought to be the civil/criminal dichotomy drawn in *Bryan* v. *Itasca County*, the Court of Appeals drew a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. Inquiring into the nature of § 326.5, the Court of Appeals held that it was regulatory rather than prohibitory.[8] This was the analysis employed, with similar results,

[8] The Court of Appeals questioned whether we indicated disapproval of the prohibitory/regulatory distinction in *Rice* v. *Rehner*, 463 U. S. 713 (1983). We did not. We rejected in that case an asserted distinction between state "substantive" law and state "regulatory" law in the context of 18 U. S. C. § 1161, which provides that certain federal statutory provisions prohibiting the sale and possession of liquor within Indian country do not apply "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . ." We noted that nothing in the text or legislative history of

by the Court of Appeals for the Fifth Circuit in *Seminole Tribe of Florida* v. *Butterworth*, 658 F. 2d 310 (1981), cert. denied, 455 U. S. 1020 (1982), which the Ninth Circuit found persuasive.[9]

We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan*'s construction of Pub. L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. But in the present case, the court reexamined the state law and reaffirmed its holding in *Barona*, and we are reluctant to disagree with that court's view of the nature and intent of the state law at issue here.

There is surely a fair basis for its conclusion. California does not prohibit all forms of gambling. California itself operates a state lottery, Cal. Govt. Code Ann. § 8880 *et seq.* (West Supp. 1987), and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Cal. Bus. & Prof. Code Ann. §§ 19400–19667 (West 1964 and Supp. 1987). Although certain enumerated gambling games are prohibited under Cal. Penal Code Ann. § 330 (West Supp. 1987), games not enumerated, including the card games played in the Cabazon card club, are permissible. The Tribes assert that more than 400 card rooms similar to the Cabazon card club flourish in California, and the State does not dispute this fact. Brief for

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§ 1161 supported the asserted distinction, and then contrasted that statute with Pub. L. 280. "In the absence of a context that might possibly require it, we are reluctant to make such a distinction. Cf. *Bryan* v. *Itasca County*, 426 U. S. 373, 390 (1976) (grant of civil jurisdiction in 28 U. S. C. § 1360 does not include regulatory jurisdiction to tax in light of tradition of immunity from taxation)." 463 U. S., at 734, n. 18.

[9] *Seminole Tribe* v. *Butterworth* was an action by the Seminole Tribe for a declaratory judgment that the Florida bingo statute did not apply to its operation of a bingo hall on its reservation. See also *Mashantucket Pequot Tribe* v. *McGuigan*, 626 F. Supp. 245 (Conn. 1986); *Oneida Tribe of Indians of Wisconsin* v. *Wisconsin*, 518 F. Supp. 712 (WD Wis. 1981).

Appellees 47–48. Also, as the Court of Appeals noted, bingo is legally sponsored by many different organizations and is widely played in California. There is no effort to forbid the playing of bingo by any member of the public over the age of 18. Indeed, the permitted bingo games *must* be open to the general public. Nor is there any limit on the number of games which eligible organizations may operate, the receipts which they may obtain from the games, the number of games which a participant may play, or the amount of money which a participant may spend, either per game or in total. In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.[10]

California argues, however, that high stakes, *unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations. But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.

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[10] Nothing in this opinion suggests that cockfighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California. See *post*, at 222. The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory. The lower courts have not demonstrated an inability to identify prohibitory laws. For example, in *United States* v. *Marcyes*, 557 F. 2d 1361, 1363–1365 (CA9 1977), the Court of Appeals adopted and applied the prohibitory/regulatory distinction in determining whether a state law governing the possession of fireworks was made applicable to Indian reservations by the Assimilative Crimes Statute, 62 Stat. 686, 18 U. S. C. § 13. The court concluded that, despite limited exceptions to the statute's prohibition, the fireworks law was prohibitory in nature. See also *United States* v. *Farris*, 624 F. 2d 890 (CA9 1980), cert. denied, 449 U. S. 1111 (1981), discussed in n. 13, *infra*.

This view, adopted here and by the Fifth Circuit in the *Butterworth* case, we find persuasive. Accordingly, we conclude that Pub. L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 326.5 (West Supp. 1987) within the Cabazon and Morongo Reservations.[11]

California and Riverside County also argue that the Organized Crime Control Act (OCCA) authorizes the application of their gambling laws to the tribal bingo enterprises. The OCCA makes certain violations of state and local gambling laws violations of federal law.[12] The Court of Appeals re-

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[11] Nor does Pub. L. 280 authorize the county to apply its gambling ordinances to the reservations. We note initially that it is doubtful that Pub. L. 280 authorizes the application of any local laws to Indian reservations. Section 2 of Pub. L. 280 provides that the criminal laws of the "State" shall have the same force and effect within Indian country as they have elsewhere. This language seems clearly to exclude local laws. We need not decide this issue, however, because even if Pub. L. 280 does make local criminal/prohibitory laws applicable on Indian reservations, the ordinances in question here do not apply. Consistent with our analysis of Cal. Penal Code Ann. § 326.5 (West Supp. 1987) above, we conclude that Ordinance No. 558, the bingo ordinance, is regulatory in nature. Although Ordinance No. 331 prohibits gambling on all card games, including the games played in the Cabazon card club, the county does not prohibit municipalities within the county from enacting municipal ordinances permitting these card games, and two municipalities have in fact done so. It is clear, therefore, that Ordinance No. 331 does not prohibit these card games for purposes of Pub. L. 280.

[12] OCCA, 18 U. S. C. § 1955, provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more that $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which —

"(i) is a *violation of the law of a State or political subdivision* in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." (Emphasis added.)

jected appellants' argument, relying on its earlier decisions in *United States* v. *Farris*, 624 F. 2d 890 (CA9 1980), cert. denied, 449 U. S. 1111 (1981), and *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal.* v. *Duffy*, 694 F. 2d 1185 (1982). 783 F. 2d, at 903. The court explained that whether a tribal activity is "a violation of the law of a state" within the meaning of OCCA depends on whether it violates the "public policy" of the State, the same test for application of state law under Pub. L. 280, and similarly concluded that bingo is not contrary to the public policy of California.[13]

The Court of Appeals for the Sixth Circuit has rejected this view. *United States* v. *Dakota*, 796 F. 2d 186 (1986).[14] Since the OCCA standard is simply whether the gambling business is being operated in "violation of the law of a State," there is no basis for the regulatory/prohibitory distinction that it agreed is suitable in construing and applying Pub. L. 280. 796 F. 2d, at 188. And because enforcement of OCCA is an exercise of federal rather than state authority, there is no danger of state encroachment on Indian tribal sovereignty. *Ibid.* This latter observation exposes the flaw in appellants' reliance on OCCA. That enactment is indeed a federal law that, among other things, defines certain federal crimes over which the district courts have exclusive jurisdiction.[15] There is nothing in OCCA indicating that the States

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[13] In *Farris*, in contrast, the court had concluded that a gambling business, featuring blackjack, poker, and dice, operated by tribal members on the Puyallup Reservation violated the public policy of Washington; the United States, therefore, could enforce OCCA against the Indians.

[14] In *Dakota*, the United States sought a declaratory judgment that a gambling business, also featuring the playing of blackjack, poker, and dice, operated by two members of the Keweenaw Bay Indian Community on land controlled by the community, and under a license issued by the community, violated OCCA. The Court of Appeals held that the gambling business violated Michigan law and OCCA.

[15] Title 18 U. S. C. § 3231 provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect. We are not informed of any federal efforts to employ OCCA to prosecute the playing of bingo on Indian reservations, although there are more than 100 such enterprises currently in operation, many of which have been in existence for several years, for the most part with the encouragement of the Federal Government.[16] Whether or not, then, the Sixth Circuit is right and the Ninth Circuit wrong about the coverage of OCCA, a matter that we do not decide, there is no warrant for California to make arrests on reservations and thus, through OCCA, enforce its gambling laws against Indian tribes.

II

Because the state and county laws at issue here are imposed directly on the Tribes that operate the games, and are not expressly permitted by Congress, the Tribes argue that the judgment below should be affirmed without more. They rely on the statement in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 170–171 (1973), that "'[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply'" (quoting United States Dept. of the Interior, Federal Indian Law 845 (1958)). Our cases, however, have not established an inflexible *per se* rule pre-

[16] See S. Rep. No. 99–493, p. 2 (1986). Federal law enforcement officers have the capability to respond to violations of OCCA on Indian reservations, as is apparent from *Farris* and *Dakota*. This is not a situation where the unavailability of a federal officer at a particular moment would likely result in nonenforcement. OCCA is directed at large-scale gambling enterprises. If state officers discover a gambling business unknown to federal authorities while performing their duties authorized by Pub. L. 280, there should be ample time for them to inform federal authorities, who would then determine whether investigation or other enforcement action was appropriate. A federal police officer is assigned by the Department of the Interior to patrol the Indian reservations in southern California. App. to Brief for Appellees D–1—D–7.

cluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.[17] "[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 331–332 (1983) (footnotes omitted). Both *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976), and *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), are illustrative. In those decisions we held that, in the absence of express congressional permission, a State could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian

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[17] In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. In *Montana* v. *Blackfeet Tribe*, 471 U. S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Id.*, at 765. We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated statements "to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. . . . Even so, *in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n*, [411 U. S. 164

customers. Both cases involved nonmembers entering and purchasing tobacco products on the reservations involved. The State's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the State was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators.[18]

This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Mescalero*, 462 U. S., at 333, 334. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Id.*, at 334–335.[19] See also,

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(1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Ibid.* (emphasis added).

[18] JUSTICE STEVENS appears to embrace the opposite presumption—that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 151 (1980), in the context of an assertion of state authority over the activities of non-Indians within a reservation, "[t]hat is simply not the law." It is even less correct when applied to the activities of tribes and tribal members within reservations.

[19] In *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 335, n. 17, we discussed a number of the statutes Congress enacted to promote tribal self-government. The congressional declarations of policy in the Indian Financing Act of 1974, as amended, 25 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), and in the Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U. S. C. § 450 *et seq.* (1982 ed. and Supp. III), are particularly significant in this case: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibil-

Iowa Mutual Insurance Co. v. *LaPlante*, *ante*, p. 9; *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143 (1980).

These are important federal interests. They were reaffirmed by the President's 1983 Statement on Indian Policy.[20] More specifically, the Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises.[21] Under the Indian Financing Act of 1974, 25

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ity for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U. S. C. § 1451. Similarly, "[t]he Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U. S. C. § 450a(b).

[20] "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. of Pres. Doc. 99 (1983).

[21] The Court of Appeals relied on the following official declarations. 783 F. 2d, at 904–905. A policy directive issued by the Assistant Secretary of the Interior on March 2, 1983, stated that the Department would "strongly oppose" any proposed legislation that would subject tribes or tribal members to state gambling regulation. "Such a proposal is inconsistent with the President's Indian Policy Statement of January 24, 1983. . . . A number of tribes have begun to engage in bingo and similar gambling operations on their reservations for the very purpose enunciated in the President's Message. Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility should be protected and enhanced." The court also relied on an affidavit submitted by the Director of Indian Services, Bureau of Indian Affairs, on behalf of the Tribes' position:

"It is the department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-

U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), the Secretary of the Interior has made grants and has guaranteed loans for the purpose of constructing bingo facilities. See S. Rep. No. 99–493, p. 5 (1986); *Mashantucket Pequot Tribe* v. *McGuigan*, 626 F. Supp. 245, 246 (Conn. 1986). The Department of Housing and Urban Development and the Department of Health and Human Services have also provided financial assistance to develop tribal gaming enterprises. See S. Rep. No. 99–493, *supra*, at 5. Here, the Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. See H. R. Rep. No. 99–488, p. 10 (1986). The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U. S. C. § 81, and has issued detailed guidelines governing that review.[22] App. to Motion to Dismiss Appeal or Affirm Judgment 63a–70a.

These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal gov-

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determination. All of these are federal goals for the tribes. Furthermore, it is the Department's position that the development of tribal bingo enterprises is consistent with and in furtherance of President Reagan's Indian Policy Statement of January 24, 1983."

[22] Among other things, the guidelines require that the contract state that no payments have been made or will be made to any elected member of the tribal government or relative of such member for the purpose of obtaining or maintaining the contract. The contractor is required to disclose information on all parties in interest to the contract and all employees who will have day-to-day management responsibility for the gambling operation, including names, home and business addresses, occupations, dates of birth, and Social Security numbers. The Federal Bureau of Investigation must conduct a name-and-record check on these persons before a contract may be approved. The guidelines also specify accounting procedures and cash management procedures which the contractor must follow.

ernments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

California seeks to diminish the weight of these seemingly important tribal interests by asserting that the Tribes are merely marketing an exemption from state gambling laws. In *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S., at 155, we held that the State could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services, because the Tribes had no right "to market an exemption from state taxation to persons who would normally do their business elsewhere." We stated that "[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Ibid.* Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games.[23] The tribal bingo enterprises are

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[23] An agent of the California Bureau of Investigation visited the Cabazon bingo parlor as part of an investigation of tribal bingo enterprises. The agent described the clientele as follows:

"In attendance for the Monday evening bingo session were about 300 players. . . . On row 5, on the front left side were a middle-aged latin couple, who were later joined by two young latin males. These men had to have

similar to the resort complex, featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the "concerted and sustained" management of reservation land and wildlife resources. *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 341. The Mescalero project generates funds for essential tribal services and provides employment for tribal members. We there rejected the notion that the Tribe is merely marketing an exemption from state hunting and fishing regulations and concluded that New Mexico could not regulate on-reservation fishing and hunting by non-Indians. *Ibid.* Similarly, the Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest.

The State also relies on *Rice* v. *Rehner*, 463 U. S. 713 (1983), in which we held that California could require a tribal member and a federally licensed Indian trader operating a general store on a reservation to obtain a state license in order to sell liquor for off-premises consumption. But our decision there rested on the grounds that Congress had never recognized any sovereign tribal interest in regulating liquor traffic and that Congress, historically, had plainly anticipated that the States would exercise concurrent authority to regulate the use and distribution of liquor on Indian reservations. There is no such traditional federal view governing the outcome of this case, since, as we have explained, the current federal policy is to promote precisely what California seeks to prevent.

The sole interest asserted by the State to justify the imposition of its bingo laws on the Tribes is in preventing the infiltration of the tribal games by organized crime. To the extent that the State seeks to prevent any and all bingo

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the game explained to them. The middle table was shared with a senior citizen couple. The aisle table had 2 elderly women, 1 in a wheelchair, and a middle-aged woman. . . . A goodly portion of the crowd were retired age to senior citizens." App. 176. We are unwilling to assume that these patrons would be indifferent to the services offered by the Tribes.

games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant and the state and county laws are pre-empted. See n. 3, *supra*. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted. The State insists that the high stakes offered at tribal games are attractive to organized crime, whereas the controlled games authorized under California law are not. This is surely a legitimate concern, but we are unconvinced that it is sufficient to escape the pre-emptive force of federal and tribal interests apparent in this case. California does not allege any present criminal involvement in the Cabazon and Morongo enterprises, and the Ninth Circuit discerned none. 783 F. 2d, at 904. An official of the Department of Justice has expressed some concern about tribal bingo operations,[24] but far from any action being taken evidencing this concern—and surely the Federal Government has the authority to forbid Indian gambling enterprises—the prevailing federal policy continues to support these tribal enterprises, including those of the Tribes involved in this case.[25]

We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enter-

[24] Hearings on H. R. 4566 before the House Committee on Interior and Insular Affairs, 98th Cong., 2d Sess., 15–39, 66–75 (1984); App. 197–205.

[25] JUSTICE STEVENS' assertion, *post*, at 226, that the State's interest in restricting the proceeds of gambling to itself, and the charities it favors, justifies the prohibition or regulation of tribal bingo games is indeed strange. The State asserted no such discriminatory economic interest; and it is pure speculation that, in the absence of tribal bingo games, would-be patrons would purchase lottery tickets or would attend state-approved bingo games instead. In any event, certainly California has no legitimate interest in allowing potential lottery dollars to be diverted to non-Indian owners of card clubs and horse tracks while denying Indian tribes the opportunity to profit from gambling activities. Nor is California necessarily entitled to prefer the funding needs of state-approved charities over the funding needs of the Tribes, who dedicate bingo revenues to promoting the health, education, and general welfare of tribal members.

prises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club. We therefore affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, dissenting.

Unless and until Congress exempts Indian-managed gambling from state law and subjects it to federal supervision, I believe that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders. Congress has not pre-empted California's prohibition against high-stakes bingo games and the Secretary of the Interior plainly has no authority to do so. While gambling provides needed employment and income for Indian tribes, these benefits do not, in my opinion, justify tribal operation of currently unlawful commercial activities. Accepting the majority's reasoning would require exemptions for cockfighting, tattoo parlors, nude dancing, houses of prostitution, and other illegal but profitable enterprises. As the law now stands, I believe tribal entrepreneurs, like others who might derive profits from catering to non-Indian customers, must obey applicable state laws.

In my opinion the plain language of Pub. L. 280, 67 Stat. 588, as amended, 18 U. S. C. § 1162, 28 U. S. C. § 1360 (1982 ed. and Supp. III), authorizes California to enforce its prohibition against commercial gambling on Indian reservations. The State prohibits bingo games that are not operated by members of designated charitable organizations or which offer prizes in excess of $250 per game. Cal. Penal Code Ann. § 326.5 (West Supp. 1987). In § 2 of Pub. L. 280, Con-

gress expressly provided that the criminal laws of the State of California "shall have the same force and effect within such Indian country as they have elsewhere within the State." 18 U. S. C. § 1162(a). Moreover, it provided in § 4(a) that the civil laws of California "that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U. S. C. § 1360(a) (1982 ed., Supp. III).

It is true that in *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), we held that Pub. L. 280 did not confer civil jurisdiction on a State to impose a personal property tax on a mobile home that was owned by a reservation Indian and located within the reservation. Moreover, the reasoning of that decision recognizes the importance of preserving the traditional aspects of tribal sovereignty over the relationships among reservation Indians. Our more recent cases have made it clear, however, that commercial transactions between Indians and non-Indians—even when conducted on a reservation—do not enjoy any blanket immunity from state regulation. In *Rice* v. *Rehner*, 463 U. S. 713 (1983), respondent, a federally licensed Indian trader, was a tribal member operating a general store on an Indian reservation. We held that the State could require Rehner to obtain a state license to sell liquor for off-premises consumption. The Court attempts to distinguish *Rice* v. *Rehner* as resting on the absence of a sovereign tribal interest in the regulation of liquor traffic to the exclusion of the States. But as a necessary step on our way to deciding that the State could regulate all tribal liquor sales in Indian country, we recognized the State's authority over transactions, whether they be liquor sales or gambling, between Indians and non-Indians: "If there is any interest in tribal sovereignty implicated by imposition

of California's alcoholic beverage regulation, it exists only insofar as the State attempts to regulate Rehner's sale of liquor to other members of the Pala Tribe on the Pala Reservation." *Id.*, at 721. Similarly, in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), we held that a State could impose its sales and cigarette taxes on non-Indian customers of smokeshops on Indian reservations.

Today the Court seems prepared to acknowledge that an Indian tribe's commercial transactions with non-Indians may violate "the State's public policy." *Ante*, at 209. The Court reasons, however, that the operation of high-stakes bingo games does not run afoul of California's public policy because the State permits some forms of gambling and, specifically, some forms of bingo. I find this approach to "public policy" curious, to say the least. The State's policy concerning gambling is to authorize certain specific gambling activities that comply with carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and to prohibit all unregulated commercial lotteries that are operated for private profit.[1] To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is con-

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[1] The Court holds that Pub. L. 280 does not authorize California to enforce its prohibition against commercial gambling within the Cabazon and Morongo Reservations. *Ante*, at 212. The Court reaches this conclusion by determining that § 4(a) of Pub. L. 280, 28 U. S. C. § 1360(a), withholds from the States general civil regulatory authority over Indian tribes, and that the State's rules concerning gambling are regulatory rather than prohibitory. In its opinion, the Court dismisses the State's argument that high-stakes, unregulated bingo is prohibited with the contention that an otherwise regulatory law does not become a prohibition simply because it "is enforceable by criminal as well as civil means." *Ante*, at 211. Aside from the questionable merit of this proposition, it does not even address the meaning of § 2(a) of Pub. L. 280, 18 U. S. C. 1162(a) (1982 ed., Supp. III), a provision which is sufficient to control the disposition of this case. See *supra*, at 222.

sistent with public policy because the State allows driving at speeds of up to 55 miles an hour.

In my view, Congress has permitted the State to apply its prohibitions against commercial gambling to Indian tribes. Even if Congress had not done so, however, the State has the authority to assert jurisdiction over appellees' gambling activities. We recognized this authority in *Washington* v. *Confederated Tribes*, *supra;* the Court's attempt to distinguish the reasoning of our decision in that case is unpersuasive. In *Washington* v. *Confederated Tribes*, the Tribes contended that the State had no power to tax on-reservation sales of cigarettes to non-Indians. The argument that we rejected there has a familiar ring:

> "The Tribes contend that their involvement in the operation and taxation of cigarette marketing on the reservation ousts the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. The primary argument is economic. It is asserted that smokeshop cigarette sales generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations. Most cigarette purchasers are outsiders attracted onto the reservations by the bargain prices the smokeshops charge by virtue of their claimed exemption from state taxation. If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-à-vis businesses in surrounding areas." *Id.*, at 154.
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> "What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation." *Id.*, at 155.

In *Confederated Tribes*, the tribal smokeshops offered their customers the same products, services, and facilities that other tobacconists offered to their customers. Al-

though the smokeshops were more modest than the bingo palaces involved in this case, presumably they were equally the product of tribal labor and tribal capital. What made them successful, however, was the value of the exemption that was offered to non-Indians "who would normally do their business elsewhere." *Id.*, at 155.

Similarly, it is painfully obvious that the value of the Tribe's asserted exemption from California's gambling laws is the primary attraction to customers who would normally do their gambling elsewhere. The Cabazon Band of Mission Indians has no tradition or special expertise in the operation of large bingo parlors. See Declaration of William J. Wallace, ¶2, App. 153, 171. Indeed, the entire membership of the Cabazon Tribe—it has only 25 enrolled members—is barely adequate to operate a bingo game that is patronized by hundreds of non-Indians nightly. How this small and formerly impoverished Band of Indians could have attracted the investment capital for its enterprise without benefit of the claimed exemption is certainly a mystery to me.

I am entirely unpersuaded by the Court's view that the State of California has no legitimate interest in requiring appellees' gambling business to comply with the same standards that the operators of other bingo games must observe. The State's interest is both economic and protective. Presumably the State has determined that its interest in generating revenues for the public fisc and for certain charities outweighs the benefits from a total prohibition against publicly sponsored games of chance. Whatever revenues the Tribes receive from their unregulated bingo games drain funds from the state-approved recipients of lottery revenues—just as the tax-free cigarette sales in the *Confederated Tribes* case diminished the receipts that the tax collector would otherwise have received.

Moreover, I am unwilling to dismiss as readily as the Court does the State's concern that these unregulated high-stakes bingo games may attract organized criminal infiltration.

Brief for Appellants 25–26, 29; Reply Brief for Appellants 12. Comprehensive regulation of the commercial gambling ventures that a State elects to license is obviously justified as a prophylactic measure even if there is presently no criminal activity associated with casino gambling in the State. Indeed, California regulates charitable bingo, horseracing, and its own lottery. The State of California requires that charitable bingo games may only be operated and staffed by members of designated charitable organizations, and that proceeds from the games may only be used for charitable purposes. Cal. Penal Code Ann. § 326.5 (West Supp. 1987). These requirements for staffing and for dispersal of profits provide bulwarks against criminal activity; neither safeguard exists for bingo games on Indian reservations.[2] In my judgment, unless Congress authorizes and regulates these commercial gambling ventures catering to non-Indians, the State has a legitimate law enforcement interest in proscribing them.

Appellants and the Secretary of the Interior may well be correct, in the abstract, that gambling facilities are a sensible way to generate revenues that are badly needed by reservation Indians. But the decision to adopt, to reject, or to define the precise contours of such a course of action, and thereby to set aside the substantial public policy concerns of a sovereign State, should be made by the Congress of the United States. It should not be made by this Court, by the temporary occupant of the Office of the Secretary of the Interior, or by non-Indian entrepreneurs who are experts in gambling management but not necessarily dedicated to serving the future well-being of Indian tribes.

I respectfully dissent.

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[2] The Cabazon Band's bingo room was operated under a management agreement with an outside firm until 1986; the Morongo Band operates its bingo room under a similar management agreement. App. to Brief for Appellees, C–1 to C–3; Morongo Band of Mission Indians Tribal Bingo Enterprise Management Agreement, ¶ 4B, App. 97–98.

MARTIN *v.* OHIO

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 85–6461. Argued December 2, 1986—Decided February 25, 1987

Under the Ohio Revised Code (Code), the burden of proving the elements of a criminal offense is upon the prosecution, but, for an affirmative defense, the burden of proof by a preponderance of the evidence is placed on the accused. Self-defense is an affirmative defense under Ohio law and therefore must be proved by the defendant. Petitioner was charged by Ohio with aggravated murder, which is defined as "purposely, and with prior calculation and design, causing the death of another." She pleaded self-defense, and testified that she had shot and killed her husband when he came at her following an argument during which he had struck her. As to the crime itself, the jury was instructed (1) that, to convict, it must find, in light of all the evidence, that each of the elements of aggravated murder was proved by the State beyond reasonable doubt, and that the burden of proof with respect to those elements did not shift; and (2) that, to find guilt, it must be convinced that none of the evidence, whether offered by the State or by petitioner in connection with her self-defense plea, raised a reasonable doubt that she had killed her husband, that she had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. However, as to self-defense, the jury was instructed that it could acquit if it found by a preponderance of the evidence that petitioner had proved (1) that she had not precipitated the confrontation with her husband; (2) that she honestly believed she was in imminent danger of death or great bodily harm and that her only means of escape was to use force; and (3) that she had satisfied any duty to retreat or avoid danger. The jury found her guilty, and both the Ohio Court of Appeals and Supreme Court affirmed the conviction, rejecting petitioner's Due Process Clause challenge which was based on the charge's placing on her the self-defense burden of proof. In reaching its decision, the State Supreme Court relied on *Patterson* v. *New York*, 432 U. S. 197.

Held:

1. Neither Ohio law nor the above instructions violate the Due Process Clause of the Fourteenth Amendment by shifting to petitioner the State's burden of proving the elements of the crime. The instructions, when read as a whole, do not improperly suggest that self-defense evidence could not be considered in determining whether there was reasonable doubt about the sufficiency of the State's proof of the crime's ele-

ments. Furthermore, simply because evidence offered to support self-defense might negate a purposeful killing by prior calculation and design does not mean that elements of the crime and self-defense impermissibly overlap, since evidence creating a reasonable doubt about any fact necessary for a finding of guilt could easily fall far short of proving self-defense by a preponderance of the evidence, but, on the other hand, a killing will be excused if self-defense is satisfactorily established even if there is no reasonable doubt in the jury's mind that the defendant is guilty. Pp. 233–234.

2. It is not a violation of the Due Process Clause for Ohio to place the burden of proving self-defense on a defendant charged with committing aggravated murder. There is no merit to petitioner's argument that it is necessary under Ohio law for the State to disprove self-defense since both unlawfulness and criminal intent are elements of serious offenses, while self-defense renders lawful that which would otherwise be a crime and negates a showing of criminal intent. The Court will follow Ohio courts that have rejected this argument, holding that unlawfulness in such cases is the conduct satisfying the elements of aggravated murder, and that the necessary mental state for this crime is the specific purpose to take life pursuant to prior calculation and design. Furthermore, the mere fact that all but two States have abandoned the common-law rule that affirmative defenses, including self-defense, must be proved by the defendant does not render that rule unconstitutional. The Court will follow *Patterson* and other of its decisions which allowed States to fashion their own affirmative-defense, burden-of-proof rules. Pp. 235–236.

21 Ohio St. 3d 91, 488 N. E. 2d 166, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, and in Parts I and III of which BLACKMUN, J., joined, *post*, p. 236.

James R. Willis argued the cause for petitioner. With him on the briefs was *Margery B. Koosed.*

George J. Sadd argued the cause for respondent. With him on the brief was *John T. Corrigan.**

**Randall M. Dana, Gregory L. Ayers, Richard L. Aynes, Margery B. Koosed,* and *J. Dean Carro* filed a brief for the Ohio Public Defender Commission as *amicus curiae* urging reversal.

JUSTICE WHITE delivered the opinion of the Court.

The Ohio Code provides that "[e]very 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)(1982). An affirmative defense is one involving "an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." Ohio Rev. Code Ann. § 2901.05(C)(2)(1982). The Ohio courts have "long determined that self-defense is an affirmative defense," 21 Ohio St. 3d 91, 93, 488 N. E. 2d 166, 168 (1986), and that the defendant has the burden of proving it as required by § 2901.05(A).

As defined by the trial court in its instructions in this case, the elements of self-defense that the defendant must prove are that (1) the defendant was not at fault in creating the situation giving rise to the argument; (2) the defendant had an honest belief that she was in imminent danger of death or great bodily harm, and that her only means of escape from such danger was in the use of such force; and (3) the defendant did not violate any duty to retreat or avoid danger. App. 19. The question before us is whether the Due Process Clause of the Fourteenth Amendment forbids placing the burden of proving self-defense on the defendant when she is charged by the State of Ohio with committing the crime of aggravated murder, which, as relevant to this case, is defined by the Revised Code of Ohio as "purposely, and with prior calculation and design, caus[ing] the death of another." Ohio Rev. Code Ann. § 2903.01 (1982).

The facts of the case, taken from the opinions of the courts below, may be succinctly stated. On July 21, 1983, petitioner Earline Martin and her husband, Walter Martin,

argued over grocery money. Petitioner claimed that her husband struck her in the head during the argument. Petitioner's version of what then transpired was that she went upstairs, put on a robe, and later came back down with her husband's gun which she intended to dispose of. Her husband saw something in her hand and questioned her about it. He came at her, and she lost her head and fired the gun at him. Five or six shots were fired, three of them striking and killing Mr. Martin. She was charged with and tried for aggravated murder. She pleaded self-defense and testified in her own defense. The judge charged the jury with respect to the elements of the crime and of self-defense and rejected petitioner's Due Process Clause challenge to the charge placing on her the burden of proving self-defense. The jury found her guilty.

Both the Ohio Court of Appeals and the Supreme Court of Ohio affirmed the conviction. Both rejected the constitutional challenge to the instruction requiring petitioner to prove self-defense. The latter court, relying upon our opinion in *Patterson* v. *New York*, 432 U. S. 197 (1977), concluded that the State was required to prove the three elements of aggravated murder but that *Patterson* did not require it to disprove self-defense, which is a separate issue that did not require Mrs. Martin to disprove any element of the offense with which she was charged. The court said, "the state proved beyond a reasonable doubt that appellant purposely, and with prior calculation and design, caused the death of her husband. Appellant did not dispute the existence of these elements, but rather sought to justify her actions on grounds she acted in self defense." 21 Ohio St. 3d, at 94, 488 N. E. 2d, at 168. There was thus no infirmity in her conviction. We granted certiorari, 475 U. S. 1119 (1986), and affirm the decision of the Supreme Court of Ohio.

In re Winship, 397 U. S. 358, 364 (1970), declared 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." A few years later, we held that *Winship*'s mandate was fully satisfied where the State of New York had proved beyond reasonable doubt each of the elements of murder, but placed on the defendant the burden of proving the affirmative defense of extreme emotional disturbance, which, if proved, would have reduced the crime from murder to manslaughter. *Patterson* v. *New York*, *supra*. We there emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion. 432 U. S., at 201–202. New York had the authority to define murder as the intentional killing of another person. It had chosen, however, to reduce the crime to manslaughter if the defendant proved by a preponderance of the evidence that he had acted under the influence of extreme emotional distress. To convict of murder, the jury was required to find beyond a reasonable doubt, based on all the evidence, including that related to the defendant's mental state at the time of the crime, each of the elements of murder and also to conclude that the defendant had not proved his affirmative defense. The jury convicted Patterson, and we held there was no violation of the Fourteenth Amendment as construed in *Winship*. Referring to *Leland* v. *Oregon*, 343 U. S. 790 (1952), and *Rivera* v. *Delaware*, 429 U. S. 877 (1976), we added that New York "did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause" and declined to reconsider those cases. 432 U. S., at 206, 207. It was also observed that "the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—[does not] mean that those States that strike a different balance are in violation of the Constitution." *Id.*, at 211.

As in *Patterson*, the jury was here instructed that to convict it must find, in light of all the evidence, that each of the elements of the crime of aggravated murder has been proved by the State beyond reasonable doubt, and that the burden of proof with respect to these elements did not shift. To find guilt, the jury had to be convinced that none of the evidence, whether offered by the State or by Martin in connection with her plea of self-defense, raised a reasonable doubt that Martin had killed her husband, that she had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. It was also told, however, that it could acquit if it found by a preponderance of the evidence that Martin had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger. The jury convicted Martin.

We agree with the State and its Supreme Court that this conviction did not violate the Due Process Clause. The State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation or design. It did not seek to shift to Martin the burden of proving any of those elements, and the jury's verdict reflects that none of her self-defense evidence raised a reasonable doubt about the State's proof that she purposefully killed with prior calculation and design. She nevertheless had the opportunity under state law and the instructions given to justify the killing and show herself to be blameless by proving that she acted in self-defense. The jury thought she had failed to do so, and Ohio is as entitled to punish Martin as one guilty of murder as New York was to punish Patterson.

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i. e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance

standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship*'s mandate. 397 U. S., at 364. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.

We are thus not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former. It may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case. When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established. We note here, but need not rely on, the observation of the Supreme Court of Ohio that "[a]ppellant did not dispute the existence of [the elements of aggravated murder], but rather sought to justify her actions on grounds she acted in self-defense." 21 Ohio St. 3d, at 94, 488 N. E. 2d, at 168.*

*The dissent believes that the self-defense instruction might have led the jury to believe that the defendant had the burden of proving the ab-

Petitioner submits that there can be no conviction under Ohio law unless the defendant's conduct is unlawful, and that because self-defense renders lawful what would otherwise be a crime, unlawfulness is an element of the offense that the state must prove by disproving self-defense. This argument founders on state law, for it has been rejected by the Ohio Supreme Court and by the Court of Appeals for the Sixth Circuit. *White* v. *Arn*, 788 F. 2d 338, 346–347 (1986); *State* v. *Morris*, 8 Ohio App. 3d 12, 18–19, 455 N. E. 2d 1352, 1359–1360 (1982). It is true that unlawfulness is essential for conviction, but the Ohio courts hold that the unlawfulness in cases like this is the conduct satisfying the elements of aggravated murder—an interpretation of state law that we are not in a position to dispute. The same is true of the claim that it is necessary to prove a "criminal" intent to convict for serious crimes, which cannot occur if self-defense is shown: the necessary mental state for aggravated murder under Ohio law is the specific purpose to take life pursuant to prior calculation and design. See *White* v. *Arn*, *supra*, at 346.

As we noted in *Patterson*, the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. "This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified." 432 U. S., at 202. Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale

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sence of prior calculation and design. Indeed, its position is that *no* instruction could be clear enough not to mislead the jury. As is evident from the text, we disagree. We do not harbor the dissent's mistrust of the jury; and the instructions were sufficiently clear to convey to the jury that the State's burden of proving prior calculation did not shift and that self-defense evidence had to be considered in determining whether the State's burden had been discharged. We do not depart from *Patterson* v. *New York*, 432 U. S. 197 (1977), in this respect, or in any other.

L. J. 880, 882, and n. 10 (1968). We are aware that all but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant. But the question remains whether those States are in violation of the Constitution; and, as we observed in *Patterson*, that question is not answered by cataloging the practices of other States. We are no more convinced that the Ohio practice of requiring self-defense to be proved by the defendant is unconstitutional than we are that the Constitution requires the prosecution to prove the sanity of a defendant who pleads not guilty by reason of insanity. We have had the opportunity to depart from *Leland* v. *Oregon*, 343 U. S. 790 (1952), but have refused to do so. *Rivera* v. *Delaware*, 429 U. S. 877 (1976). These cases were important to the *Patterson* decision and they, along with *Patterson*, are authority for our decision today.

The judgment of the Ohio Supreme Court is accordingly

Affirmed.

JUSTICE POWELL, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, and with whom JUSTICE BLACKMUN joins with respect to Parts I and III, dissenting.

Today the Court holds that a defendant can be convicted of aggravated murder even though the jury may have a reasonable doubt whether the accused acted in self-defense, and thus whether he is guilty of a crime. Because I think this decision is inconsistent with both precedent and fundamental fairness, I dissent.

I

Petitioner Earline Martin was tried in state court for the aggravated murder of her husband. Under Ohio law, the elements of the crime are that the defendant has purposely killed another with "prior calculation and design." Ohio Rev. Code Ann. § 2903.01 (1982). Martin admitted that she

shot her husband, but claimed that she acted in self-defense. Because self-defense is classified as an "affirmative" defense in Ohio, the jury was instructed that Martin had the burden of proving her claim by a preponderance of the evidence. Martin apparently failed to carry this burden, and the jury found her guilty.

The Ohio Supreme Court upheld the conviction, relying in part on this Court's opinion in *Patterson* v. *New York*, 432 U. S. 197 (1977). The Court today also relies on the *Patterson* reasoning in affirming the Ohio decision. If one accepts *Patterson* as the proper method of analysis for this case, I believe that the Court's opinion ignores its central meaning.

In *Patterson*, the Court upheld a state statute that shifted the burden of proof for an affirmative defense to the accused. New York law required the prosecutor to prove all of the statutorily defined elements of murder beyond a reasonable doubt, but permitted a defendant to reduce the charge to manslaughter by showing that he acted while suffering an "extreme emotional disturbance." See N. Y. Penal Law §§ 125.25, 125.20 (McKinney 1975 and Supp. 1987). The Court found that this burden shifting did not violate due process, largely because the affirmative defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder." 432 U. S., at 207. The clear implication of this ruling is that when an affirmative defense *does* negate an element of the crime, the state may not shift the burden. See *White* v. *Arn*, 788 F. 2d 338, 344–345 (CA6 1986). In such a case, *In re Winship*, 397 U. S. 358 (1970), requires the state to prove the nonexistence of the defense beyond a reasonable doubt.

The reason for treating a defense that negates an element of the crime differently from other affirmative defenses is plain. If the jury is told that the prosecution has the burden of proving all the elements of a crime, but then also is in-

structed that the defendant has the burden of *dis*proving one of those same elements, there is a danger that the jurors will resolve the inconsistency in a way that lessens the presumption of innocence. For example, the jury might reasonably believe that by raising the defense, the accused has assumed the ultimate burden of proving that particular element. Or, it might reconcile the instructions simply by balancing the evidence that supports the prosecutor's case against the evidence supporting the affirmative defense, and conclude that the state has satisfied its burden if the prosecution's version is more persuasive. In either case, the jury is given the unmistakable but erroneous impression that the defendant shares the risk of nonpersuasion as to a fact necessary for conviction.[1]

Given these principles, the Court's reliance on *Patterson* is puzzling. Under Ohio law, the element of "prior calculation and design" is satisfied only when the accused has engaged in a "definite process of reasoning *in advance* of the killing," *i. e.*, when he has given the plan at least some "studied consideration." App. 14 (jury instructions) (emphasis added). In contrast, when a defendant such as Martin raises a claim of

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[1] Indeed, this type of instruction has an inherently illogical aspect. It makes no sense to say that the prosecution has the burden of proving an element beyond a reasonable doubt, *and* that the defense has the burden of proving the contrary by a preponderance of the evidence. If the jury finds that the prosecutor has *not* met his burden, it of course will have no occasion to consider the affirmative defense. And if the jury finds that each element of the crime *has* been proved beyond a reasonable doubt, it necessarily has decided that the defendant has not disproved an element of the crime. In either situation the instructions on the affirmative defense are surplusage. Because a reasonable jury will attempt to ascribe some significance to the court's instructions, the likelihood that it will impermissibly shift the burden is increased.

Of course, whether the jury will in fact improperly shift the burden away from the state is uncertain. But it is "settled law . . . that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Francis* v. *Franklin*, 471 U. S. 307, 323, n. 8 (1985).

self-defense, the jury also is instructed that the accused must prove that she "had an honest belief that she was in *imminent* danger of death or great bodily harm."[2] *Id.*, at 19 (emphasis added). In many cases, a defendant who finds himself in immediate danger and reacts with deadly force will not have formed a prior intent to kill. The Court recognizes this when it states:

> "It may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design . . . ." *Ante*, at 234.

Under *Patterson*, this conclusion should suggest that Ohio is precluded from shifting the burden as to self-defense. The Court nevertheless concludes that Martin was properly required to prove self-defense, simply because "Ohio does not shift to the defendant the burden of disproving any element of the state's case." *Ibid.*

The Court gives no explanation for this apparent rejection of *Patterson*. The only justification advanced for the Court's decision is that the jury could have used the evidence of self-defense to find that the State failed to carry its burden of proof. Because the jurors were free to consider both Martin's and the State's evidence, the argument goes, the verdict of guilt necessarily means that they were convinced that the defendant acted with prior calculation and design, and were unpersuaded that she acted in self-defense. *Ante*, at 233. The Court thus seems to conclude that as long as the jury is told that the state has the burden of proving all elements of the crime, the overlap between the offense and defense is immaterial.

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[2] The accused also must have avoided the danger if possible, and must not have been at fault in creating the threatening situation. See *State* v. *Robbins*, 58 Ohio St. 2d 74, 79–80, 388 N. E. 2d 755, 758 (1979).

This reasoning is flawed in two respects. First, it simply ignores the problem that arises from inconsistent jury instructions in a criminal case. The Court's holding implicitly assumes that the jury in fact understands that the ultimate burden remains with the prosecutor at all times, despite a conflicting instruction that places the burden on the accused to disprove the same element. But as pointed out above, the *Patterson* distinction between defenses that negate an element of the crime and those that do not is based on the legitimate concern that the jury *will* mistakenly lower the state's burden. In short, the Court's rationale fails to explain why the overlap in this case does not create the risk that *Patterson* suggested was unacceptable.[3]

Second, the Court significantly, and without explanation, extends the deference granted to state legislatures in this area. Today's decision could be read to say that virtually all state attempts to shift the burden of proof for affirmative defenses will be upheld, regardless of the relationship between the elements of the defense and the elements of the crime. As I understand it, *Patterson* allowed burden shifting because evidence of an extreme emotional disturbance did not negate the *mens rea* of the underlying offense. After today's decision, however, even if proof of the defense *does* negate an element of the offense, burden shifting still may be

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[3] This risk could have been reduced—although in my view, not eliminated—if the instructions had made it clear that evidence of self-defense can create a reasonable doubt as to guilt, *even if* that same evidence did not rise to the level necessary to prove an affirmative defense. But the instructions gave little guidance in this respect. The trial court simply told the jury that the prosecution must prove the elements of the crime, and the defendant must prove the existence of the defense. The instructions gave no indication how the jury should evaluate evidence that affected an element of *both* the crime and the defense. Cf. *Francis* v. *Franklin*, *supra*, at 322 ("Nothing in these specific sentences or in the [jury] charge as a whole makes clear . . . that one of these contradictory instructions carries more weight than the other").

permitted because the jury can consider the defendant's evidence when reaching its verdict.

I agree, of course, that States must have substantial leeway in defining their criminal laws and administering their criminal justice systems. But none of our precedents suggests that courts must give complete deference to a State's judgment about whether a shift in the burden of proof is consistent with the presumption of innocence. In the past we have emphasized that in some circumstances it may be necessary to look beyond the text of the State's burden-shifting laws to satisfy ourselves that the requirements of *Winship* have been satisfied. In *Mullaney* v. *Wilbur*, 421 U. S. 684, 698–699 (1975) we explicitly noted the danger of granting the State unchecked discretion to shift the burden as to any element of proof in a criminal case.[4] The Court today fails to discuss or even cite *Mullaney*, despite our unanimous agreement in that case that this danger would justify judicial intervention in some cases. Even *Patterson*, from which I dissented, recognized that "there are obviously constitutional limits beyond which the States may not go [in labeling elements of a crime as an affirmative defense]."[5] 432 U. S., at 210. Today, however, the Court simply asserts that Ohio law properly allocates the burdens, without giving any indication of where those limits lie.

Because our precedent establishes that the burden of proof may not be shifted when the elements of the defense and the elements of the offense conflict, and because it seems clear

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[4] We noted, for example:

"[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U. S., at 698.

[5] See also *McMillan* v. *Pennsylvania*, 477 U. S. 79, 86 (1986) ("[I]n certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged").

that they do so in this case, I would reverse the decision of the Ohio Supreme Court.

II

Although I believe that this case is wrongly decided even under the principles set forth in *Patterson*, my differences with the Court's approach are more fundamental. I continue to believe that the better method for deciding when a State may shift the burden of proof is outlined in the Court's opinion in *Mullaney* and in my dissenting opinion in *Patterson*. In *Mullaney*, we emphasized that the state's obligation to prove certain facts beyond a reasonable doubt was not necessarily restricted to legislative distinctions between offenses and affirmative defenses. The boundaries of the state's authority in this respect were elaborated in the *Patterson* dissent, where I proposed a two-part inquiry:

> "The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence. . . . It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof." 432 U. S., at 226–227 (footnotes omitted).

Cf. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 103 (1986) (STEVENS, J., dissenting) ("[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*").

There are at least two benefits to this approach. First, it ensures that the critical facts necessary to sustain a conviction will be proved by the state. Because the Court would

be willing to look beyond the text of a state statute, legislatures would have no incentive to redefine essential elements of an offense to make them part of an affirmative defense, thereby shifting the burden of proof in a manner inconsistent with *Winship* and *Mullaney*. Second, it would leave the States free in all other respects to recognize new factors that may mitigate the degree of criminality or punishment, without requiring that they also bear the burden of disproving these defenses. See *Patterson* v. *New York*, 432 U. S., at 229–230 (POWELL, J., dissenting) ("New ameliorative affirmative defenses . . . generally remain undisturbed by the holdings in *Winship* and *Mullaney*" (footnote omitted)).

Under this analysis, it plainly is impermissible to require the accused to prove self-defense. If petitioner could have carried her burden, the result would have been decisively different as to both guilt and punishment. There also is no dispute that self-defense historically is one of the primary justifications for otherwise unlawful conduct. See, *e. g.*, *Beard* v. *United States*, 158 U. S. 550, 562 (1895). Thus, while I acknowledge that the two-part test may be difficult to apply at times, it is hard to imagine a more clear-cut application than the one presented here.

III

In its willingness to defer to the State's legislative definitions of crimes and defenses, the Court apparently has failed to recognize the practical effect of its decision. Martin alleged that she was innocent because she acted in self-defense, a complete justification under Ohio law. See *State* v. *Nolton*, 19 Ohio St. 2d 133, 249 N. E. 2d 797 (1969). Because she had the burden of proof on this issue, the jury could have believed that it was just as likely as not that Martin's conduct was justified, and yet still have voted to convict. In other words, even though the jury may have had a substantial doubt whether Martin committed a crime, she was found guilty under Ohio law. I do not agree that the Court's au-

thority to review state legislative choices is so limited that it justifies increasing the risk of convicting a person who may not be blameworthy. See *Patterson* v. *New York*, *supra*, at 201–202 (state definition of criminal law must yield when it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (quoting *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958))). The complexity of the inquiry as to when a State may shift the burden of proof should not lead the Court to fashion simple rules of deference that could lead to such unjust results.

Syllabus

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FLORIDA POWER CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–1658. Argued December 3, 1986—Decided February 25, 1987*

The Pole Attachments Act (Act) empowers the Federal Communications Commission (FCC), in the absence of parallel state regulation, to determine "just and reasonable" rates that utility companies may charge cable television systems for using utility poles as the physical medium for stringing television cable (47 U. S. C. § 224(b)(1)). The Act, in effect, also provides a range of reasonableness within which the FCC may set rates when it indicates that a minimum reasonable rate is equivalent to the marginal cost of providing pole attachments, while the maximum reasonable rate is determined by computing the fully allocated cost of the construction and operation of each pole to which cable is attached (47 U. S. C. § 224(d)(1)). Upon the complaints of three cable operators alleging that the yearly per-pole attachment rentals charged them by appellee Florida Power Corporation—$7.15, $6.24, and $5.50, respectively—were unreasonable, the FCC's Common Carrier Bureau issued orders reforming each of the pole attachment agreements to provide for yearly rents of $1.79 per pole. These orders were upheld by the FCC, which rejected appellee's constitutional arguments under the Takings and Due Process Clauses. However, on review, the Court of Appeals held that the Act violated the Fifth Amendment. The court first concluded that the Act authorized a permanent physical occupation of property constituting a *per se* taking for which compensation must be paid under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419. The court then struck down the Act under the Fifth Amendment on the ground that its authorization to the FCC to make initial rate determinations under prescribed standards usurped an exclusively judicial function.

Held:

1. The Act does not authorize a taking of property within the meaning of the Fifth Amendment. Pp. 250–254.

(a) The Court of Appeals erred in applying *Loretto*'s narrow *per se* rule, since the element of required acquiescence is at the heart of the concept of occupation under *Loretto*, whereas nothing in the Act, as in-

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*Together with No. 85–1660, *Group W Cable, Inc., et al.* v. *Florida Power Corp. et al.*, also on appeal from the same court.

terpreted by the FCC, requires utility companies to give cable companies space on utility poles or prohibits utility companies from refusing to enter into attachment agreements. Since the Act clearly contemplates voluntary commercial leases rather than forced governmental licensing, it merely regulates the economic relations of utility company landlords and cable company tenants, which regulation is not a *per se* taking under *Loretto*. Pp. 250–253.

(b) The FCC order did not effect a taking under traditional Fifth Amendment standards, which permit governmental regulation of rates chargeable on the use of private property devoted to public purposes so long as the rates set are not confiscatory. Here, the rate imposed was calculated according to the Act's maximum rate formula, which is not confiscatory since it provides for the recovery of fully allocated costs, including the actual cost of capital. Pp. 253–254.

2. Because the Act does not authorize a taking under the Fifth Amendment, it is unnecessary to review the Court of Appeals' holding that the Act is unconstitutional. P. 254.

772 F. 2d 1537, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 254.

Deputy Solicitor General Wallace argued the cause for appellants in No. 85–1658. With him on the brief were *Solicitor General Fried, Harriet S. Shapiro,* and *Jack D. Smith. Jay E. Ricks* argued the cause for appellants in No. 85–1660. With him on the briefs were *Brenda L. Fox, E. Barrett Prettyman, Jr.,* and *J. Christopher Redding.*

Allan J. Topols argued the cause for appellees in both cases and filed a brief for appellee Florida Power Corp. With him on the brief was *Harry A. Evertz III. Peyton G. Bowman III* and *Daniel J. Wright* filed a brief for appellees Alabama Power Co. et al. *Shirley S. Fujimoto* and *Ralph A. Simmons* filed a brief for appellee Tampa Electric Co.†

†*Paul Glist* filed a brief for the Texas Cable TV Association, Inc., et al. as *amici curiae* urging reversal in No. 85–1658.

Briefs of *amici curiae* urging affirmance were filed for the Edison Electric Institute by *Robert L. Baum* and *Jan J. Sagett;* for the Mountain States Telephone and Telegraph Co. et al. by *L. Andrew Tollin;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley.*

JUSTICE MARSHALL delivered the opinion of the Court.

These cases present consolidated appeals from a single decision of the United States Court of Appeals for the Eleventh Circuit holding that 47 U. S. C. § 224 (the Pole Attachments Act) effects an unconstitutional taking of property without just compensation.

I

The Pole Attachments Act, 92 Stat. 35, as amended, 47 U. S. C. § 224, was enacted by Congress as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service. Cable television operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable; in most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables. Over the past 30 years, utility companies throughout the country have entered into arrangements for the leasing of space on poles to operators of cable television systems. These contracts have generally provided for the payment by the cable companies of a yearly rent for space on each pole to which cables were attached, the fixed costs of making modifications to the poles and of physical installation of cables being borne by the cable operators. In many States the rates charged by the utility companies for these attachments have not been subject to regulation.

In response to arguments by cable operators that utility companies were exploiting their monopoly position by engaging in widespread overcharging, Congress in the Pole Attachments Act authorized the Federal Communications Commission to fill the gap left by state systems of public utilities

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Briefs of *amici curiae* were filed for the Association of American Railroads by *Paul A. Cunningham* and *Kenneth P. Kolson;* and for Nor-West Cable Communications et al. by *Harold R. Farrow*, *Sol Schildhause*, and *Siegfried Hesse*.

regulation.[1] See S. Rep. No. 95–580, pp. 12–14 (1977). The Act provides that any cable company operating in a State which does not regulate the rates, terms, and conditions of pole attachments may seek relief from alleged overcharging before the Commission, which is empowered to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable . . . ." 47 U. S. C. § 224(b)(1). The Act establishes a standard for the Commission's determination of rates, providing that "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." § 224(d)(1).

In 1963, appellee Florida Power Corporation (Florida Power) entered into a pole attachment agreement with appellant Cox Cablevision Corporation (Cox). Florida Power subsequently, in 1977 and 1980, contracted for similar purposes with Teleprompter Corporation and Teleprompter Southeast, Inc. (Teleprompter), and Acton CATV, Inc. (Acton), respectively.[2] In November 1980, Teleprompter filed a complaint with the FCC, alleging that its 1980 per pole rent of $6.24 was unreasonable under the Act. In February 1981, Acton filed a complaint concerning the rate under its agreement, which was $7.15 per pole. In July 1981, the Commis-

[1] The Commission had previously investigated allegations of overcharging by utilities, but had concluded that it had no jurisdiction because pole attachments were not "communications by wire or radio" under the Communications Act, 48 Stat. 1064, as amended, 47 U. S. C. § 151. See *California Water & Telephone Co.*, 64 F. C. C. 2d 753, 758 (1977).

[2] Florida Power's agreements with Cox and Acton were for a minimum term of one year, thereafter terminable by either party on six months' notice. The agreement with Teleprompter provided for a minimum term of 5½ years, terminable thereafter on six months' notice.

sion's Common Carrier Bureau issued a memorandum opinion and order finding in favor of Teleprompter and Acton, reforming the agreements to provide in both cases for yearly rents of $1.79 per pole, and ordering refunds of excess rents paid after the filing of the complaints.[3] Florida Power filed an application for review by the FCC; during the pendency of this application Cox filed a complaint seeking revision of the rent charge under its 1963 agreement, which was at that time set at $5.50 per pole. The Common Carrier Bureau ordered reformation of Cox's agreement to provide for rent of $1.79 per pole. In September 1984 the FCC, in a single order, approved the orders of the Common Carrier Bureau in all three cases. The Commission rejected constitutional arguments raised by Florida Power under the Takings and Due Process Clauses, and upheld the rate calculations made by the Bureau.

Florida Power then sought review of the FCC's decision in the United States Court of Appeals for the Eleventh Circuit.[4] Neither Florida Power nor any of the intervenors argued before the Eleventh Circuit that the Pole Attachments Act was unconstitutional.[5] The Court of Appeals nonetheless held in a *per curiam* opinion that the Pole Attachments Act violated the Fifth Amendment. 772 F. 2d 1537 (1985).

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[3] The rate ordered by the Commission was in both instances substantially lower than the rate which the cable operators had asked the Commission to adopt. The cable operators, after review of information provided by Florida Power, had requested the imposition of annual rents of approximately $2.20 per pole.

[4] Appellants in No. 85–1660, Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation, intervened before the Court of Appeals supporting the FCC. Tampa Electric Company, Alabama Power Company, Arizona Public Service Company, and Mississippi Power and Light Company, appellees in both cases, intervened before the Court of Appeals in support of Florida Power.

[5] Florida Power's opening brief in the Court of Appeals stated that its petition for review of the Commission's order did not "involve a facial attack on the constitutionality of a legislative act." See Brief for Petitioner in No. 84–3683 (CA11), p. 35.

The court first concluded that the Act effected a taking of property because it authorized a permanent physical occupation of property under our decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982). 772 F. 2d, at 1544. The court then struck down the Act under the Fifth Amendment because it authorizes the FCC to make the initial determination of the amount of compensation to be paid under legislatively prescribed standards. "By prescribing a 'binding rule' in regard to the ascertainment of just compensation," the court stated, "Congress has usurped what has long been held an exclusive judicial function." *Id.*, at 1546.

The FCC and intervenor cable operators noticed separate appeals from this decision. We noted probable jurisdiction and consolidated the cases for argument and decision, 476 U. S. 1156 (1986). We now reverse.

II

The Court of Appeals found at the outset that the Pole Attachments Act authorizes a permanent physical occupation of property, which, under the rule we adopted in *Loretto*, is *per se* a taking for which compensation must be paid. 772 F. 2d, at 1543–1544. We disagree with this premise, for we find that *Loretto* has no application to the facts of this litigation.

In *Loretto* we reviewed a New York statute which prohibited any owner of rental property from "interfer[ing] with the installation of cable television facilities upon his property or premises," and provided that the landlord could charge cable operators for access to his property only the amount "which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable." 458 U. S., at 423, and n. 3. The appellant in *Loretto* had purchased an apartment building upon the roof of which appellee had mounted cables and switching boxes for the provision of cable television service to tenants. The State Commission on Cable Television had declared that a one-time charge of $1 might be levied by

landlords in return for the statutory compulsory access to property. *Id.*, at 424–425. We found that our prior decisions interpreting the Takings Clause, along with the purposes of the Clause itself, compelled the conclusion that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.*, at 426. We reversed the holding of the New York Court of Appeals that the challenged statute did not take property within the meaning of the Fifth Amendment, and remanded for consideration of the issue whether just compensation had been paid.

We characterized our holding in *Loretto* as "very narrow." *Id.*, at 441. The Court of Appeals in its decision in these cases broadened that narrow holding beyond the scope to which it legitimately applies. For, while the statute we considered in *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.[6] The Act authorizes the FCC, in the absence of par-

[6] The Court of Appeals found, and appellees contend here, that "[t]he hard reality of the matter is that if Florida Power desires to exclude the cable companies, for whatever reason, they are powerless to do so . . . because in previous cases where utilities have ordered cable companies to disconnect, the FCC has routinely intervened by issuing temporary stays which prevent the exclusion of the cable companies." 772 F. 2d 1537, 1543 (1985). According to the Solicitor General, the FCC "has not yet taken a position" on whether utilities may terminate attachment contracts for nonretaliatory reasons. Tr. of Oral Arg. 7. The language of the Act provides no explicit authority to the FCC to require pole access for cable operators, and the legislative history strongly suggests that Congress intended no such authorization. See, *e. g.*, S. Rep. No. 95–580, p. 16 (1977) (The Act "does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use"). We do not decide today what the application of *Loretto* v. *Teleprompter Manhattan CATV Corp.*,

allel state regulation, to review the rents charged by public utility landlords who have voluntarily entered into leases with cable company tenants renting space on utility poles. As we observed in *Loretto*, statutes regulating the economic relations of landlords and tenants are not *per se* takings. *Id.*, at 440; see *Bowles* v. *Willingham*, 321 U. S. 503, 517–518 (1944); *Block* v. *Hirsh*, 256 U. S. 135, 157 (1921); see also *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U. S. 875 (1983) (dismissing challenge to rent control ordinance under *Loretto* for want of substantial federal question). "So long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto*, *supra*, at 440 (emphasis added).

This element of required acquiescence is at the heart of the concept of occupation. As we said in *Loretto:*

> "[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." 458 U. S., at 436 (citation omitted).

Appellees contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinc-

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458 U. S. 419 (1982), would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.

tion between a commercial lessee and an interloper with a government license. We conclude that the Court of Appeals erred in applying the *per se* rule of *Loretto* to the Pole Attachments Act.

III

The remaining question, whether under traditional Fifth Amendment standards the challenged FCC order effected a taking of property, is readily answered. It is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible. See *Munn* v. *Illinois*, 94 U. S. 113, 133–134 (1877); *Permian Basin Area Rate Cases*, 390 U. S. 747, 768–769 (1968). Such regulation of maximum rates or prices "may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *Id.*, at 769. So long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53 (1936); see *Permian Basin*, *supra*, at 770.

The Pole Attachments Act, as previously noted, provides a range of reasonableness within which the FCC may undertake ratesetting. The Act provides that the minimum reasonable rate is equal to "the additional costs of providing pole attachments," while the maximum reasonable rate is to be calculated "by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." 47 U. S. C. §224(d)(1). The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which cable is attached.

The FCC has evidently interpreted the statute to provide that when it reduces the contract rate for pole attachments, it may only reduce to the maximum rate allowed under the statute. Tr. of Oral Arg. 10. The rate imposed by the Commission in this case was calculated according to the statutory formula for the determination of fully allocated cost. App. to Juris. Statement of FCC 23a. Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.[7] Accordingly, we hold that the the FCC regulatory order challenged below does not effect a taking of property under the Fifth Amendment.

IV

Because we hold that the Pole Attachments Act does not authorize a taking of property within the meaning of the Fifth Amendment, the holding of the Court of Appeals, that the Act is void because it unconstitutionally constrains the judicial determination of just compensation for takings, necessarily falls.[8] The decision of the Court of Appeals is

Reversed.

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, concurring.

I join the Court's opinion, and write only to state generally my understanding as to the scope of judicial review of rates determined by an administrative agency. I agree that the FCC regulatory order challenged in these cases does not effect

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[7] In view of the Commission's interpretation of the statute, and use of the fully allocated cost measure in this case, we have no occasion to consider the constitutionality of the minimum rate allowable under the statute.

[8] Our disposition of the takings question makes it unnecessary to review on the merits the Court of Appeals' holding that Congress may not establish standards under which the initial determination of compensation will be made by an administrative authority subject to final judicial review.

an unconstitutional taking of property. In the Court's brief discussion of "traditional Fifth Amendment standards," it quotes a single sentence from the *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968), to the effect that regulation of maximum rates "may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness," *id.*, at 769.

The inquiry mandated by the Constitution is considerably more complex than this simple statement reflects. Justice Harlan's opinion for the Court in that case is some 74 pages long. In addition, Justice Douglas wrote an interesting, and relevant, dissenting opinion. The one sentence included in today's opinion in no way accurately portrays the full rationale of judicial review of ratemaking by administrative tribunals. Other portions of the *Permian* opinion could be quoted to indicate that the standard gives governments far less leeway. Indeed, on the next page in *Permian* the Court identifies the relevant standard of review under the Natural Gas Act as "just and reasonable," *id.*, at 770, and the opinion goes on to suggest that the Commission's rates must be selected "from the broad zone of reasonableness." *Ibid.* A second rate case in which several Justices carefully considered the role courts should play in reviewing administrative ratemaking orders is *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944). Justice Douglas, writing for the Court, stated that the "just and reasonable" standard required that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." *Id.*, at 603.

I do not suggest that this isolated sentence from *Hope Natural Gas* is any more to be viewed as *the* appropriate standard than the sentence from *Permian Basin* the Court quotes today. My point is only that judicial review of rates challenged as taking property without just compensation involves careful consideration of the relevant statute, the action of the

regulatory commission, and a complex of other factors. The rates before us clearly comport with the Constitution. In my view no purpose is served by selecting for quotation a single sentence that, standing alone, is meaningless at best.

CITY OF SPRINGFIELD, MASSACHUSETTS *v.* KIBBE, ADMINISTRATRIX OF THE ESTATE OF THURSTON

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

No. 85–1217. Argued November 4, 1986—Decided February 25, 1987

Certiorari was granted in this case to resolve the question whether consistently with the decision in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, a municipality can be held liable under 42 U. S. C. § 1983 for inadequate training of its employees. In addressing that issue, this Court anticipated that, under its Rule 21.1(a), it would be able to reach the "fairly included" related question whether more than *negligence* in training is required in order to establish such liability. However, in the District Court petitioner city did not object to the jury instruction stating that gross negligence would suffice, and in fact proposed its own instruction to the same effect. Nor did it argue for a higher standard than gross negligence in the Court of Appeals.

Held: The writ of certiorari is dismissed as improvidently granted. Although petitioner argues here that a heightened negligence standard does not suffice under *Monell*'s requirement of a municipal policy, this Court ordinarily will not decide questions not raised or litigated in the lower courts, especially where the party seeking to argue the issue has failed to object to a jury instruction, as required by Rule 51 of the Federal Rules of Civil Procedure. This Court's inability to reach the negligence issue makes this case an inappropriate vehicle for resolving the inadequate-training question, because of the close interrelationship between the two matters, and the other questions presented are not of sufficient importance to warrant review independently. Although there is no jurisdictional bar to this Court's reaching the negligence issue, whether or not the Court of Appeals did so, there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, distinguished.

Certiorari dismissed. Reported below: 777 F. 2d 801.

Edward M. Pikula argued the cause for petitioner. With him on the briefs were *Richard T. Egan* and *Harry P. Carroll*.

Terry Scott Nagel argued the cause for respondent. With him on the brief were *J. Levonne Chambers* and *Eric Schnapper.**

PER CURIAM.

We granted certiorari to resolve the question whether consistently with our decision in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), a municipality can be held liable under 42 U. S. C. § 1983 for inadequate training of its employees.† 475 U. S. 1064 (1986). In addressing that issue, we anticipated that we would be able to reach the "fairly included" related question, see this Court's Rule 21.1(a), whether more than *negligence* in training is required in order to establish such liability.

The case having now been fully briefed and orally argued, we conclude that we cannot reach the negligence question. Although petitioner city of Springfield argues here that a heightened negligence standard does not suffice under *Monell*'s requirement of a municipal policy, it appears that in the District Court petitioner did not object to the jury instruction stating that gross negligence would suffice, App. 234–235, and indeed proposed its own instruction to the same effect. *Id.*, at 28. Nor did it argue for a higher standard than gross negligence in the Court of Appeals. Brief for Defendant-Appellant and Reply Brief for Defendant-Appellant in No. 85–1078 (CA1). It has informed us of no

Benna Ruth Solomon and *David O. Stewart* filed a brief for the U. S. Conference of Mayors as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Marjorie Heins*, *Jack D. Novik*, *Howard Friedman*, *Michael Avery*, and *David Rudovsky*; and for the National Association for the Advancement of Colored People by *Grover G. Hankins*.

†We also granted certiorari on two other questions: whether the "single incident" rule of *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), is limited in application to one act by one officer, and whether a policy of inadequate training may be inferred from the conduct of several police officers during a single incident absent evidence of prior misconduct in the department or a conscious decision by policymakers.

special circumstances explaining its failure to preserve this question.

We ordinarily will not decide questions not raised or litigated in the lower courts. See *California* v. *Taylor*, 353 U. S. 553, 556, n. 2 (1957). That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict." Here, our inability to reach the negligence issue makes this case an inappropriate vehicle for resolving the inadequate training question, because of the close interrelationship between the two matters, and the other questions presented are not of sufficient importance to warrant our review independently.

The dissent argues that we need not concern ourselves about Springfield's failure to preserve this issue, because it was passed on by the Court of Appeals below. *Post*, at 263–266. There is doubtless no jurisdictional bar to our reaching it, whether or not the Court of Appeals did so. See *Carlson* v. *Green*, 446 U. S. 14, 17, n. 2 (1980). We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested. That the Court of Appeals was fortunate enough to entertain the issue without reaching that outcome would not justify our running the same risk. In any event, we disagree with the dissent's reading of the Court of Appeals' opinion, and do not believe that it pursued the extraordinary course of considering this issue—which petitioner had not even *raised* in its arguments to that court—any more than we are inclined to do so. See 777 F. 2d 801, 804, 809–810 (CA1 1985). (We refrain from elaborating upon the latter point, since it is of no general application.)

Unlike *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), this case does not present a proper occasion for us to exercise our discretion to decide an issue despite petitioner's failure to preserve it. In *Tuttle*, the issue in question was explicitly set forth in the petition for certiorari, *id.*, at 814, n. 2, and was not objected to in respondent's brief in opposition to certiorari or in respondent's merits brief. *Id.*, at 815. In addition, the issue had been fully briefed and argued in the Court of Appeals. *Ibid.* Here, by contrast, respondent's failure to object at the petition stage is unsurprising, because the petition did not explicitly present the negligence question, and it had not been addressed below. It would be unreasonable to require a respondent on pain of waiver to object at the certiorari stage not only to the petitioner's failure to preserve the questions actually presented, but also to his failure to preserve any questions fairly included within the questions presented but uncontested earlier. Respondent strenuously objected to petitioner's raising this question at the first point that she was on notice that it was at issue in this case—in her response to petitioner's brief on the merits in No. 85–1078.

For these reasons, we have concluded that the writ should be dismissed as improvidently granted. See *Belcher* v. *Stengel*, 429 U. S. 118 (1976) *(per curiam)*.

It is so ordered.

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

We granted certiorari in this case to resolve whether a city can be held liable under 42 U. S. C. § 1983 for providing inadequate police training, and, if so, what standard should govern the imposition of such liability. 475 U. S. 1064 (1986). In my view, the question is properly before the Court, and I would decide it on the merits.

I

On the evening of September 28, 1981, the Springfield Police Department received a telephone call reporting that

someone had called an apartment's occupants and threatened to come after them with a knife. Later calls reported that an individual identified as Clinton Thurston had broken the apartment door and assaulted a woman staying at the apartment. When officers arrived at the scene, they discovered that Thurston had abducted the woman and driven away in his car. A short while later, Thurston's vehicle was spotted by an officer driving an unmarked police car. When Thurston stopped at an intersection, the officer walked up to Thurston's vehicle and identified himself as a police officer, but Thurston drove away.

The officer gave chase, and soon was joined by other members of the Springfield Police Department. Two officers set up a roadblock to stop Thurston, but he drove past the obstacle without stopping. As he did so, one of the officers fired at the tires of Thurston's vehicle; later a nick was found in the left rear wheel. At a second roadblock, Officer Kenneth Schaub placed his vehicle across one lane of traffic, while he stood in the middle of the other lanes and attempted to flag down Thurston's automobile. Thurston again failed to stop. As Thurston passed the roadblock, Schaub fired in the direction of the car.

Officer Theodore Perry, who had been waiting near the second roadblock on his motorcycle, heard Schaub's shot and joined the chase. Accelerating past several police cars, Perry pulled abreast of the rear window on the driver's side of Thurston's car. As he did so, Thurston swerved to the left, and Perry dropped back. Rather than remain behind the vehicle, Perry twice more moved up even with the car's rear window; on both occasions, when Thurston swerved towards him, Perry fired his gun. Apparently Perry hit Thurston in the head with the second shot; the car rolled to a stop and Thurston was taken, unconscious, to the hospital, where he died a short time later.

Respondent, the administratrix of Thurston's estate, brought suit in the Federal District Court for the District of

Massachusetts under § 1983, alleging that the city and several of its police officers had deprived Thurston of his civil rights. After trial, the jury returned verdicts against the city and Officer Perry, but found in favor of the other officers. The jury awarded $1 in compensatory damages and $500 in punitive damages against Perry and $50,000 in compensatory damages against the city. The District Court denied the city's motions for directed verdict and for judgment notwithstanding the verdict. The city appealed the District Court's refusal to grant either a directed verdict or a judgment notwithstanding the verdict, and also claimed error in the jury charge.

The Court of Appeals for the First Circuit affirmed. 777 F. 2d 801 (1985). In showing that Thurston's injuries were inflicted pursuant to government "policy or custom" under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), respondent "argued primarily that the City should be found liable here because it had a policy or custom of inadequately training its officers." 777 F. 2d, at 803. The Court of Appeals observed that while the plurality opinion in *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), may "have raised doubts as to whether a harm allegedly caused by a policy of gross negligence in police training could meet § 1983's standard of causation," the Court of Appeals "continue[d] to believe [that] this is a viable theory of municipal liability." 777 F. 2d, at 804. The Court of Appeals found that while the evidence in the record regarding the Springfield Police Department's training policy admittedly was "sparse," the jury could have concluded from the testimony of two police officers that the city's training in the apprehension of fleeing vehicles was grossly inadequate. The jury also could infer, from the fact that both Schaub and Perry had used deadly force, that the city's failure to train its officers in alternative methods of stopping a fleeing vehicle played a substantial part in bringing about Thurston's death. *Id.*, at 808. The Court of Appeals identified a number of additional "policies"

or "customs" that the jury might have inferred from the evidence in this case. As the court noted, however, "these other policies were not proven sufficiently or linked sufficiently with the harm to impose municipal liability." *Id.*, at 809.

Turning to the city's challenge to the jury instructions given in the case, the Court of Appeals noted that the city's argument was that its liability "could not be predicated upon an isolated incident of negligent training, but must instead be based on 'a pattern of deliberate supervisory inaction and indifference.'" *Ibid.* The Court of Appeals concluded that while the jury instructions "could have emphasized the distinction between negligence and reckless or grossly negligent conduct," the instructions were not deficient because they did inform the jury "that it must find a failure to train which amounted to gross negligence." *Id.*, at 810.

II

The central question presented in this case is whether a city can be held liable under § 1983 for the inadequate training of its employees. As the Court notes, fairly included is the related question whether more than simple or heightened negligence in training is required in order to establish such liability. See *ante*, at 258.[1]

The Court of Appeals clearly reached and decided the negligence question, both in its consideration of the appeal from the jury charge, and in its review of the denial of the city's motions for directed verdict and for judgment notwithstanding the verdict. First, in addressing the city's challenge to the jury instructions, the Court of Appeals specifically considered whether the jury charge should have required a

[1] We also granted certiorari to consider whether the "single incident" rule of *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), was satisfied in this case. Because, in my view, the decision below is inconsistent with *Tuttle*'s requirement of proof of fault, see *infra*, at 271–272, I do not reach the question whether other aspects of *Tuttle* were satisfied in this case.

showing of "deliberate supervisory inaction and indifference." See 777 F. 2d, at 809. The Court of Appeals rejected the city's argument, concluding that the jury instructions were adequate because they "instructed the jury that it must find a failure to train which amounted to gross negligence." *Id.*, at 810. Today this Court holds that the city's challenge to the jury charge was not properly preserved on appeal because the city failed to make a timely objection to the instructions as required by Federal Rule of Civil Procedure 51. *Ante*, at 258–259. The Court of Appeals, however, did not treat the question as barred by Rule 51, perhaps because that argument was not pressed before it. See Brief for Plaintiff-Appellee in No. 85–1078 (CA1), pp. 21–24. In my view, this Court should not now decline, on that basis, to review the Court of Appeals' affirmance of the jury charge.

Moreover, even if the Court treats the city as having waived its challenge to the jury charge, the failure to object to an instruction does not render the instruction the "law of the case" for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict. See *Ebker* v. *Tan Jay International, Ltd.*, 739 F. 2d 812, 825, n. 17 (CA2 1984); *Hanson* v. *Ford Motor Co.*, 278 F. 2d 586, 592–593 (CA8 1960); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558 (1971). The city raised the negligence question in its motions for directed verdict and for judgment notwithstanding the verdict, arguing that it should not be held liable "even for its grossly negligent failure to train single police officers." App. 26, 41. In arguing that a "pattern" of police misconduct is necessary to establish municipal liability under § 1983, the city relied on *Wellington* v. *Daniels*, 717 F. 2d 932 (CA4 1983), and *Languirand* v. *Hayden*, 717 F. 2d 220 (CA5 1983). In those cases, the courts required proof of a pattern of police misconduct on the ground that municipal liability under § 1983 could not be imposed absent proof of the city's "'tacit authorization' of or 'deliberate indifference' to constitutional injuries." See

Wellington v. *Daniels*, *supra*, at 936; see also *Languirand* v. *Hayden*, *supra*, at 226, n. 7, and 227–228.

The Court of Appeals must have viewed the city's motions as raising the negligence question, because the court directly ruled on the issue. The Court of Appeals began by stating that it previously had recognized "grossly inadequate training" as a basis for imposing municipal liability. See 777 F. 2d, at 803. The court acknowledged, however, that the decision in *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), had "raised doubts as to whether a harm allegedly caused by a policy of gross negligence in police training could meet § 1983's standard of causation." 777 F. 2d, at 804. The Court of Appeals then cited a footnote in *Tuttle* which states: "[I]t is open to question whether a policymaker's 'gross negligence' in establishing police training practices could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, *or whether a more conscious decision on the part of the policymaker would be required.*" 471 U. S., at 824, n. 7 (emphasis added). Notwithstanding the reservations expressed in *Tuttle*, the Court of Appeals "continue[d] to believe" that gross negligence in police training was "a viable theory of municipal liability" under § 1983. 777 F. 2d, at 804.

The Court does not contend that the Court of Appeals failed to pass upon the negligence question. Instead, the Court finds, from its own review of the briefs filed in the court below, that the city did not *argue* for a higher standard in the Court of Appeals. *Ante*, at 258. Certainly it is fair to conclude from the city's briefs in the Court of Appeals that its position on the question of culpability was unclear: it argued at different points that the standard should be deliberate indifference, see Brief for Defendant-Appellant in No. 85–1078 (CA1), p. 15; recklessness or "gross, palpable, and culpable" negligence, *id.*, at 8; or deliberate indifference or gross negligence, *id.*, at 13. Perhaps the Court of Appeals might have been able to conclude from this that it did not have before it the question whether municipal liability

can be based on a finding of negligence. The court did not read the briefs in that fashion, however; instead it viewed the question as before it and proceeded to consider whether gross negligence or some "more conscious decision on the part of the policymaker," *Oklahoma City* v. *Tuttle*, *supra*, at 824, n. 7, would be required to establish § 1983 liability. Having done so, it is clear that there are no jurisdictional or prudential reasons why this Court should not review the Court of Appeals' decision. The standard we previously have employed is that we will not review a question not pressed *or* passed on by the courts below. See, *e. g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970); *Husty* v. *United States*, 282 U. S. 694, 702 (1931); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927). Here, the Court of Appeals expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction; it is therefore entirely proper in light of our precedents for the Court to reach the question on which it granted certiorari, and I would do so.

III

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court held that municipal liability under § 1983 can be imposed only where the municipality itself "causes" the constitutional violation. The *Monell* Court reasoned that § 1983, as originally enacted, imposed liability if a person "subjected, or caused to be subjected," another person to the deprivation of federally protected rights. By specifically imposing liability for the torts of another person if one "caused" the tort to be committed, the statutory language suggested that Congress "did not intend § 1983 liability to attach where such causation was absent." *Id.*, at 692.

The *Monell* Court found support for this conclusion in the legislative history of the Civil Rights Act of 1871, the precursor to § 1983. The legislative history showed that Congress had rejected the "Sherman amendment," which would have imposed vicarious liability on municipalities for damage

caused by the "riotou[s] and tumultuou[s] assembl[y]" of private individuals within their borders, Cong. Globe, 42d Cong., 1st Sess., 749 (1871), on the ground that the amendment was of questionable constitutional validity. The Court determined that while the legislative history did not specifically address whether Congress intended to permit vicarious liability for the torts of municipal agents and employees, the same constitutional difficulties that Congress perceived when it rejected the Sherman amendment would apply to liability based on *respondeat superior*. The *Monell* Court concluded that Congress did not intend, in enacting § 1983, that municipalities be held vicariously liable for the tortious conduct of their employees. It is only when the "execution of [the] government's policy or custom . . . inflicts the injury" that the municipality may be held liable under § 1983. 436 U. S., at 694.

Given the importance, under § 1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. See, *e. g.*, *Oklahoma City* v. *Tuttle*, *supra*, at 824–825, n. 8 (requiring "affirmative link" between municipal policy and constitutional violation); *Polk County* v. *Dodson*, 454 U. S. 312 (1981) (municipal policy must be "moving force" behind constitutional deprivation). In *Monell* itself, the policy at issue commanded the deprivation of constitutional rights. The causal link between the municipal policy and the constitutional violation therefore was readily apparent: no "evidence was needed other than a statement of the policy by the municipal corporation, and its exercise." *Oklahoma City* v. *Tuttle*, *supra*, at 822–823.

When the execution of municipal policy does not compel a constitutional violation, however, the causal connection between municipal policy and the deprivation of constitutional rights becomes more difficult to discern. In some sense, of course, almost any injury inflicted by a municipal agent or

employee ultimately can be traced to some municipal policy. Finding § 1983's causation requirement satisfied by such a remote connection, however, would eviscerate *Monell*'s distinction, based on the language and history of § 1983, between vicarious liability and liability predicated on the municipality's *own* constitutional violations. The limits on municipal liability imposed by § 1983 require more careful analysis, in each instance, of the municipal policy alleged in the case, and whether a jury reasonably could conclude that the city's conduct was the moving force in bringing about the constitutional violation.

In this case, the causal connection between the municipal policy and the constitutional violation is an inherently tenuous one. Respondent does not contend that the city's police training program *authorizes* the use of deadly force in the apprehension of fleeing vehicles; rather, her argument is that the methods taught in the city's training program were "inadequate," and that if individual officers had received more complete training, they would have resorted to those alternative methods without engaging in the unconstitutional conduct. The difficulty with respondent's argument is that at the time of the officers' alleged misconduct, any number of other factors were also in operation that were equally likely to contribute or play a predominant part in bringing about the constitutional injury: the disposition of the individual officers, the extent of their experience with similar incidents, the actions of the other officers involved, and so forth. To conclude, in a particular instance, that omissions in a municipal training program constituted the "moving force" in bringing about the officer's unconstitutional conduct, notwithstanding the large number of intervening causes also at work up to the time of the constitutional harm, appears to be largely a matter of speculation and conjecture.

Because of the remote causal connection between omissions in a police training program and affirmative misconduct by individual officers in a particular instance, in my view the

"inadequacy" of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain. The "causation" requirement of § 1983 is a matter of statutory interpretation rather than of common tort law. Cf. *Martinez* v. *California*, 444 U. S. 277, 285 (1980) (injury "too remote a consequence" of official conduct to impose liability under § 1983, even if conduct "proximately caused" injury under state tort law). Analogy to traditional tort principles, however, shows that the law has been willing to trace more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence. See, *e. g.*, Restatement (Second) of Torts § 501, Comment *a*, p. 591 (1965) ("[A] jury may be permitted to find that a defendant's reckless misconduct bears a sufficient causal relation to a plaintiff's harm to make him liable, although were the defendant's conduct merely negligent, no such finding would be permissible"). See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton should be permitted to find that the municipality's inadequate training "caused" the plaintiff's injury only if the inadequacy of the training amounts to deliberate indifference or reckless disregard for the consequences. Negligence in training alone is not sufficient to satisfy the causation requirement of § 1983.

A number of lower courts have recognized the need to show more than negligence before a deficient training policy can form the basis for municipal liability under § 1983, phrasing the requisite degree of fault variously as "deliberate indifference" or gross negligence "amounting to deliberate indifference." See, *e. g.*, *Fiacco* v. *Rensselaer*, 783 F. 2d 319, 326 (CA2 1986) ("deliberate indifference"); *Languirand* v. *Hayden*, 717 F. 2d, at 227 (so grossly negligent as to constitute "deliberate indifference"); *Patzner* v. *Burkett*, 779 F. 2d

1363, 1367 (CA8 1985) ("deliberate indifference" where training so grossly negligent "that police misconduct inevitably occurs"); *Wellington* v. *Daniels*, 717 F. 2d, at 937, n. 6 (no showing that municipality "remain[ed] indifferent to" unwarranted injury). Indeed, the Court of Appeals for the First Circuit previously had adopted such a standard, requiring proof of gross negligence "amounting to deliberate indifference" before finding *Monell* liability. See *Voutour* v. *Vitale*, 761 F. 2d 812, 820 (1985). In my view, these decisions properly reflect the need to show more than "negligence" in police training procedures before a jury should be permitted to find that the city's policy was a material element and substantial factor in bringing about the alleged deprivation of protected federal rights.

In this case, there clearly was insufficient evidence to support a finding that the city's training policy was conducted with reckless disregard for the consequences or deliberate indifference to its citizens' constitutional rights. Because such a showing is necessary, in my view, to make out a claim that the city "subjected, or caused [Thurston] to be subjected," to a deprivation of his constitutional rights under § 1983, the Court of Appeals for the First Circuit should have reversed the decision of the District Court and remanded for the entry of judgment on behalf of the city of Springfield.

The plurality opinion in *Tuttle* made clear that to establish municipal liability for a policy that is not itself unconstitutional, the plaintiff must introduce evidence sufficient to establish the existence of the policy; evidence showing that the city was at fault for establishing the policy; and evidence establishing that the policy was the moving force in causing the constitutional harm. A plaintiff does not carry the burden of proving these elements merely by introducing evidence concerning the particular incident at issue: "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the

municipality, and the causal connection between the 'policy' and the constitutional deprivation." 471 U. S., at 824 (footnotes omitted). A different result would have been directly at odds with the need under § 1983 to "prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers." *Id.*, at 821.

The Court of Appeals' analysis of "fault" in this case relies upon the kind of inference specifically rejected in *Tuttle*. The evidence introduced at trial showed that the city's officers were instructed in two techniques for apprehending fleeing suspects: they were told to stand in the street and put up their hands in a stopping motion; and to move up behind the vehicle while using lights and siren to signify that the suspect should pull over and stop. 777 F. 2d, at 807. They were taught not to set up obstacles that completely block the road. *Ibid.* The Court of Appeals did not point to any evidence which would support the conclusion that these instructions deviated from accepted police practice. Instead, the court concluded that the jury could have inferred, from the chase itself, that "partial roadblocks were not an effective method of slowing down a suspect who was unwilling to stop," *ibid.*; that additional methods might have been successful in apprehending the fleeing vehicle;[2] and that the failure to instruct

[2] The Court of Appeals speculated that the jury might have found three alternatives to be successful in stopping fleeing vehicles: "deploying several police cars to crowd or surround Thurston's car"; "calling in reinforcements"; or using "sheer persistence" in the hope that it "might have worn Thurston down." 777 F. 2d, at 807. The first method would not have been an accepted alternative to the use of deadly force. See International Association of Chiefs of Police, A Manual of Model Police Traffic Services, Policies and Procedures, Procedure 1.20, p. 91 (1986) ("[B]oxing in, heading off, ramming, or driving alongside the pursued vehicle . . . may be approved only when the use of deadly force would be authorized"). The second alternative, the use of reinforcements, in fact had been implemented by the city's police officers during the chase—10 officers ultimately were involved in trying to stop Thurston's vehicle. The third suggestion does not appear to be different from the city's policy of following the vehicle while using lights and siren.

in these additional methods constituted gross negligence on the part of the city. *Ibid.*

The chain of inferences drawn by the Court of Appeals directly conflicts with *Tuttle*'s instruction that "considerably more proof than the single incident will be necessary in every case to establish . . . the requisite fault on the part of the municipality." 471 U. S., at 824. There was no evidence in the record, apart from the speculative inferences suggested by the Court of Appeals, from which jurors reasonably could conclude that the city's training in the apprehension of fleeing vehicles manifested recklessness or deliberate indifference. Respondent therefore failed to prove an essential element of her claim, and a directed verdict should have been entered in favor of the city. Accordingly I would reverse the Court of Appeals for the First Circuit and would remand for the entry of judgment in favor of petitioner in this case. I respectfully dissent from the Court's judgment dismissing this case as improvidently granted.

Syllabus

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE

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

No. 85–1277. Argued December 3, 1986—Decided March 3, 1987

Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794 (Act), provides, *inter alia*, that no "otherwise qualified handicapped individual," as defined in 29 U. S. C. § 706(7), shall, solely by reason of his handicap, be excluded from participation in any program receiving federal financial assistance. Section 706(7)(B) defines "handicapped individual" to mean any person who "(i) has a physical . . . impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Department of Health and Human Services (HHS) regulations define "physical impairment" to mean, *inter alia*, any physiological disorder affecting the respiratory system, and define "major life activities" to include working. Respondent was hospitalized for tuberculosis in 1957. The disease went into remission for the next 20 years, during which time respondent began teaching elementary school in Florida. In 1977, March 1978, and November 1978, respondent had relapses, after the latter two of which she was suspended with pay for the rest of the school year. At the end of the 1978–1979 school year, petitioners discharged her after a hearing because of the continued recurrence of tuberculosis. After she was denied relief in state administrative proceedings, she brought suit in Federal District Court, alleging a violation of § 504. The District Court held that she was not a "handicapped person" under the Act, but that, even assuming she were, she was not "qualified" to teach elementary school. The Court of Appeals reversed, holding that persons with contagious diseases are within § 504's coverage, and remanded for further findings as to whether respondent was "otherwise qualified" for her job.

Held:

1. A person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of § 504. Pp. 280–286.

(a) Respondent is a "handicapped individual" as defined in § 706(7)(B) and the HHS regulations. Her hospitalization in 1957 for a disease that affected her respiratory system and that substantially limited "one or more of [her] major life activities" establishes that she has a "record of . . . impairment." Pp. 280–281.

(b) The fact that a person with a record of impairment is also contagious does not remove that person from § 504's coverage. To allow an employer to justify discrimination by distinguishing between a disease's contagious effects on others and its physical effects on a patient would be unfair, would be contrary to § 706(7)(B)(iii) and the legislative history, which demonstrate Congress' concern about an impairment's effect on others, and would be inconsistent with § 504's basic purpose to ensure that handicapped individuals are not denied jobs because of the prejudice or ignorance of others. The Act replaces such fearful, reflexive reactions with actions based on reasoned and medically sound judgments as to whether contagious handicapped persons are "otherwise qualified" to do the job. Pp. 281–286.

2. In most cases, in order to determine whether a person handicapped by contagious disease is "otherwise qualified" under § 504, the district court must conduct an individualized inquiry and make appropriate findings of fact, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (*e. g.*, how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. Courts must then determine, in light of these findings, whether any "reasonable accommodation" can be made by the employer under the established standards for that inquiry. Pp. 287–288.

3. Because the District Court did not make appropriate findings, it is impossible for this Court to determine whether respondent is "otherwise qualified" for the job of elementary school teacher, and the case is remanded for additional findings of fact. Pp. 288–289.

772 F. 2d 759, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 289.

Brian T. Hayes argued the cause for petitioners. With him on the briefs was *John D. Carlson.*

Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Reynolds, Deputy*

Solicitor General Ayer, Deputy Assistant Attorney General Carvin, Richard J. Lazarus, and *Mark L. Gross.*

George K. Rahdert argued the cause for respondent. With him on the brief was *Steven H. Malone.**

JUSTICE BRENNAN delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (Act), prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap. This case presents the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of § 504 of the Act, and, if so, whether such an individual is "otherwise qualified" to teach elementary school.

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*Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby;* and for Congressman William E. Dannemeyer et al. by *William E. Dannemeyer, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Association for Retarded Citizens of the United States et al. by *Thomas K. Gilhool, Michael Churchill, Frank J. Laski, Timothy M. Cook, Stanley S. Herr,* and *Donald S. Goldman;* and for the Employment Law Center et al. by *Robert E. Borton.*

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp,* Attorney General, *Andrea Sheridan Ordin,* Chief Assistant Attorney General, and *Marian M. Johnston* and *M. Anne Jennings,* Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, and *Bronson C. La Follette* of Wisconsin; for the American Medical Association by *Benjamin W. Heineman, Jr.,* and *Carter G. Phillips;* for the American Public Health Association et al. by *Nan D. Hunter* and *Herbert Semmel;* for Doctors for AIDS Research and Education by *Stanley Fleishman, Joseph Lawrence, Susan D. McGreivy,* and *Paul Hoffman;* for the Epilepsy Foundation of America by *Alexandra K. Finucane;* for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon;* and for Senator Cranston et al. by *Arlene Mayerson.*

I

From 1966 until 1979, respondent Gene Arline taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years. After she was denied relief in state administrative proceedings, she brought suit in federal court, alleging that the school board's decision to dismiss her because of her tuberculosis violated § 504 of the Act.[1]

A trial was held in the District Court, at which the principal medical evidence was provided by Marianne McEuen, M.D., an assistant director of the Community Tuberculosis Control Service of the Florida Department of Health and Rehabilitative Services. According to the medical records reviewed by Dr. McEuen, Arline was hospitalized for tuberculosis in 1957. App. 11–12. For the next 20 years, Arline's disease was in remission. *Id.*, at 32. Then, in 1977, a culture revealed that tuberculosis was again active in her system; cultures taken in March 1978 and in November 1978 were also positive. *Id.*, at 12.

The superintendent of schools for Nassau County, Craig Marsh, then testified as to the school board's response to Arline's medical reports. After both her second relapse, in the spring of 1978, and her third relapse in November 1978, the school board suspended Arline with pay for the remainder of the school year. *Id.*, at 49–51. At the end of the 1978–1979 school year, the school board held a hearing, after which it discharged Arline, "not because she had done anything wrong," but because of the "continued reoccurence *[sic]* of tuberculosis." *Id.*, at 49–52.

In her trial memorandum, Arline argued that it was "not disputed that the [school board dismissed her] solely on the basis of her illness. Since the illness in this case qualifies the

[1] Respondent also sought relief under 42 U. S. C. § 1983, alleging that the board denied her due process of law. Both the District Court and the Court of Appeals rejected this argument, and respondent did not present the issue to this Court.

Plaintiff as a 'handicapped person' it is clear that she was dismissed solely as a result of her handicap in violation of Section 504." Record 119. The District Court held, however, that although there was "[n]o question that she suffers a handicap," Arline was nevertheless not "a handicapped person under the terms of that statute." App. to Pet. for Cert. C–2. The court found it "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." The court then went on to state that, "even assuming" that a person with a contagious disease could be deemed a handicapped person, Arline was not "qualified" to teach elementary school. *Id.*, at C–2—C–3.

The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of section 504," and that Arline's condition "falls . . . neatly within the statutory and regulatory framework" of the Act. 772 F. 2d 759, 764 (CA11 1985). The court remanded the case "for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position" or in some other position. *Id.*, at 765 (footnote omitted). We granted certiorari, 475 U. S. 1118 (1986), and now affirm.

II

In enacting and amending the Act, Congress enlisted all programs receiving federal funds in an effort "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." 123 Cong. Rec. 13515 (1977) (statement of Sen. Humphrey). To that end, Congress not only increased federal support for vocational rehabilitation, but also addressed the broader problem of discrimination against the handicapped by including § 504, an antidiscrimination provision patterned after Title VI of the Civil Rights

Act of 1964.[2] Section 504 of the Rehabilitation Act reads in pertinent part:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U. S. C. § 794.

In 1974 Congress expanded the definition of "handicapped individual" for use in § 504 to read as follows:[3]

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[2] Congress' decision to pattern § 504 after Title VI is evident in the language of the statute, compare 29 U. S. C. § 794 with 42 U. S. C. § 2000d, and in the legislative history of § 504, see, *e. g.*, S. Rep. No. 93–1297, pp. 39–40 (1974); S. Rep. No. 95–890, p. 19 (1978). Cf. TenBroek & Matson, The Disabled and the Law of Welfare, 54 Cal. L. Rev. 809, 814–815, and nn. 21–22 (1966) (discussing theory and evidence that "negative attitudes and practices toward the disabled resemble those commonly attached to 'underprivileged ethnic and religious minority groups' "). The range of programs subject to § 504's prohibition is broader, however, than that covered by Title VI, because § 504 covers employment discrimination even in programs that receive federal aid with a primary objective other than the promotion of employment. See *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624 (1984); Note, Accommodating the Handicapped: Rehabilitating Section 504 after *Southeastern*, 80 Colum. L. Rev. 171, 174–175, and n. 21 (1980).

[3] The primary focus of the 1973 Act was to increase federal support for vocational rehabilitation; the Act's original definition of the term "handicapped individual" reflected this focus by including only those whose disability limited their employability, and those who could be expected to benefit from vocational rehabilitation. After reviewing the Department of Health, Education, and Welfare's subsequent attempt to devise regulations to implement the Act, however, Congress concluded that the definition of "handicapped individual," while appropriate for the vocational rehabilitation provisions in Titles I and III of the Act, was too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the handicapped. S. Rep. No. 93–1297, at 16, 37–38, 50.

> "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U. S. C. § 706(7)(B).

The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93–1297, p. 50 (1974). To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Southeastern Community College* v. *Davis*, 442 U. S. 397, 405–406, n. 6 (1979).[4]

In determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance. As we have previously recognized, these regulations were drafted with the oversight and approval of Congress, see *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, 634–635, and nn. 14–16 (1984); they provide "an important source of guidance on the meaning of § 504." *Alexander* v. *Choate*, 469 U. S. 287, 304, n. 24 (1985). The

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[4] See *id.*, at 39 ("This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped"); *id.*, at 37–39, 63–64; see also 120 Cong. Rec. 30531 (1974) (statement of Sen. Cranston).

regulations are particularly significant here because they define two critical terms used in the statutory definition of handicapped individual.[5] "Physical impairment" is defined as follows:

> "[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine." 45 CFR § 84.3(j)(2)(i) (1985).

In addition, the regulations define "major life activities" as

> "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 84.3(j)(2)(ii).

III

Within this statutory and regulatory framework, then, we must consider whether Arline can be considered a handicapped individual. According to the testimony of Dr.

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[5] In an appendix to these regulations, the Department of Health and Human Services explained that it chose not to attempt to "set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list." 45 CFR pt. 84, Appendix A, p. 310 (1985). Nevertheless, the Department went on to state that "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness" would be covered. *Ibid.* The Department also reinforced what a careful reading of the statute makes plain, "that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities." *Ibid.* Although many of the comments on the regulations when first proposed suggested that the definition was unreasonably broad, the Department found that a broad definition, one not limited to so-called "traditional handicaps," is inherent in the statutory definition. *Ibid.*

McEuen, Arline suffered tuberculosis "in an acute form in such a degree that it affected her respiratory system," and was hospitalized for this condition. App. 11. Arline thus had a physical impairment as that term is defined by the regulations, since she had a "physiological disorder or condition . . . affecting [her] . . . respiratory [system]." 45 CFR § 84.3(j)(2)(i) (1985). This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impairment" within the meaning of 29 U. S. C. § 706(7)(B)(ii), and is therefore a handicapped individual.

Petitioners concede that a contagious disease may constitute a handicapping condition to the extent that it leaves a person with "diminished physical or mental capabilities," Brief for Petitioners 15, and concede that Arline's hospitalization for tuberculosis in 1957 demonstrates that she has a record of a physical impairment, see Tr. of Oral Arg. 52–53. Petitioners maintain, however, that Arline's record of impairment is irrelevant in this case, since the school board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others.[6]

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[6] See Brief for Petitioners 15–16 (Act covers conditions that leave individuals with "diminished physical or mental capabilities," but not conditions that could "impair the health of others"); Pet. for Cert. 13–14 ("[T]he concept of a 'handicap' [should be limited] to physical and mental conditions which result in either a real or perceived diminution of an individual's capabilities. . . . [A]n individual suffering from a contagious disease may not necessarily suffer from any physical or mental impairments affecting his ability to perform the job in question. In other words, an employer's reluctance to hire such an individual is not due to any real or perceived inability on the individual's part, but rather because of the employer's reluctance to expose its other employees and its clientele to the threat of infection").

We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[7]

Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage, in 29 U. S. C. § 706(7)(B)(iii), to those individuals who are simply "regarded as having" a physical or mental impairment.[8] The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." S. Rep. No. 93–1297, at 64.[9]

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[7] The United States argues that it is possible for a person to be simply a carrier of a disease, that is, to be capable of spreading a disease without having a "physical impairment" or suffering from any other symptoms associated with the disease. The United States contends that this is true in the case of some carriers of the Acquired Immune Deficiency Syndrome (AIDS) virus. From this premise the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of a handicap. The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment *and* to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

[8] See n. 4, *supra*.

[9] Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the

Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.[10]

Act. For example, Representative Vanik, whose remarks constitute "a primary signpost on the road toward interpreting the legislative history of § 504," *Alexander* v. *Choate*, 469 U. S. 287, 295–296, and n. 13 (1985), cited as an example of improper handicap discrimination a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 Cong. Rec. 45974 (1971). See also 118 Cong. Rec. 36761 (1972) (remarks of Sen. Mondale) (a woman "crippled by arthritis" was denied a job not because she could not do the work but because "college trustees [thought] 'normal students shouldn't see her'"); *id.*, at 525 (remarks of Sen. Humphrey); cf. Macgregor, Some Psycho-Social Problems Associated with Facial Deformities, 16 Am. Sociological Rev. 629 (1961).

[10] The Department of Health and Human Services regulations, which include among the conditions illustrative of physical impairments covered by the Act "cosmetic disfigurement," lend further support to Arline's position that the effects of one's impairment on others is as relevant to a determination of whether one is handicapped as is the physical effect of one's handicap on oneself. 45 CFR § 84.3(j)(2)(i)(A) (1985). At oral argument, the United States took the position that a condition such as cosmetic disfigurement could not substantially limit a major life activity within the meaning of the statute, because the only major life activity that it would affect would be the ability to work. The United States recognized that "working" was one of the major life activities listed in the regulations, but said that to argue that a condition that impaired *only* the ability to work was a handicapping condition was to make "a totally circular argument which lifts itself by its bootstraps." Tr. of Oral Arg. 15–16. The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work. "[T]he primary goal of the Act is to increase employment of the handicapped." *Consolidated Rail Corporation* v. *Darrone*, 465 U. S., at 633, n. 13; see also *id.*, at 632 ("Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether § 504 was intended to prohibit other types of discrimination as well").

Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.[11] Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.[12] Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.[13] The Act is

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[11] S. Rep. No. 93–1297, at 50; see n. 4, *supra*. See generally, TenBroek & Matson, 54 Cal. L. Rev., at 814; Strauss, Chronic Illness, in The Sociology of Health and Illness 138, 146–147 (P. Conrad & R. Kern eds. 1981).

[12] The isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness. Tuberculosis is no exception. See R. Dubos & J. Dubos, The White Plague (1952); S. Sontag, Illness as Metaphor (1978).

[13] Senator Humphrey noted the "irrational fears or prejudice on the part of employers or fellow workers" that make it difficult for former cancer patients to secure employment. 123 Cong. Rec. 13515 (1977). See also Feldman, Wellness and Work, in Psychosocial Stress and Cancer 173–200 (C. Cooper ed. 1984) (documenting job discrimination against recovered cancer patients); S. Sontag, *supra*, at 6 ("Any disease that is treated as a mystery and acutely enough feared will be felt to be morally, if not literally, contagious. Thus, a surprisingly large number of people with cancer find themselves being shunned by relatives and friends . . . as if cancer, like TB, were an infectious disease"); Dell, Social Dimensions of Epilepsy: Stigma and Response, in Psychopathology in Epilepsy: Social Dimensions 185–210 (S. Whitman & B. Hermann eds. 1986) (reviewing range of discrimination affecting epileptics); Brief for Epilepsy Foundation of

carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[14] We conclude that

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America as *Amicus Curiae* 5–14 ("A review of the history of epilepsy provides a salient example that fear, rather than the handicap itself, is the major impetus for discrimination against persons with handicaps").

[14] Congress reaffirmed this approach in its 1978 amendments to the Act. There, Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejected the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others." 29 U. S. C. § 706(7)(B). See 124 Cong. Rec. 30322 (1978); Brief for Senator Cranston et al. as *Amici Curiae* 35–36; 43 Op. Atty. Gen. No. 12 (1977).

This approach is also consistent with that taken by courts that have addressed the question whether the Act covers persons suffering from conditions other than contagious diseases that render them a threat to the safety of others. See, *e. g.*, *Strathie* v. *Department of Transportation*, 716 F. 2d 227, 232–234 (CA3 1983); *Doe* v. *New York University*, 666 F. 2d 761, 775 (CA2 1981).

the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504.[15]

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[15] The dissent implies that our holding rests only on our "own sense of fairness and implied support from the Act," *post*, at 289, and that this holding is inconsistent with *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981). It is evident, however, that our holding is premised on the plain language of the Act, and on the detailed regulations that implement it, neither of which the dissent discusses and both of which support the conclusion that those with a contagious disease such as tuberculosis may be considered "handicapped" under the Act. We also find much support in the legislative history, while the dissent is unable to find any evidence to support its view. Accordingly, the dissent's construction of the Act to exclude those afflicted with a contagious disease is not only arbitrary (and therefore unfair) but unfaithful to basic canons of statutory construction.

Nothing in *Pennhurst* requires such infidelity. The statutory provision at issue there was held to be "simply a general statement of 'findings'" and to express "no more than . . . a congressional preference for certain kinds of treatment." *Id.*, at 19. See *Wright* v. *Roanoke Redevelopment and Housing Auth.*, 479 U. S. 418, 423 (1987) ("In *Pennhurst* . . . the statutory provisions were thought to be only statements of 'findings' indicating no more than a congressional preference—at most a 'nudge in the preferred directio[n]'"). The contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of § 504 could not be more stark.

Nor is there any reason to think that today's decision will extend the Act beyond manageable bounds. Construing § 504 not to exclude those with contagious diseases will complement rather than complicate state efforts to enforce public health laws. As we state, *infra*, at 288, courts may reasonably be expected normally to defer to the judgments of public health officials in determining whether an individual is otherwise qualified unless those judgments are medically unsupportable. Conforming employment decisions with medically reasonable judgments can hardly be thought to threaten the States' regulation of communicable diseases. Indeed, because the Act requires employers to respond rationally to those handicapped by a contagious disease, the Act will assist local health officials by helping remove an important obstacle to preventing the spread of infectious diseases: the individual's reluctance to report his or her condition. It is not surprising, then, that in their brief as *amici curiae* in support of respondent, the States of California, Maryland, Michigan, Minnesota, New

IV

The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.[16] The basic factors to be considered in conducting this inquiry are well established.[17] In the con-

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Jersey, New York, and Wisconsin conclude that "inclusion of communicable diseases within the ambit of Section 504 does not reorder the priorities of state regulatory agencies . . . [and] would not alter the balance between state and federal authority." Brief for State of California et al. 30.

[16] A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary schoolchildren. Respondent conceded as much at oral argument. Tr. of Oral Arg. 45.

[17] "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College* v. *Davis*, 442 U. S. 397, 406 (1979). In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 CFR § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. *Ibid.* Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, *Southeastern Community College* v. *Davis*, 442 U. S., at 412, or requires "a fundamental alteration in the nature of [the] program," *id.*, at 410. See 45 CFR § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship); 45 CFR pt. 84, Appendix A, p. 315 (1985) ("[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be

text of the employment of a person handicapped with a contagious disease, we agree with *amicus* American Medical Association that this inquiry should include

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Brief for American Medical Association as *Amicus Curiae* 19.

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials.[18] The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry. See n. 17, *supra*.

Because of the paucity of factual findings by the District Court, we, like the Court of Appeals, are unable at this stage of the proceedings to resolve whether Arline is "otherwise qualified" for her job. The District Court made no findings as to the duration and severity of Arline's condition, nor as to the probability that she would transmit the disease. Nor did the court determine whether Arline was contagious at the time she was discharged, or whether the School Board could

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considered discrimination"); *Davis*, *supra*, at 410–413; *Alexander* v. *Choate*, 469 U. S., at 299–301, and n. 19; *Strathie* v. *Department of Transportation*, 718 F. 2d, at 231.

[18] This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied.

have reasonably accommodated her.[19] Accordingly, the resolution of whether Arline was otherwise qualified requires further findings of fact.

V

We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973, and that respondent Arline is such a person. We remand the case to the District Court to determine whether Arline is otherwise qualified for her position. The judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins, dissenting.

In *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), this Court made clear that, where Congress intends to impose a condition on the grant of federal funds, "it must do so unambiguously." *Id.*, at 17. This principle applies with full force to § 504 of the Rehabilitation Act, which Congress limited in scope to "those who actually 'receive' federal financial assistance." *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U. S. 597, 605 (1986). Yet, the Court today ignores this principle, resting its holding on its own sense of fairness and implied support from the Act. *Ante*, at 282–286. Such an approach, I believe, is foreclosed not only by *Pennhurst*, but also by our prior decisions interpreting the Rehabilitation Act.

Our decision in *Pennhurst* was premised on the view that federal legislation imposing obligations only on recipients of

[19] Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies. See n. 17, *supra;* 45 CFR § 84.12 and Appendix A, pp. 315–316 (1985).

federal funds is "much in the nature of a contract." 451 U. S., at 17. See also *Board of Education of Hendrick Hudson Central School District* v. *Rowley*, 458 U. S. 176, 204, n. 26 (1982). As we have stated in the context of the Rehabilitation Act, "'Congress apparently determined it would require . . . grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds.'" *United States Department of Transportation* v. *Paralyzed Veterans of America*, *supra*, at 605, quoting *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, 633, n. 13 (1984). The legitimacy of this *quid pro quo* rests on whether recipients of federal funds voluntarily and knowingly accept the terms of the exchange. *Pennhurst*, *supra*, at 17. There can be no knowing acceptance unless Congress speaks "with a clear voice" in identifying the conditions attached to the receipt of funds. 451 U. S., at 17.

The requirement that Congress unambiguously express conditions imposed on federal moneys is particularly compelling in cases such as this where there exists longstanding state and federal regulation of the subject matter. From as early as 1796, Congress has legislated directly in the area of contagious diseases.[1] Congress has also, however, left significant leeway to the States, which have enacted a myriad of public health statutes designed to protect against the introduction and spread of contagious diseases.[2] When faced

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[1] See, *e. g.*, 42 U. S. C. §§ 243, 264; Act of May 27, 1796, ch. 31, 1 Stat. 474; see generally Morgenstern, The Role of the Federal Government in Protecting Citizens from Communicable Diseases, 47 U. Cin. L. Rev. 537 (1978).

[2] The coverage of state statutes regulating contagious diseases is broad, addressing, *inter alia*, reporting requirements, quarantines, denial of marriage licenses based on the presence of certain diseases, compulsory immunization, and certification and medical testing requirements for school employees. See, *e. g.*, Ariz. Rev. Stat. Ann. § 36.621 *et seq.* (1986) (reporting requirements); Conn. Gen. Stat. §§ 19a–207, 19a–221 (1985) (quarantines); Fla. Stat. §§ 741.051–741.055 (1985) (marriage licenses); Mass. Gen. Laws § 71:55B (1984) (certification requirements for school employees); Miss.

with such extensive regulation, this Court has declined to read the Rehabilitation Act expansively. See *Bowen* v. *American Hospital Assn.*, 476 U. S. 610, 642–647 (1986); *Alexander* v. *Choate*, 469 U. S. 287, 303, 307 (1985). Absent an expression of intent to the contrary, "Congress . . . 'will not be deemed to have significantly changed the federal-state balance.'" *Bowen* v. *American Hospital Assn.*, *supra*, at 644, quoting *United States* v. *Bass*, 404 U. S. 336, 349 (1971).

Applying these principles, I conclude that the Rehabilitation Act cannot be read to support the result reached by the Court. The record in this case leaves no doubt that Arline was discharged because of the contagious nature of tuberculosis, and not because of any diminished physical or mental capabilities resulting from her condition.[3] Thus, in the language of § 504, the central question here is whether discrimination on the basis of contagiousness constitutes discrimination "by reason of . . . handicap." Because the language of the Act, regulations, and legislative history are

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Code Ann. § 37–7–301(i) (Supp. 1986) (compulsory immunization of school students); W. Va. Code § 16–3–4a (1985) (medical testing).

[3] In testifying concerning his reasons for recommending Arline's termination, petitioner Craig Marsh, Superintendent of Schools of Nassau County, Florida, stated that "I felt like that for the benefit of the total student population and . . . personnel in Nassau County and the public benefit, that it would be best if—not to continue or offer Mrs. Arline any employment." App. 62. Marsh added:

"I am charged and so is the school board, with the responsibility for the protecting, the safety, health and welfare of students, every student in Nassau County. And the record clearly states that, you know, after all—after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it [was] in the best interest of the school system of Nassau County that she be dismissed from the classroom." *Id.*, at 81.

Before Arline's termination, Marsh consulted with Dr. Marianne McEuen, who testified that she recommended the termination because of the threat that Arline's condition posed to the health of the small children with whom Arline was in constant contact. *Id.*, at 12–17.

silent on this issue,[4] the principles outlined above compel the conclusion that contagiousness is not a handicap within the meaning of § 504. It is therefore clear that the protections of the Act do not extend to individuals such as Arline.

In reaching a contrary conclusion, the Court never questions that Arline was discharged because of the threat her condition posed to others. Instead, it posits that the contagious effects of a disease cannot be "meaningfully" distinguished from the disease's effect on a claimant under the Act. *Ante*, at 282. To support this position, the Court observes that Congress intended to extend the Act's protections to individuals who have a condition that does not impair their mental and physical capabilities, but limits their major life activities because of the adverse reactions of others. This congressional recognition of a handicap resulting from the reactions of others, we are told, reveals that Congress intended the Rehabilitation Act to regulate discrimination on the basis of contagiousness. *Ante*, at 284.

This analysis misses the mark in several respects. To begin with, Congress' recognition that an individual may be handicapped under the Act solely by reason of the reactions of others in no way demonstrates that, for the purposes of interpreting the Act, the reactions of others to the condition cannot be considered separately from the effect of the condition on the claimant. In addition, the Court provides no basis for extending the Act's generalized coverage of individuals suffering discrimination as a result of the reactions of others to coverage of individuals with contagious diseases. Although citing examples of handicapped individuals described in the regulations and legislative history, the Court points to nothing in these materials suggesting that Congress contemplated that a person with a condition posing a threat to the health of others may be considered handicapped under

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[4] See, *e. g.*, 29 U. S. C. § 701 *et seq.*; 45 CFR pt. 84 (1985); H. R. Rep. No. 95–1149 (1978); S. Rep. No. 95–890 (1978); S. Rep. No. 93–1297 (1974); H. R. Rep. No. 93–244 (1973); S. Rep. No. 93–318 (1973).

the Act.[5] Even in an ordinary case of statutory construction, such meager proof of congressional intent would not be determinative. The Court's evidence, therefore, could not possibly provide the basis for "knowing acceptance" by such entities as the Nassau County School Board that their receipt of federal funds is conditioned on Rehabilitation Act regulation of public health issues. *Pennhurst*, 451 U. S., at 17.

In *Alexander* v. *Choate*, *supra*, at 299, this Court stated that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." The Court has wholly disregarded this admonition here.

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[5] In fact, two of the examples cited by the Court may be read to support a contrary conclusion. The 1978 amendments to the Rehabilitation Act, cited by the majority, *ante*, at 285, n. 14, specifically exclude from the definition of a handicapped person alcoholics and drug abusers that "constitute a *direct threat to* property or *the safety of others*." 29 U. S. C. § 706(7)(B) (emphasis added). If anything, this exclusion evinces congressional intent to avoid the Act's interference with public health and safety concerns. See Oversight Hearings on Rehabilitation Act of 1973 before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 2d Sess., 503 (1978) (statement of Rep. Hyde) ("Congress needs to give thoughtful and wide-ranging consideration to the needs of handicapped persons, balanced against the realities of public safety, economics, and commonsense"). This intent is also present in the statements of Representative Vanik relied on by the Court. See *ante*, at 283, n. 9. Representative Vanik expressed apparent disapproval of a court ruling that "'a cerebral palsied child, *who was not a physical threat* and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates.'" *Ante*, at 283, n. 9, quoting 117 Cong. Rec. 45974 (1971) (emphasis added).

UNITED STATES *v.* DUNN

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

No. 85–998. Argued January 20, 1987—Decided March 3, 1987

In 1980, Drug Enforcement Administration agents, having discovered that one Carpenter had bought large quantities of chemicals and equipment used to make controlled substances, placed tracking "beepers" in some of the equipment and one of the chemical containers, which, when transported in Carpenter's truck, led the agents to respondent's ranch. Aerial photographs of the ranch showed the truck backed up to a barn behind the ranch house. The ranch was completely encircled by a perimeter fence, and contained several interior barbed wire fences, including one around the house approximately 50 yards from the barn, and a wooden fence enclosing the front of the barn, which had an open overhang and locked, waist-high gates. Without a warrant, officers crossed the perimeter fence, several of the barbed wire fences, and the wooden fence in front of the barn. They were led there by the smell of chemicals, and, while there, could hear a motor running inside. They did not enter the barn but stopped at the locked gate and shined a flashlight inside, observing what they took to be a drug laboratory. They then left the ranch, but entered it twice the next day to confirm the laboratory's presence. They obtained a search warrant and executed it, arresting respondent and seizing chemicals and equipment, as well as bags of amphetamines they discovered in the house. After the District Court denied respondent's motion to suppress all evidence seized pursuant to the warrant, respondent and Carpenter were convicted of conspiracy to manufacture controlled substances and related offenses. However, the Court of Appeals reversed, holding that the barn was within the residence's curtilage and therefore within the Fourth Amendment's protective ambit.

Held:

1. The area near the barn is not within the curtilage of the house for Fourth Amendment purposes. Extent-of-curtilage questions should be resolved with particular reference to the following four factors, at least to the extent that they bear upon whether the area claimed to be curtilage is so intimately tied to the home itself that it should be placed under the home's "umbrella" of protection: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken

by the resident to protect the area from observation by passersby. Applying the *first* factor to the instant case, the barn's substantial distance from the fence surrounding the house (50 yards) and from the house itself (60 yards) supports no inference that it should be treated as an adjunct of the house. *Second*, the barn did not lie within the fence surrounding the house, which plainly demarks the area that is part and parcel of the house, but stands out as a distinct and separate portion of the ranch. *Third*, it is especially significant that the officers possessed objective data indicating that the barn was not being used as part of respondent's home, in that the aerial photographs showed that Carpenter's truck was backed up to the barn, apparently to unload its contents which included the chemical container, and the officers detected strong chemical odors coming from, and heard a motor running in, the barn. *Fourth*, respondent did little to protect the barn area from observation by those standing outside, the ranch's fences being of the type used to corral livestock, not to ensure privacy. Pp. 300–303.

2. Respondent's contention that, because the barn is essential to his business, he possessed an expectation of privacy in it and its contents independent from his home's curtilage, is without merit. Even assuming that the barn could not be entered lawfully without a warrant, respondent's argument ignores the fact that, prior to obtaining the warrant, the officers never entered the barn but conducted their observations from the surrounding open fields after crossing over respondent's ranch-style fences. The Court's prior decisions have established that the Government's intrusion upon open fields is not an unreasonable search; that the erection of fences on an open field—at least of the type involved here—does not create a constitutionally protected privacy interest; that warrantless naked-eye observation of an area protected by the Fourth Amendment is not unconstitutional; and that shining a flashlight into a protected area, without probable cause to search the area, is permissible. Pp. 303–305.

782 F. 2d 1226, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined, and in all but the paragraph headed "*Third*" in Part II of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part, *post*, p. 305. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 305.

Roy T. Englert, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General*

Fried, Assistant Attorney General Trott, and *Deputy Solicitor General Bryson.*

Louis Dugas, Jr., argued the cause and filed a brief for respondent.

JUSTICE WHITE delivered the opinion of the Court.

We granted the Government's petition for certiorari to decide whether the area near a barn, located approximately 50 yards from a fence surrounding a ranch house, is, for Fourth Amendment purposes, within the curtilage of the house. The Court of Appeals for the Fifth Circuit held that the barn lay within the house's curtilage, and that the District Court should have suppressed certain evidence obtained as a result of law enforcement officials' intrusion onto the area immediately surrounding the barn. 782 F. 2d 1226 (1986). We conclude that the barn and the area around it lay outside the curtilage of the house, and accordingly reverse the judgment of the Court of Appeals.

I

Respondent Ronald Dale Dunn and a codefendant, Robert Lyle Carpenter, were convicted by a jury of conspiring to manufacture phenylacetone and amphetamine, and to possess amphetamine with intent to distribute, in violation of 21 U. S. C. § 846. Respondent was also convicted of manufacturing these two controlled substances and possessing amphetamine with intent to distribute. The events giving rise to respondent's apprehension and conviction began in 1980 when agents from the Drug Enforcement Administration (DEA) discovered that Carpenter had purchased large quantities of chemicals and equipment used in the manufacture of amphetamine and phenylacetone. DEA agents obtained warrants from a Texas state judge authorizing installation of miniature electronic transmitter tracking devices, or "beepers," in an electric hot plate stirrer, a drum of acetic anhydride, and a container holding phenylacetic acid, a precursor to phenylacetone. All of these items had been ordered by

Carpenter. On September 3, 1980, Carpenter took possession of the electric hot plate stirrer, but the agents lost the signal from the "beeper" a few days later. The agents were able to track the "beeper" in the container of chemicals, however, from October 27, 1980, until November 5, 1980, on which date Carpenter's pickup truck, which was carrying the container, arrived at respondent's ranch. Aerial photographs of the ranch property showed Carpenter's truck backed up to a barn behind the ranch house. The agents also began receiving transmission signals from the "beeper" in the hot plate stirrer that they had lost in early September and determined that the stirrer was on respondent's ranch property.

Respondent's ranch comprised approximately 198 acres and was completely encircled by a perimeter fence. The property also contained several interior fences, constructed mainly of posts and multiple strands of barbed wire. The ranch residence was situated ½ mile from a public road. A fence encircled the residence and a nearby small greenhouse. Two barns were located approximately 50 yards from this fence. The front of the larger of the two barns was enclosed by a wooden fence and had an open overhang. Locked, waist-high gates barred entry into the barn proper, and netting material stretched from the ceiling to the top of the wooden gates.

On the evening of November 5, 1980, law enforcement officials made a warrantless entry onto respondent's ranch property. A DEA agent accompanied by an officer from the Houston Police Department crossed over the perimeter fence and one interior fence. Standing approximately midway between the residence and the barns, the DEA agent smelled what he believed to be phenylacetic acid, the odor coming from the direction of the barns. The officers approached the smaller of the barns—crossing over a barbed wire fence—and, looking into the barn, observed only empty boxes. The officers then proceeded to the larger barn, crossing another

barbed wire fence as well as a wooden fence that enclosed the front portion of the barn. The officers walked under the barn's overhang to the locked wooden gates and, shining a flashlight through the netting on top of the gates, peered into the barn. They observed what the DEA agent thought to be a phenylacetone laboratory. The officers did not enter the barn.[1] At this point the officers departed from respondent's property, but entered it twice more on November 6 to confirm the presence of the phenylacetone laboratory.

On November 6, 1980, at 8:30 p.m., a Federal Magistrate issued a warrant authorizing a search of respondent's ranch. DEA agents and state law enforcement officials executed the warrant on November 8, 1980.[2] The officers arrested re-

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[1] In denying respondent's motion to suppress all evidence obtained as a result of the search warrant, the District Court Judge stated that the law enforcement officials, during their incursions onto respondent's property, "did not invade the premises, that is, the houses or the barns . . . ." Tr. 216. The Court of Appeals did not disturb this finding. At the suppression hearing, the DEA agent described the officers' approach to the large barn on November 5:

"A. We came back around, we crossed a small wooden type fence here, which put us right underneath a type of a tin overhang and in front of us was a wooden locked gate . . . .

. . . . . .

"Q. How high was that gate?

"A. It probably came up to my waist, estimated.

"Q. Was that gate open or shut?

"A. It was shut and it was locked.

"Q. Was there anything above that gate?

"A. Yes, there was.

"Q. What was that?

"A. A fish netting, kind of a netting, that was hanging from the ceiling down to the gate.

"Q. Did you cross over that gate and go into the barn?

"A. No.

"Q. Did you stand outside the gate?

"A. We stood right at the gate."

App. 17–18.

[2] Prior to the actual search of the barn and ranch house, the agents entered the property for further observations.

spondent and seized chemicals and equipment, as well as bags of amphetamines they discovered in a closet in the ranch house.

The District Court denied respondent's motion to suppress all evidence seized pursuant to the warrant and respondent and Carpenter were convicted. In a decision rendered in 1982, the Court of Appeals reversed respondent's conviction. *United States* v. *Dunn*, 674 F. 2d 1093. The court concluded that the search warrant had been issued based on information obtained during the officers' unlawful warrantless entry onto respondent's ranch property and, therefore, all evidence seized pursuant to the warrant should have been suppressed. Underpinning this conclusion was the court's reasoning that "the barn in question was within the curtilage of the residence and was within the protective ambit of the fourth amendment." *Id.*, at 1100. We granted the Government's petition for certiorari, vacated the judgment of the Court of Appeals, and remanded the case for further consideration in light of *Oliver* v. *United States*, 466 U. S. 170 (1984). 467 U. S. 1201 (1984). On remand, the Court of Appeals reaffirmed its judgment that the evidence seized pursuant to the warrant should have been suppressed, but altered the legal basis supporting this conclusion: the large barn was not within the curtilage of the house, but by standing outside the barn and peering into the structure, the officers nonetheless violated respondent's "reasonable expectation of privacy in his barn and its contents." 766 F. 2d 880, 886 (1985). The Government again filed a petition for certiorari. On January 17, 1986, before this Court acted on the petition, the Court of Appeals recalled and vacated its judgment issued on remand, stating that it would enter a new judgment in due course. 781 F. 2d 52. On February 4, 1986, the Court of Appeals reinstated the original opinion rendered in 1982, asserting that "[u]pon studied reflection, we now conclude and hold that the barn was inside the protected curtilage." 782 F. 2d, at 1227. The Government thereupon submitted a supplement to its petition for certiorari, revising the question pre-

sented to whether the barn lay within the curtilage of the house. We granted the petition, 477 U. S. 903, and now reverse.

II

The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. The concept plays a part, however, in interpreting the reach of the Fourth Amendment. *Hester* v. *United States*, 265 U. S. 57, 59 (1924), held that the Fourth Amendment's protection accorded "persons, houses, papers, and effects" did not extend to the open fields, the Court observing that the distinction between a person's house and open fields "is as old as the common law. 4 Bl. Comm. 223, 225, 226."[3]

We reaffirmed the holding of *Hester* in *Oliver* v. *United States*, *supra*. There, we recognized that the Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. 466 U. S., at 180. We identified the central component of this inquiry as whether the area harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Ibid.* (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)).

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[3] In the section of Blackstone's Commentaries which the Court cited, Blackstone described the elements of common-law burglary, and elaborated on the element that a breaking occur in a mansion or dwelling house. In defining the terms "mansion or dwelling-house," Blackstone wrote that "no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man's castle of defence . . . ." 4 W. Blackstone, Commentaries *225. Blackstone observed, however, that "if the barn, stable, or warehouse, be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall." *Ibid.*

Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. See *California* v. *Ciraolo*, 476 U. S. 207, 221 (1986) (POWELL, J., dissenting) (citing *Care* v. *United States*, 231 F. 2d 22, 25 (CA10), cert. denied, 351 U. S. 932 (1956); *United States* v. *Van Dyke*, 643 F. 2d 992, 993–994 (CA4 1981)).[4] We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection. Applying these factors to respondent's barn and to the area immediately surrounding it, we have little difficulty in concluding that this area lay outside the curtilage of the ranch house.

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[4] We decline the Government's invitation to adopt a "bright-line rule" that "the curtilage should extend no farther than the nearest fence surrounding a fenced house." Brief for United States 14. Fencing configurations are important factors in defining the curtilage, see *infra*, at 302, but, as we emphasize above, the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home. Application of the Government's "first fence rule" might well lead to diminished Fourth Amendment protection in those cases where a structure lying outside a home's enclosing fence was used for such domestic activities. And, in those cases where a house is situated on a large parcel of property and has no nearby enclosing fence, the Government's rule would serve no utility; a court would still be required to assess the various factors outlined above to define the extent of the curtilage.

First. The record discloses that the barn was located 50 yards from the fence surrounding the house and 60 yards from the house itself. 766 F. 2d, at 882–883; 782 F. 2d, at 1228. Standing in isolation, this substantial distance supports no inference that the barn should be treated as an adjunct of the house.

Second. It is also significant that respondent's barn did not lie within the area surrounding the house that was enclosed by a fence. We noted in *Oliver, supra,* that "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." 466 U. S., at 182, n. 12. Viewing the physical layout of respondent's ranch in its entirety, see 782 F. 2d, at 1228, it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house. Conversely, the barn—the front portion itself enclosed by a fence—and the area immediately surrounding it, stands out as a distinct portion of respondent's ranch, quite separate from the residence.

Third. It is especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home. The aerial photographs showed that the truck Carpenter had been driving that contained the container of phenylacetic acid was backed up to the barn, "apparently," in the words of the Court of Appeals, "for the unloading of its contents." 674 F. 2d, at 1096. When on respondent's property, the officers' suspicion was further directed toward the barn because of "a very strong odor" of phenylacetic acid. App. 15. As the DEA agent approached the barn, he "could hear a motor running, like a pump motor of some sort . . . ." *Id.*, at 17. Furthermore, the officers detected an "extremely strong" odor of phenylacetic acid coming from a small crack in the

wall of the barn. *Ibid.* Finally, as the officers were standing in front of the barn, immediately prior to looking into its interior through the netting material, "the smell was very, very strong . . . [and the officers] could hear the motor running very loudly." *Id.*, at 18. When considered together, the above facts indicated to the officers that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of respondent's home.

Fourth. Respondent did little to protect the barn area from observation by those standing in the open fields. Nothing in the record suggests that the various interior fences on respondent's property had any function other than that of the typical ranch fence; the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas.

III

Respondent submits an alternative basis for affirming the judgment below, one that was presented to but ultimately not relied upon by the Court of Appeals. Respondent asserts that he possessed an expectation of privacy, independent from his home's curtilage, in the barn and its contents, because the barn is an essential part of his business. Brief for Respondent 9. Respondent overlooks the significance of *Oliver* v. *United States*, 466 U. S. 170 (1984).

We may accept, for the sake of argument, respondent's submission that his barn enjoyed Fourth Amendment protection and could not be entered and its contents seized without a warrant. But it does not follow on the record before us that the officers' conduct and the ensuing search and seizure violated the Constitution. *Oliver* reaffirmed the precept, established in *Hester*, that an open field is neither a "house" nor an "effect," and, therefore, "the government's intrusion upon the open fields is not one of those 'unreasonable searches'

proscribed by the text of the Fourth Amendment." 466 U. S., at 177. The Court expressly rejected the argument that the erection of fences on an open field—at least of the variety involved in those cases and in the present case—creates a constitutionally protected privacy interest. *Id.*, at 182–183. "[T]he term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Id.*, at 180, n. 11. It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn. As previously mentioned, the officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn. This conclusion flows naturally from our previous decisions.

Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields. Similarly, the fact that the objects observed by the officers lay within an area that we have assumed, but not decided, was protected by the Fourth Amendment does not affect our conclusion. Last Term, in *California* v. *Ciraolo*, 476 U. S. 207 (1986), we held that warrantless naked-eye aerial observation of a home's curtilage did not violate the Fourth Amendment. We based our holding on the premise that the Fourth Amendment "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.*, at 213. Importantly, we deemed it irrelevant that the police observation at issue

was directed specifically at the identification of marijuana plants growing on an area protected by the Fourth Amendment. *Ibid.* Finally, the plurality opinion in *Texas* v. *Brown*, 460 U. S. 730, 739–740 (1983), notes that it is "beyond dispute" that the action of a police officer in shining his flashlight to illuminate the interior of a car, without probable cause to search the car, "trenched upon no right secured . . . by the Fourth Amendment." The holding in *United States* v. *Lee*, 274 U. S. 559, 563 (1927) is of similar import. Here, the officers' use of the beam of a flashlight, directed through the essentially open front of respondent's barn, did not transform their observations into an unreasonable search within the meaning of Fourth Amendment.

The officers lawfully viewed the interior of respondent's barn, and their observations were properly considered by the Magistrate in issuing a search warrant for respondent's premises. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in part.

I join JUSTICE WHITE's opinion with the exception of the paragraph in Part II headed "*Third.*" It does not seem to me "especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home." *Ante*, at 302. What is significant is that the barn was not being so used, whether or not the law enforcement officials knew it. The officers' perceptions might be relevant to whether intrusion upon curtilage was nevertheless reasonable, but they are no more relevant to whether the barn was curtilage than to whether the house was a house.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Government agents' intrusions upon Ronald Dunn's privacy and property violated the Fourth Amendment for

two reasons. First, the barnyard invaded by the agents lay within the protected curtilage of Dunn's farmhouse. Second, the agents infringed upon Dunn's reasonable expectation of privacy in the barn and its contents. Our society is not so exclusively urban that it is unable to perceive or unwilling to preserve the expectation of farmers and ranchers that barns and their contents are protected from (literally) unwarranted government intrusion.

I

I briefly recount the relevant facts.

Respondent's ranch of 198 acres is encircled by a perimeter fence. The residence and its outbuildings are located in a clearing surrounded by woods, one-half mile from a road, down a chained, locked driveway. Neither the farmhouse nor its outbuildings are visible from the public road or from the fence that encircles the entire property. Once inside this perimeter fence, it is necessary to cross at least one more "substantial" fence before approaching Dunn's farmhouse or either of his two barns. *United States* v. *Dunn*, 674 F. 2d 1093, 1100 (CA5 1982).

The front of the barn involved here is enclosed by a wooden fence. Its back and sides

> "were composed of brick, metal siding, and large metal sliding doors and were completely enclosed. The front of the barn was partially composed of a wooden wall with windows. The remainder was enclosed by waist-high wood slatting and wooden gates. At the time of [the] agent['s] visits . . . , the top half of the front of the barn was covered by a fishnet type material from the ceiling down to the top of the locked wooden gates. To see inside the barn it was necessary to stand immediately next to the netting [under the barn's overhang]. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting." 766 F. 2d 880, 883 (CA5 1985).

The issues are whether the barn was within the protected curtilage of the house, and whether the conduct of the Drug Enforcement Agency (DEA) agents—"circling the large barn, being unable to see inside through the back or sides, climbing a wooden fence at its front, entering its overhang and going into the immediate proximity of the fishnet and wooden gate front enclosure"—infringed upon Dunn's reasonable expectation of privacy in the barn or its contents. *Id.*, at 884.

II

A

In *Oliver* v. *United States*, 466 U. S. 170 (1984), the Court affirmed its holding in *Hester* v. *United States*, 265 U. S. 57 (1924), that the Fourth Amendment protects the home and its curtilage, but not the "open fields." We explained that curtilage is "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" 466 U. S., at 180 (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)).

The Court states that curtilage questions are often resolved through evaluation of four factors: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Ante*, at 301. The Court applies this test and concludes that Dunn's barn and barnyard were not within the curtilage of his dwelling. This conclusion overlooks the role a barn plays in rural life and ignores extensive authority holding that a barn, when clustered with other outbuildings near the residence, is part of the curtilage.

State and federal courts have long recognized that a barn, like many other outbuildings, is "a domestic building constituting an integral part of that group of structures making up the farm home." *Walker* v. *United States*, 225 F. 2d 447, 449 (CA5 1955). Consequently, the general rule is that the

"[c]urtilage includes all outbuildings used in connection with a residence, such as garages, sheds, [and] *barns* . . . connected with and in close vicinity of the residence." *Luman* v. *Oklahoma*, 629 P. 2d 1275, 1276 (Okla. Crim. App. 1981) (emphasis added).

The overwhelming majority of state courts have consistently held that barns are included within the curtilage of a farmhouse. See, *e. g.*, *Brown* v. *Oklahoma City*, 721 P. 2d 1346, 1349 (Okla. App. 1986) ("[C]urtilage . . . includes, among other things, garages, sheds, barns and the like"); *McGlothlin* v. *State*, 705 S. W. 2d 851, 857 (Tex. App. 1986) (barn located 100 yards from residence is within curtilage); *State* v. *Fierge*, 673 S. W. 2d 855, 856 (Mo. App. 1984) ("[C]urtilage includes all outbuildings used in connection with the residence, such as garages, sheds, barns, yards, and lots connected with or in the close vicinity of the residence"); *State* v. *Simpson*, 639 S. W. 2d 230, 232 (Mo. App. 1982) (same); *Luman* v. *Oklahoma*, *supra* (same); *Bunn* v. *State*, 153 Ga. App. 270, 272, 265 S. E. 2d 88, 90 (1980) ("'[c]urtilage' includes the yards and grounds of a particular address, its garages, barns, buildings, etc."); *State* v. *Vicars*, 207 Neb. 325, 330, 299 N. W. 2d 421, 425 (1980) (calf shed located 100 feet from the house and separated from it by chain link fence which surrounded the yard was within curtilage); *State* v. *Browning*, 28 N. C. App. 376, 379, 221 S. E. 2d 375, 377 (1976) (curtilage of the home includes "'at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings'") (quoting *State* v. *Frizzelle*, 243 N. C. 49, 51, 89 S. E. 2d 725, 726 (1955)); *Norman* v. *State*, 134 Ga. App. 767, 768, 216 S. E. 2d 644, 645 (1975) (truck containing moonshine liquor located 200 feet from farmhouse and 100 feet from barn was within curtilage); *Brinlee* v. *State*, 403 P. 2d 253, 256 (Okla. Crim. App. 1965) (cattle located 100 yards from home in a lot adjacent to the barn were within curtilage); *State* v. *Lee*, 120 Ore. 643, 648, 253 P. 533, 534 (1927) ("Premises other than dwellings have

been held within the protection of the Fourth Amendment[,] for example a barn. As construed by the courts from the earliest to the latest times the words 'dwelling' or 'dwelling-house' have been construed to include not only the main but all the cluster of buildings convenient for the occupants of the premises, generally described as within the curtilage").

Federal courts, too, have held that barns, like other rural outbuildings, lie within the curtilage of the farmhouse. See *United States* v. *Berrong*, 712 F. 2d 1370, 1374 (CA11 1983) ("[t]he 'outer limits of the curtilage' have been expressly defined to be 'the outer walls of the extreme outbuildings'") (quoting *United States* v. *Williams*, 581 F. 2d 451, 454 (CA5 1978)); *Rosencranz* v. *United States*, 356 F. 2d 310, 313 (CA1 1966) (barn located an unknown distance from house and separated from it by a driveway deemed within curtilage); *Walker* v. *United States*, *supra* (barn located 70 to 80 yards from house, separated from house by private driveway, and surrounded by separate fence is within curtilage); *United States* v. *Swann*, 377 F. Supp. 1305, 1306 (Md. 1974) (barns and outbuildings on farm were part of curtilage); *United States* v. *King*, 305 F. Supp. 630, 634 (ND Miss. 1969) (barns and other outbuildings of unknown distance from house within curtilage).

Thus, case law demonstrates that a barn is an integral part of a farm home and therefore lies within the curtilage. The Court's opinion provides no justification for its indifference to the weight of state and federal precedent.

The above-cited authority also reveals the infirmities in the Court's application of its four-part test. First, the distance between the house and the barn does not militate against the barn or barnyard's presence in the curtilage. Many of the cases cited involve a barn separated from a residence by a distance in excess of 60 yards. Second, the cases make evident that the configuration of fences is not determinative of the status of an outbuilding. Here, where the barn was connected to the house by a "well walked" and a "well driven"

path, App. to Supp. to Pet. for Cert. 51a, and was clustered with the farmhouse and other outbuildings in a clearing surrounded by woods, the presence of intervening fences fades into irrelevance.

The third factor in the test—the nature of the uses to which the area is put—has been badly misunderstood and misapplied by the Court. The Court reasons that, because the barn and barnyard were not actually in domestic use, they were not within the curtilage. This reveals a misunderstanding of the level of generality at which the constitutional inquiry must proceed and is flatly inconsistent with the Court's analysis in *Oliver*.

In *Oliver*, the Court held that, as a general matter, the open fields "are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment." 466 U. S., at 179, n. 10. The Court expressly refused to do a case-by-case analysis to ascertain whether, on occasion, an individual's expectation of privacy in a certain activity in an open field should be protected. *Id.*, at 181. In the instant case, the Court is confronted with the general rule that a barn *is* in domestic use. To be consistent with *Oliver*, the Court should refuse to do a case-by-case analysis of the expectation of privacy in any particular barn and follow the general rule that a barn is in domestic use. What should be relevant here, as in *Oliver*, is the typical use of an area or structure. The Court's willingness to generalize about the absence of a privacy interest in the open fields and unwillingness to generalize about the existence of a privacy interest in a barn near a residence are manifestly inconsistent and reflect a hostility to the purpose of the Fourth Amendment.

Moreover, the discovery that Dunn's barn was actually used as a drug laboratory is irrelevant to the question whether the area is typically in domestic use. No one would contend that, absent exigent circumstances, the police could intrude upon a home without a warrant to search for a drug

manufacturing operation. The Fourth Amendment extends that same protection to outbuildings in the curtilage of the home.

Even accepting that courts should do a case-by-case inquiry regarding the use of buildings within the curtilage, the Court's analysis is faulty. The Court finds it significant that, because of the strong odor and the noise of a motor emanating from the barn, the officers knew that the barn was not in domestic use. But these Government agents *were already within the curtilage* when they detected the odor of phenylacetic acid. They were wandering about in the area between the barns and the farmhouse, an area that is itself part of the curtilage. The Court cannot abrogate the general rule that a barn is in the curtilage with evidence gathered after the intrusion has occurred.[1]

Finally, neither the smell of the chemicals nor the sound of the motor running would remove the protection of the Fourth Amendment from an otherwise protected structure. A barn, like a home, may simultaneously be put to domestic and nondomestic uses, even the manufacture of drugs. Dual use does not strip a home or any building within the curtilage of Fourth Amendment protection. As this Court said in *Taylor* v. *United States*, 286 U. S. 1, 6 (1932), where a garage adjacent to a city residence and within its curtilage was searched for illegal alcohol, "[p]rohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable

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[1] Cf. *United States* v. *Mullin*, 329 F. 2d 295, 298 (CA4 1964) ("We are not dissuaded from this view [that the smokehouse was part of the curtilage] by testimony of Government witnesses that after entering the smokehouse they found it to be in a dilapidated condition, unfit (in their opinion) for the storage of meat. *The critical moment was the appearance of the smokehouse before entry; subsequent observations as to its condition are irrelevant.* See also United States v. Di Re, 332 U. S. 581 . . . (1948)") (emphasis added).

search."[2] What the evidence cited by the Court might suggest is that the DEA agents had probable cause to enter the barn or barnyard *before they made any unconstitutional intrusion*. If so—and I do not concede it—they should have obtained a warrant.

With regard to the fourth factor of the curtilage test, I find astounding the Court's conclusion that "[r]espondent did little to protect the barn area from observation by those standing in the open fields." *Ante*, at 303. Initially, I note that the fenced area immediately adjacent to the barn in this case is not part of the open fields, but is instead part of the curtilage and an area in which Dunn had a reasonable expectation of privacy. See *infra*, at 314–319. Second, Dunn in fact took elaborate measures to ensure his privacy. He locked his driveway, fenced in his barn, and covered its open end with a locked gate and fishnetting. The Court of Appeals found that "[t]o see inside the barn it was necessary to stand immediately next to the netting. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting." 766 F. 2d, at 883. The Fourth Amendment does not require the posting of a 24-hour guard to preserve an expectation of privacy.

The Court of Appeals correctly concluded that Dunn's barn and barnyard were within the curtilage of the farmhouse. This Court's reversal of that determination reflects a fundamental misunderstanding of the typical role of a barn in rural domestic life.[3]

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[2] In addition, the sound of a motor running is not inherently inconsistent with the use of the barn for domestic purposes. Household activities on a farm may differ from those conducted in an urban apartment, but they retain their domestic character. A barn is an integral part of a particular way of life, and its many standard uses are part of a distinctive domestic economy.

[3] This case bears out the prediction made in *Oliver* v. *United States*, 466 U. S. 170, 196, and n. 20 (1984) (MARSHALL, J., dissenting), that police officers making warrantless entries upon private land will be obliged "to make on-the-spot judgments as to how far the curtilage extends, and to

B

Today's decision has an unforeseen consequence. In narrowing the meaning given to the concept of curtilage, the Court also narrows the scope of searches permissible under a warrant authorizing a search of building premises. Police officers often proceed as if a warrant that authorizes a search of the premises or the dwelling also authorizes a search of any outbuildings (such as garages, barns, sheds, smokehouses) because such buildings are commonly deemed within the curtilage. See *Gumina* v. *State*, 166 Ga. App. 592, 595, 305 S. E. 2d 37, 39 (1983) ("[E]ven if the [trailers] had not been described at all [in the warrant], the officers would have been authorized to search them as part of the curtilage or premises of the residence"); *Barton* v. *State*, 161 Ga. App. 591, 592, 288 S. E. 2d 914, 915 (1982) (curtilage includes yards, grounds, gardens, barn, and outbuildings; all may be searched though not specifically described in warrant, so long as warrant has been obtained to search premises); *State* v. *Vicars*, 207 Neb. 325, 299 N. W. 2d 421 (1980) (calf shed located 100 feet from house on opposite side of chain link fence that surrounded the yard is within curtilage so search war-

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stay outside that zone" and that officers will have difficulty in doing so. I continue to believe that the rule suggested in dissent in *Oliver* is most faithful to the Fourth Amendment analysis set forth in *Katz* v. *United States*, 389 U. S. 347 (1967), and provides the clearest answer to the question of when persons possess a reasonable expectation of privacy in their property: "Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendmen[t]." 466 U. S., at 195. By rejecting this rule, "the Court is willing to sanction the introduction of evidence seized pursuant to a potentially criminal activity (trespassing) in order to convict an individual of a slightly more serious crime." Comment, Curtilage or Open Fields?: *Oliver v. United States* Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis, 46 U. Pitt. L. Rev. 795, 810, n. 87 (1985). "For good or for ill, [the Government] teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).

rant authorizing search of dwelling also authorizes search of outbuilding); *Bellamy* v. *State*, 134 Ga. App. 340, 214 S. E. 2d 383, 384 (1975) ("'Curtilage' comes down from early English days. An outbuilding on the grounds is within the 'curtilage' and may be searched under such a warrant, though not described specifically"); *Meek* v. *Pierce*, 19 Wis. 300, 302 (1865) ("It would destroy the utility of the proceeding, if, beside the building principally named, all other buildings and places of concealment upon the same premises, occupied in connection with it and by the same person, could not also be searched, and by virtue of the same warrant"). After today, reliance upon this general rule is illegitimate, and warrants must specify that a search of the farmer's outbuildings is also contemplated.

III

Even if Dunn's barn were not within the curtilage of his farmhouse, his reasonable expectation of privacy in the barnyard would bring the Fourth Amendment into play.

It is well established that the Fourth Amendment protects a privacy interest in commercial premises. See *Oliver* v. *United States*, 466 U. S., at 178, n. 8 (the protection of privacy interests in business premises is "based on societal expectations that have deep roots in the history of the Amendment").[4] The questions in this case are whether a barn is a commercial structure and, if so, how far its owner's expectations of privacy reasonably extend.

The Court assumes that respondent possessed an expectation of privacy in his barn and its contents because the barn was an essential part of his business. This assumption is

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[4] See also *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978) (the historical foundation of the Fourth Amendment reveals that "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence"); *See* v. *City of Seattle*, 387 U. S. 541, 543 (1967) ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property").

plainly correct. A ranch or a farm is a business like any other. As the Court of Appeals, like many other courts to consider the question,[5] concluded:

> "A barn is as much a part of a rancher's place of business as a warehouse or outbuilding is part of an urban merchant's place of business. It is and ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy." 766 F. 2d, at 885.

This established, we inquire whether the owner of a commercial building has a reasonable expectation of privacy *in the area surrounding or adjacent to that building.*[6] Since

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[5] See also *Walker* v. *United States*, 225 F. 2d 447, 453 (CA5 1955) (Rives, J., dissenting) ("I can see no reason why a farmer should be afforded less protection in the barn where he actually does business, whether located within the curtilage or not, than is accorded a city dweller in his office"); *Janney* v. *United States*, 206 F. 2d 601, 603 (CA4 1953) (the defendant's barn was protected because "the [Fourth] Amendment extends not only to the dwelling house of a defendant, but also to the structures used by him in connection with his . . . place of business"); *United States* v. *Broadhurst*, 612 F. Supp. 777, 790 (ED Cal. 1985) (the argument "that farmers or other citizens living and working in rural settings . . . are not protected in their business enterprises by the Fourth Amendment to the same degree as their urban counterparts" could not prevail); *Norman* v. *State*, 379 So. 2d 643, 647 (Fla. 1980) (the defendant's "barn, as an integral part of petitioner's farming business, enjoyed the same fourth amendment protection as do other business premises").

[6] The usual manner of deciding whether intrusions on land near a dwelling are reasonable is to determine whether an officer is within the curtilage or in the open fields. It is plain that the open fields doctrine is not properly applied to land which has been developed. See *Oliver*, 466 U. S., at 180, n. 11, and 178 (emphasis added) ("It is clear . . . that the term 'open fields' may include *any unoccupied or undeveloped area* outside of the curtilage." "[A]n individual may not legitimately demand privacy for activities conducted *out of doors in fields*"); see *id.*, at 196 (MARSHALL, J., dissenting) ("[W]e may now expect to see a spate of litigation over the question of how much improvement is necessary to remove private land from the category of 'unoccupied or undeveloped area' to which the 'open fields exception' is now deemed applicable").

Katz v. *United States*, 389 U. S. 347 (1967), this Court has applied the Fourth Amendment whenever "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979). This is a two-part inquiry. First, the individual must exhibit a subjective expectation of privacy in the object of the challenged search. See *Smith* v. *Maryland*, *supra*, at 740.[7] Dunn has met this standard. See *supra*, at 312.

Second, "the expectation [must] be one that society is prepared to recognize as 'reasonable.'" *Katz*, *supra*, at 361 (Harlan, J., concurring). For a homeowner to preserve Fourth Amendment protection in the area immediately surrounding the residence, he or she must not conduct an activity or leave an item in the plain view of those outside that area. The occupant of a commercial building must take the *additional* step of affirmatively barring the public from the area because a business operator has a reasonable expectation of privacy only in those areas from which the public has been excluded.[8] When a business or commercial structure is not open to the public,

> "[a]pplication of the *Katz* justified-expectation-of-privacy test . . . requires consideration of where the police were at the time of surveillance and how the surveillance was conducted. If police using the naked eye or ear are able to see or hear while located on adjoining

[7] The Court has noted that in some situations the absence of any subjective expectation of privacy would not defeat an individual's Fourth Amendment claim. See *Smith* v. *Maryland*, 442 U. S., at 740. See also Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 384 (1974).

[8] This requirement comports with the Court's usual view of the relationship between commercial premises and the Fourth Amendment. The Government must obtain a search warrant only when it wishes to search those areas of commercial premises from which the public has been excluded. See *See* v. *City of Seattle*, *supra*, at 545. See also Comment, 46 U. Pitt. L. Rev., at 815, n. 113.

> property or even on property of the business which is readily accessible to the general public, this is not a search. . . .
>
> "*On the other hand, if the police engage in a much more intense form of surveillance, especially from places not ordinarily used by the public, this is a search under* Katz." 1 W. LaFave, Search and Seizure § 2.4 (b), pp. 433–434 (2d ed. 1987) (emphasis added; footnotes omitted).[9]

See *Norman* v. *State*, 379 So. 2d 643, 647 (Fla. 1980) (petitioner had a reasonable expectation of privacy in his barn because the "barn, as an integral part of petitioner's farming business, enjoyed the same fourth amendment protection as do other business premises" and because he "took overt steps to designate his farm and barn as a place not open to the public").

The Court applied this distinction between protected commercial premises (from which the public is excluded) and unprotected commercial premises (to which the public has access) in its analysis last Term in *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 237–238 (1986). In that case the Court held that "EPA's aerial photography of petitioner's 2,000-acre plant complex without a warrant was not a search under the Fourth Amendment." *Id.*, at 229. In so holding, the Court emphasized that "the narrow issue raised" was the lawfulness of observation "*without* physical entry" and that "[a]ny actual physical entry by EPA into *any enclosed area* would raise significantly different questions." *Id.*, at 237 (emphasis added). For that reason, the Court deter-

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[9] For example, in *Commonwealth* v. *Soychak*, 221 Pa. Super. 458, 462–463, 289 A. 2d 119, 122–123 (1972), a police officer, suspicious that gambling activities were taking place inside a certain club, climbed onto the roof of a building and peered through the louvers of a ventilating fan. The court held that despite the fact that the club had "failed to completely block the view of police investigators," its operators nonetheless possessed a reasonable expectation of privacy.

mined that the question of invasion of the so-called "business curtilage" was not presented. *Id.*, at 239, n. 7.[10]

Looking into a building from a vantage point inaccessible to the public—here by climbing over the "substantial" wooden fence enclosing the front of the barn to intrude on Dunn's farmyard—is an unacceptable invasion of a reasonable privacy interest. When, as here, the public is excluded from an area immediately surrounding or adjacent to a business structure, that area is not—contrary to the Court's position—part of the open fields. "[O]ccupants of business and commercial premises should not be put to the choice of taking extraordinary methods of sealing off those premises or else submitting to unrestrained police surveillance." 1 LaFave, *supra*, at 434.[11]

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[10] Cf. *Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.*, 416 U. S. 861, 865 (1974) (inspector's entry onto corporation land to make an opacity reading of emissions of corporate smokestacks was not a search because the inspector was *not* "on premises from which the public was excluded" and "sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke").

[11] It matters little if this protected area is denominated a "business curtilage" or if the Court holds that the business occupant has a reasonable expectation of privacy there. An area was historically considered part of the curtilage only if used for domestic purposes because the Fourth Amendment was thought to protect only the "'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U. S., at 180 (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)). Now that it is plain that commercial buildings, too, are covered by the Fourth Amendment, there is no reason to restrict the application of the curtilage concept to areas surrounding dwellings and used only for domestic purposes. See Comment, 46 U. Pitt. L. Rev., at 816.

In *United States* v. *Swart*, 679 F. 2d 698 (CA7 1982), for example, the Court of Appeals utilized both a "business curtilage" concept and a *Katz* reasonable expectation-of-privacy analysis to hold that the warrantless search of business premises violated the Fourth Amendment. In that case, police officers searched the area surrounding a garage and sheds that constituted a business for repairing and rebuilding cars and trucks. The court held that the search violated the Fourth Amendment because the cars "may have been within the curtilage of the business buildings," and

A barn, like a factory, a plant, or a warehouse, is a business place not open to the general public. Like these other business establishments, the barn, and any area immediately surrounding or adjacent to it from which the public is excluded, should receive protection. A business operator is undisputably entitled to constitutional protection *within* the premises when steps have been taken to ensure privacy. It is equally clear that he or she is entitled to protection in those areas immediately surrounding the building when obvious efforts have been made to exclude the public.[12]

IV

The Fourth Amendment prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wished to guard their privacy.[13] In this case, in order to look inside respondent's barn, the DEA agents traveled one-half mile off a public road over respondent's fenced-in property, crossed over three additional wooden and barbed wire fences, stepped under the eaves of the barn, and then used a flashlight to peer through otherwise opaque fishnetting. For the police habitually to engage in such surveillance—without a warrant—is constitutionally intolerable. Because I believe that farmers' and ranchers' expectations of privacy in their barns

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because the occupant of the premises had a reasonable expectation of privacy in the cars located on his property which "was not diminished by the fact that the cars were on closed business premises." 679 F. 2d, at 702.

[12] When a rural business structure such as a barn is also located within the curtilage of a farm residence, there is plainly a substantial likelihood that the business enterprise is also closely related to domestic life. This fact compounds the need for the court to protect the individual's expectation of privacy in the business structure. See *United States* v. *Broadhurst*, 612 F. Supp., at 790, n. 11.

[13] As Professor Amsterdam has observed, "[t]he question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." Amsterdam, *supra* n. 7, at 403.

and other outbuildings are expectations society would regard as reasonable, and because I believe that sanctioning the police behavior at issue here does violence to the purpose and promise of the Fourth Amendment, I dissent.

ARIZONA *v.* HICKS

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 85–1027. Argued December 8, 1986—Decided March 3, 1987

A bullet fired through the floor of respondent's apartment injured a man on the floor below. Police entered the apartment to search for the shooter, for other victims, and for weapons, and there seized three weapons and discovered a stocking-cap mask. While there, one of the policemen noticed two sets of expensive stereo components and, suspecting that they were stolen, read and recorded their serial numbers—moving some of them, including a turntable, to do so—and phoned in the numbers to headquarters. Upon learning that the turntable had been taken in an armed robbery, he seized it immediately. Respondent was subsequently indicted for the robbery, but the state trial court granted his motion to suppress the evidence that had been seized, and the Arizona Court of Appeals affirmed. Relying upon a statement in *Mincey* v. *Arizona*, 437 U. S. 385, that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," the Court of Appeals held that the policeman's obtaining the serial numbers violated the Fourth Amendment because it was unrelated to the shooting, the exigent circumstance that justified the initial entry and search. Both state courts rejected the contention that the policeman's actions were justified under the "plain view" doctrine.

Held:

1. The policeman's actions come within the purview of the Fourth Amendment. The mere recording of the serial numbers did not constitute a "seizure" since it did not meaningfully interfere with respondent's possessory interest in either the numbers or the stereo equipment. However, the moving of the equipment was a "search" separate and apart from the search that was the lawful objective of entering the apartment. The fact that the search uncovered nothing of great personal value to respondent is irrelevant. Pp. 324–325.

2. The "plain view" doctrine does not render the search "reasonable" under the Fourth Amendment. Pp. 325–329.

(a) The policeman's action directed to the stereo equipment was not *ipso facto* unreasonable simply because it was unrelated to the justification for entering the apartment. That lack of relationship always exists when the "plain view" doctrine applies. In saying that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," *Mincey* was simply addressing the scope of the primary

search itself, and was not overruling the "plain view" doctrine by implication. Pp. 325–326.

(b) However, the search was invalid because, as the State concedes, the policeman had only a "reasonable suspicion"—*i. e.*, less than probable cause to believe—that the stereo equipment was stolen. Probable cause is required to invoke the "plain view" doctrine as it applies to seizures. It would be illogical to hold that an object is seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for it if it had been known to be on the premises. Probable cause to believe the equipment was stolen was also necessary to support the search here, whether legal authority to move the equipment could be found only as the inevitable concomitant of the authority to seize it, or also as a consequence of some independent power to search objects in plain view. Pp. 326–328.

3. The policeman's action cannot be upheld on the ground that it was not a "full-blown search" but was only a "cursory inspection" that could be justified by reasonable suspicion instead of probable cause. A truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a "search" for Fourth Amendment purposes, and therefore does not even require reasonable suspicion. This Court is unwilling to create a subcategory of "cursory" searches under the Fourth Amendment. Pp. 328–329.

146 Ariz. 533, 707 P. 2d 331, affirmed.

SCALIA, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 329. POWELL, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 330. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and POWELL, J., joined, *post*, p. 333.

Linda A. Akers, Assistant Attorney General of Arizona, argued the cause for petitioner. With her on the briefs were *Robert K. Corbin*, Attorney General, *Steven A. LaMar*, Assistant Attorney General, and *Steven J. Twist*, Chief Assistant Attorney General.

John W. Rood III, by appointment of the Court, 476 U. S. 1113, argued the cause for respondent. With him on the brief was *James H. Kemper*.*

**David Crump, Daniel B. Hales, William C. Summers, Jack E. Yelverton, 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.

JUSTICE SCALIA delivered the opinion of the Court.

In *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), we said that in certain circumstances a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment. See *id.*, at 465–471 (plurality opinion); *id.*, at 505–506 (Black, J., concurring and dissenting); *id.*, at 521–522 (WHITE, J., concurring and dissenting). We granted certiorari, 475 U. S. 1107 (1986), in the present case to decide whether this "plain view" doctrine may be invoked when the police have less than probable cause to believe that the item in question is evidence of a crime or is contraband.

I

On April 18, 1984, a bullet was fired through the floor of respondent's apartment, striking and injuring a man in the apartment below. Police officers arrived and entered respondent's apartment to search for the shooter, for other victims, and for weapons. They found and seized three weapons, including a sawed-off rifle, and in the course of their search also discovered a stocking-cap mask.

One of the policemen, Officer Nelson, noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment. Suspecting that they were stolen, he read and recorded their serial numbers—moving some of the components, including a Bang and Olufsen turntable, in order to do so—which he then reported by phone to his headquarters. On being advised that the turntable had been taken in an armed robbery, he seized it immediately. It was later determined that some of the other serial numbers matched those on other stereo equipment taken in the same armed robbery, and a warrant

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William J. Taylor, George Kannar, and *Burt Neuborne* filed a brief for the American Civil Liberties Union Foundation as *amicus curiae* urging affirmance.

was obtained and executed to seize that equipment as well. Respondent was subsequently indicted for the robbery.

The state trial court granted respondent's motion to suppress the evidence that had been seized. The Court of Appeals of Arizona affirmed. It was conceded that the initial entry and search, although warrantless, were justified by the exigent circumstance of the shooting. The Court of Appeals viewed the obtaining of the serial numbers, however, as an additional search, unrelated to that exigency. Relying upon a statement in *Mincey* v. *Arizona*, 437 U. S. 385 (1978), that a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,'" *id.*, at 393 (citation omitted), the Court of Appeals held that the police conduct violated the Fourth Amendment, requiring the evidence derived from that conduct to be excluded. 146 Ariz. 533, 534–535, 707 P. 2d 331, 332–333 (1985). Both courts—the trial court explicitly and the Court of Appeals by necessary implication—rejected the State's contention that Officer Nelson's actions were justified under the "plain view" doctrine of *Coolidge* v. *New Hampshire*, *supra*. The Arizona Supreme Court denied review, and the State filed this petition.

II

As an initial matter, the State argues that Officer Nelson's actions constituted neither a "search" nor a "seizure" within the meaning of the Fourth Amendment. We agree that the mere recording of the serial numbers did not constitute a seizure. To be sure, that was the first step in a process by which respondent was eventually deprived of the stereo equipment. In and of itself, however, it did not "meaningfully interfere" with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure. See *Maryland* v. *Macon*, 472 U. S. 463, 469 (1985).

Officer Nelson's moving of the equipment, however, did constitute a "search" separate and apart from the search for

the shooter, victims, and weapons that was the lawful objective of his entry into the apartment. Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. See *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983). But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. This is why, contrary to JUSTICE POWELL's suggestion, *post*, at 333, the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

III

The remaining question is whether the search was "reasonable" under the Fourth Amendment.

On this aspect of the case we reject, at the outset, the apparent position of the Arizona Court of Appeals that because the officers' action directed to the stereo equipment was unrelated to the justification for their entry into respondent's apartment, it was *ipso facto* unreasonable. That lack of relationship *always* exists with regard to action validated under the "plain view" doctrine; where action is taken for the purpose justifying the entry, invocation of the doctrine is superfluous. *Mincey* v. *Arizona*, *supra*, in saying that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," 437 U. S., at 393 (citation omitted), was addressing only the scope of the primary

search itself, and was not overruling by implication the many cases acknowledging that the "plain view" doctrine can legitimate action beyond that scope.

We turn, then, to application of the doctrine to the facts of this case. "It is well established that under certain circumstances the police may *seize* evidence in plain view without a warrant," *Coolidge* v. *New Hampshire*, 403 U. S., at 465 (plurality opinion) (emphasis added). Those circumstances include situations "[w]here the initial intrusion that brings the police within plain view of such [evidence] is supported . . . by one of the recognized exceptions to the warrant requirement," *ibid.*, such as the exigent-circumstances intrusion here. It would be absurd to say that an object could lawfully be seized and taken from the premises, but could not be moved for closer examination. It is clear, therefore, that the search here was valid if the "plain view" doctrine would have sustained a seizure of the equipment.

There is no doubt it would have done so if Officer Nelson had probable cause to believe that the equipment was stolen. The State has conceded, however, that he had only a "reasonable suspicion," by which it means something less than probable cause. See Brief for Petitioner 18–19.* We have not ruled on the question whether probable cause is required in order to invoke the "plain view" doctrine. Dicta in *Payton* v. *New York*, 445 U. S. 573, 587 (1980), suggested that the standard of probable cause must be met, but our later opinions in *Texas* v. *Brown*, 460 U. S. 730 (1983), explicitly regarded the issue as unresolved, see *id.*, at 742, n. 7 (plurality opinion); *id.*, at 746 (STEVENS, J., concurring in judgment).

We now hold that probable cause is required. To say otherwise would be to cut the "plain view" doctrine loose from its theoretical and practical moorings. The theory of that doctrine consists of extending to nonpublic places such as the

*Contrary to the suggestion in JUSTICE O'CONNOR's dissent, *post*, at 339, this concession precludes our considering whether the probable-cause standard was satisfied in this case.

home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband. See *Payton* v. *New York*, *supra*, at 586–587. And the practical justification for that extension is the desirability of sparing police, whose viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place, the inconvenience and the risk—to themselves or to preservation of the evidence—of going to obtain a warrant. See *Coolidge* v. *New Hampshire*, *supra*, at 468 (plurality opinion). Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause* for the seizure than a warrant would require, *i. e.*, the standard of probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises.

We do not say, of course, that a seizure can never be justified on less than probable cause. We have held that it can—where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime. See, *e. g.*, *United States* v. *Cortez*, 449 U. S. 411 (1981) (investigative detention of vehicle suspected to be transporting illegal aliens); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975) (same); *United States* v. *Place*, 462 U. S. 696, 709, and n. 9 (1983) (dictum) (seizure of suspected drug dealer's luggage at airport to permit exposure to specially trained dog). No special operational necessities are relied on here, however—but rather the mere fact that the items in question came lawfully within the officer's plain view. That alone cannot supplant the requirement of probable cause.

The same considerations preclude us from holding that, even though probable cause would have been necessary for a *seizure*, the *search* of objects in plain view that occurred here

could be sustained on lesser grounds. A dwelling-place search, no less than a dwelling-place seizure, requires probable cause, and there is no reason in theory or practicality why application of the "plain view" doctrine would supplant that requirement. Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, see *Texas* v. *Brown*, *supra*, at 747–748 (STEVENS, J., concurring in judgment), neither the one nor the other is of inferior worth or necessarily requires only lesser protection. We have not elsewhere drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action, and we see no reason for a distinction in the particular circumstances before us here. Indeed, to treat searches more liberally would especially erode the plurality's warning in *Coolidge* that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." 403 U. S., at 466. In short, whether legal authority to move the equipment could be found only as an inevitable concomitant of the authority to seize it, or also as a consequence of some independent power to search certain objects in plain view, probable cause to believe the equipment was stolen was required.

JUSTICE O'CONNOR's dissent suggests that we uphold the action here on the ground that it was a "cursory inspection" rather than a "full-blown search," and could therefore be justified by reasonable suspicion instead of probable cause. As already noted, a truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a "search" for Fourth Amendment purposes, and therefore does not even require reasonable suspicion. We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a "plain view" inspection nor

yet a "full-blown search." Nothing in the prior opinions of this Court supports such a distinction, not even the dictum from Justice Stewart's concurrence in *Stanley* v. *Georgia*, 394 U. S. 557, 571 (1969), whose reference to a "mere inspection" describes, in our view, close observation of what lies in plain sight.

JUSTICE POWELL's dissent reasonably asks what it is we would have had Officer Nelson do in these circumstances. *Post*, at 332. The answer depends, of course, upon whether he had probable cause to conduct a search, a question that was not preserved in this case. If he had, then he should have done precisely what he did. If not, then he should have followed up his suspicions, if possible, by means other than a search—just as he would have had to do if, while walking along the street, he had noticed the same suspicious stereo equipment sitting inside a house a few feet away from him, beneath an open window. It may well be that, in such circumstances, no effective means short of a search exist. But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all. Our disagreement with the dissenters pertains to where the proper balance should be struck; we choose to adhere to the textual and traditional standard of probable cause.

The State contends that, even if Officer Nelson's search violated the Fourth Amendment, the court below should have admitted the evidence thus obtained under the "good faith" exception to the exclusionary rule. That was not the question on which certiorari was granted, and we decline to consider it.

For the reasons stated, the judgment of the Court of Appeals of Arizona is

Affirmed.

JUSTICE WHITE, concurring.

I write only to emphasize that this case does not present, and we have no occasion to address, the so-called "inadver-

tent discovery" prong of the plain-view exception to the Warrant Clause. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 469–471 (1971) (plurality opinion). This "requirement" of the plain-view doctrine has never been accepted by a judgment supported by a majority of this Court, and I therefore do not accept JUSTICE O'CONNOR's dissent's assertion that evidence seized in plain view must have been inadvertently discovered in order to satisfy the dictates of the Fourth Amendment. See *post*, at 334. I join the majority opinion today without regard to the inadvertence of the officers' discovery of the stereo components' serial numbers. The police officers conducted a search of respondent's stereo equipment absent probable cause that the equipment was stolen. It is for this reason that the judgment of the Court of Appeals of Arizona must be affirmed.

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

I join JUSTICE O'CONNOR's dissenting opinion, and write briefly to highlight what seem to me the unfortunate consequences of the Court's decision.

Today the Court holds for the first time that the requirement of probable cause operates as a separate limitation on the application of the plain-view doctrine.[1] The plurality opinion in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971),

[1] In *Texas* v. *Brown*, 460 U. S. 730 (1983), the plurality opinion expressly declined to "address whether, in some circumstances, a degree of suspicion lower than probable cause would be sufficient basis for a seizure . . . ." *Id.*, at 742, n. 7. Even the probable-cause standard, in the plurality's view, requires only facts sufficient to "'warrant a man of reasonable caution in the belief' . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Id.*, at 742 (quoting *Carroll* v. *United States*, 267 U. S. 132, 162 (1925)). See also *Texas* v. *Brown*, *supra*, at 746 (POWELL, J., concurring in judgment) (leaving open the question whether probable cause is required to inspect objects in plain view). As the Court recognizes, *ante*, at 326, the statements in *Payton* v. *New York*, 445 U. S. 573, 587 (1980), are dicta.

required only that it be "immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Id.*, at 466 (citation omitted). There was no general exploratory search in this case, and I would not approve such a search. All the pertinent objects were in plain view and could be identified as objects frequently stolen. There was no looking into closets, opening of drawers or trunks, or other "rummaging around." JUSTICE O'CONNOR properly emphasizes that the moving of a suspicious object in plain view results in a minimal invasion of privacy. *Post*, at 338. The Court nevertheless holds that "merely looking at" an object in plain view is lawful, *ante*, at 328, but "moving" or "disturbing" the object to investigate a reasonable suspicion is not, *ante*, at 324, 328. The facts of this case well illustrate the unreasonableness of this distinction.

The officers' suspicion that the stereo components at issue were stolen was both reasonable and based on specific, articulable facts. Indeed, the State was unwise to concede the absence of probable cause. The police lawfully entered respondent's apartment under exigent circumstances that arose when a bullet fired through the floor of the apartment struck a man in the apartment below. What they saw in the apartment hardly suggested that it was occupied by law-abiding citizens. A .25-caliber automatic pistol lay in plain view on the living room floor. During a concededly lawful search, the officers found a .45-caliber automatic, a .22-caliber, sawed-off rifle, and a stocking-cap mask. The apartment was littered with drug paraphernalia. App. 29. The officers also observed two sets of expensive stereo components of a type that frequently was stolen.[2]

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[2] Responding to a question on cross-examination, Officer Nelson explained that his suspicion was "based on 12 years' worth of police experience. I have worked in different burglary crimes throughout that period

It is fair to ask what Officer Nelson should have done in these circumstances. Accepting the State's concession that he lacked probable cause, he could not have obtained a warrant to seize the stereo components. Neither could he have remained on the premises and forcibly prevented their removal. Officer Nelson's testimony indicates that he was able to read some of the serial numbers without moving the components.[3] To read the serial number on a Bang and Olufsen turntable, however, he had to "turn it around or turn it upside down." *Id.*, at 19. Officer Nelson noted the serial numbers on the stereo components and telephoned the National Crime Information Center to check them against the Center's computerized listing of stolen property. The computer confirmed his suspicion that at least the Bang and Olufsen turntable had been stolen. On the basis of this information, the officers obtained a warrant to seize the turntable and other stereo components that also proved to be stolen.

The Court holds that there was an unlawful search of the turntable. It agrees that the "mere recording of the serial numbers did not constitute a seizure." *Ante*, at 324. Thus, if the computer had identified as stolen property a component with a visible serial number, the evidence would have been admissible. But the Court further holds that "Officer Nelson's moving of the equipment . . . did constitute a 'search' . . . ." *Ibid.* It perceives a constitutional distinction between reading a serial number on an object and moving or picking up an identical object to see its serial number. To make its position unmistakably clear, the Court concludes that a "search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Ante*, at 325. With

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of time and . . . I'm just very familiar with people converting stolen stereos and TV's into their own use." App. 28–29.

[3] Officer Nelson testified that there was an opening of about a foot between the back of one set of stereo equipment and the wall. *Id.*, at 20. Presumably this opening was large enough to permit Officer Nelson to view serial numbers on the backs of the components without moving them.

all respect, this distinction between "looking" at a suspicious object in plain view and "moving" it even a few inches trivializes the Fourth Amendment.[4] The Court's new rule will cause uncertainty, and could deter conscientious police officers from lawfully obtaining evidence necessary to convict guilty persons. Apart from the importance of rationality in the interpretation of the Fourth Amendment, today's decision may handicap law enforcement without enhancing privacy interests. Accordingly, I dissent.

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

The Court today gives the right answer to the wrong question. The Court asks whether the police must have probable cause before either seizing an object in plain view or conducting a full-blown search of that object, and concludes that they must. I agree. In my view, however, this case presents a different question: whether police must have probable cause before conducting a cursory inspection of an item in plain view. Because I conclude that such an inspection is reasonable if the police are aware of facts or circumstances that justify a reasonable suspicion that the item is evidence of a crime, I would reverse the judgment of the Arizona Court of Appeals, and therefore dissent.

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[4] Numerous articles that frequently are stolen have identifying numbers, including expensive watches and cameras, and also credit cards. Assume for example that an officer reasonably suspects that two identical watches, both in plain view, have been stolen. Under the Court's decision, if one watch is lying face up and the other lying face down, reading the serial number on one of the watches would not be a search. But turning over the other watch to read its serial number would be a search. Moreover, the officer's ability to read a serial number may depend on its location in a room and light conditions at a particular time. Would there be a constitutional difference if an officer, on the basis of a reasonable suspicion, used a pocket flashlight or turned on a light to read a number rather than moving the object to a point where a serial number was clearly visible?

In *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), Justice Stewart summarized three requirements that the plurality thought must be satisfied for a plain-view search or seizure. First, the police must lawfully make an initial intrusion or otherwise be in a position from which they can view a particular area. Second, the officer must discover incriminating evidence "inadvertently." Third, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. As another plurality observed in *Texas* v. *Brown*, 460 U. S. 730, 737 (1983), these three requirements have never been expressly adopted by a majority of this Court, but "as the considered opinion of four Members of this Court [the *Coolidge* plurality] should obviously be the point of reference for further discussion of the issue." There is no dispute in this case that the first two requirements have been satisfied. The officers were lawfully in the apartment pursuant to exigent circumstances, and the discovery of the stereo was inadvertent—the officers did not "'know in advance the location of [certain] evidence and intend to seize it,' relying on the plain-view doctrine only as a pretext." *Ibid.* (quoting *Coolidge* v. *New Hampshire*, *supra*, at 470). Instead, the dispute in this case focuses on the application of the "immediately apparent" requirement; at issue is whether a police officer's reasonable suspicion is adequate to justify a cursory examination of an item in plain view.

The purpose of the "immediately apparent" requirement is to prevent "general, exploratory rummaging in a person's belongings." *Coolidge* v. *New Hampshire*, 403 U. S., at 467. If an officer could indiscriminately search every item in plain view, a search justified by a limited purpose—such as exigent circumstances—could be used to eviscerate the protections of the Fourth Amendment. In order to prevent such a general search, therefore, we require that the relevance of the item be "immediately apparent." As Justice Stewart explained:

> "Of course, the extension of the original justification [for being present] is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. Cf. *Stanley* v. *Georgia*, [394 U. S. 557], 571–572 [(1969)] (Stewart, J., concurring in result)." *Id.*, at 466–467.

Thus, I agree with the Court that even under the plain-view doctrine, probable cause is required before the police seize an item, or conduct a full-blown search of evidence in plain view. *Ante*, at 326–328. Such a requirement of probable cause will prevent the plain-view doctrine from authorizing general searches. This is not to say, however, that even a mere inspection of a suspicious item must be supported by probable cause. When a police officer makes a cursory inspection of a suspicious item in plain view in order to determine whether it is indeed evidence of a crime, there is no "exploratory rummaging." Only those items that the police officer "reasonably suspects" as evidence of a crime may be inspected, and perhaps more importantly, the scope of such an inspection is quite limited. In short, if police officers have a reasonable, articulable suspicion that an object they come across during the course of a lawful search is evidence of crime, in my view they may make a cursory examination of the object to verify their suspicion. If the officers wish to go beyond such a cursory examination of the object, however, they must have probable cause.

This distinction between a full-blown search and seizure of an item and a mere inspection of the item was first suggested by Justice Stewart. In his concurrence in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), which is cited in *Coolidge*, Justice Stewart observed that the federal agents there had acted within the scope of a lawful warrant in opening the drawers of the defendant's desk. When they found in one of the drawers not the gambling material described in the warrant

but movie films, they proceeded to exhibit the films on the defendant's projector, and thereafter arrested the defendant for possession of obscene matter. Justice Stewart agreed with the majority that the film had to be suppressed, but in doing so he suggested that a less intrusive inspection of evidence in plain view would present a different case: "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by *mere inspection.*" *Id.*, at 571 (emphasis added) (footnote omitted).

Following Justice Stewart's suggestion, the overwhelming majority of both state and federal courts have held that probable cause is not required for a minimal inspection of an item in plain view. As Professor LaFave summarizes the view of these courts, "the minimal additional intrusion which results from an inspection or examination of an object in plain view is reasonable if the officer was first aware of some facts and circumstances which justify a reasonable suspicion (not probable cause, in the traditional sense) that the object is or contains a fruit, instrumentality, or evidence of crime." 2 W. LaFave, Search and Seizure § 6.7(b), p. 717 (2d ed. 1987); see also *id.*, at 345 ("It is generally assumed that there is nothing improper in merely picking up an unnamed article for the purpose of noting its brand name or serial number or other identifying characteristics to be found on the surface"). Thus, while courts require probable cause for more extensive examination, cursory inspections—including picking up or moving objects for a better view—require only a reasonable suspicion. See, *e. g.*, *United States* v. *Marbury*, 732 F. 2d 390, 399 (CA5 1984) (police may inspect an item found in plain view to determine whether it is evidence of crime if they have a reasonable suspicion to believe that the item is evidence); *United States* v. *Hillyard*, 677 F. 2d 1336, 1342 (CA9 1982) (police may give suspicious documents brief perusal if they have a "reasonable suspicion"); *United States* v. *Wright*, 667

F. 2d 793, 798 (CA9 1982) ("[A]n officer may conduct such an examination if he at least has a 'reasonable suspicion' to believe that the discovered item is evidence"); *United States* v. *Roberts*, 619 F. 2d 379, 381 (CA5 1980) ("Police officers are not required to ignore the significance of items in plain view even when the full import of the objects cannot be positively ascertained without some examination"); *United States* v. *Ochs*, 595 F. 2d 1247, 1257–1258, and n. 8 (CA2 1979) (Friendly, J.) (same).

Indeed, several state courts have applied a reasonable-suspicion standard in factual circumstances almost identical to this case. See, *e. g.*, *State* v. *Noll*, 116 Wis. 2d 443, 343 N. W. 2d 391 (1984) (officer, upon seeing television, could check serial numbers); *State* v. *Riedinger*, 374 N. W. 2d 866 (ND 1985) (police, in executing warrant for drugs, could check serial number of microwave oven); *People* v. *Dorris*, 110 Ill. App. 3d 660, 442 N. E. 2d 951 (1982) (police may note account number of deposit slip because, when the police have a reasonable suspicion that an item in plain view is stolen property, the minimal additional intrusion of checking external identification numbers is proper); *State* v. *Proctor*, 12 Wash. App. 274, 529 P. 2d 472 (1974) (upholding police notation of serial numbers on calculators); *People* v. *Eddington*, 23 Mich. App. 210, 178 N. W. 2d 686 (1970) (upholding examination of heels of shoes), rev'd on other grounds, 387 Mich. 551, 198 N. W. 2d 297 (1972).

This distinction between searches based on their relative intrusiveness—and its subsequent adoption by a consensus of American courts—is entirely consistent with our Fourth Amendment jurisprudence. We have long recognized that searches can vary in intrusiveness, and that some brief searches "may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a [search] based only on specific articulable facts" that the item in question is contraband or evidence of a crime. *United States* v. *Place*, 462 U. S. 696, 706

(1983). In *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979), we held that the permissibility of a particular law enforcement practice should be judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Thus, "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 341 (1985). The governmental interests considered include crime prevention and detection. *Terry* v. *Ohio*, 392 U. S. 1, 22 (1968). The test is whether these law enforcement interests are sufficiently "substantial," not, as the Court would have it, whether "operational necessities render [a standard less than probable cause] the only practicable means of detecting certain types of crimes." *Ante*, at 327. See *United States* v. *Place*, *supra*, at 704.

In my view, the balance of the governmental and privacy interests strongly supports a reasonable-suspicion standard for the cursory examination of items in plain view. The additional intrusion caused by an inspection of an item in plain view for its serial number is minuscule. Indeed, the intrusion in this case was even more transitory and less intrusive than the seizure of luggage from a suspected drug dealer in *United States* v. *Place*, *supra*, and the "severe, though brief, intrusion upon cherished personal security" in *Terry* v. *Ohio*, *supra*, at 24–25.

Weighed against this minimal additional invasion of privacy are rather major gains in law enforcement. The use of identification numbers in tracing stolen property is a powerful law enforcement tool. Serial numbers are far more helpful and accurate in detecting stolen property than simple police recollection of the evidence. Cf. *New York* v. *Class*, 475 U. S. 106, 111 (1986) (observing importance of vehicle identification numbers). Given the prevalence of mass pro-

duced goods in our national economy, a serial number is often the only sure method of detecting stolen property. The balance of governmental and private interests strongly supports the view accepted by a majority of courts that a standard of reasonable suspicion meets the requirements of the Fourth Amendment.

Unfortunately, in its desire to establish a "bright-line" test, the Court has taken a step that ignores a substantial body of precedent and that places serious roadblocks to reasonable law enforcement practices. Indeed, in this case no warrant to search the stereo equipment for its serial number could have been obtained by the officers based on reasonable suspicion alone, and in the Court's view the officers may not even move the stereo turntable to examine its serial number. The theoretical advantages of the "search is a search" approach adopted by the Court today are simply too remote to justify the tangible and severe damage it inflicts on legitimate and effective law enforcement.

Even if probable cause were the appropriate standard, I have little doubt that it was satisfied here. When police officers, during the course of a search inquiring into grievously unlawful activity, discover the tools of a thief (a sawed-off rifle and a stocking mask) and observe in a small apartment *two* sets of stereo equipment that are both inordinately expensive in relation to their surroundings and known to be favored targets of larcenous activity, the "flexible, commonsense standard" of probable cause has been satisfied. *Texas* v. *Brown*, 460 U. S., at 742 (plurality opinion).

Because the Court today ignores the existence of probable cause, and in doing so upsets a widely accepted body of precedent on the standard of reasonableness for the cursory examination of evidence in plain view, I respectfully dissent.

ILLINOIS *v.* KRULL ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 85–608. Argued November 5, 1986—Decided March 9, 1987

An Illinois statute, as it existed in 1981, required licensed motor vehicle and vehicular parts sellers to permit state officials to inspect certain required records. In 1981, pursuant to the statute, a police detective entered respondents' automobile wrecking yard and asked to see records of vehicle purchases. He was told that the records could not be located but was given a list of approximately five purchases. After receiving permission to look at the cars in the yard, he ascertained that three were stolen and that a fourth had had its identification number removed. He then seized the cars, and respondents were arrested and charged with various crimes. The state trial court granted respondents' motion to suppress the evidence seized from the yard, agreeing with a federal-court ruling, issued the day after the search, that the state statute violated the Fourth Amendment because it permitted officers unbridled discretion in their warrantless searches. The State Supreme Court affirmed, rejecting petitioner's argument that the seized evidence was admissible because the detective had acted in good-faith reliance on the statute in making the search.

Held:

1. The Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but which is subsequently found to violate the Fourth Amendment. Pp. 349–355.

(a) Application of the exclusionary rule in these circumstances would have little deterrent effect on future police misconduct, which is the basic purpose of the rule. Officers conducting such searches are simply fulfilling their responsibility to enforce the statute as written. If a statute is not clearly unconstitutional, officers cannot be expected to question the judgment of the legislature that passed the law. Pp. 349–350.

(b) Application of the exclusionary rule cannot be justified on the basis of deterring legislative misconduct. Police, not legislators, are the focus of the rule. Furthermore, there is no evidence to suggest that legislatures are inclined to ignore or subvert the Fourth Amendment. There is also no indication that the exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional would have a significant deterrent effect on the enactment of similar laws. Legislators

enact statutes for broad programmatic purposes, not for the purpose of procuring evidence in particular cases. The greatest deterrent to unconstitutional enactments is the courts' power to invalidate such statutes. Even if the exclusionary rule provided some incremental deterrent, its benefit would be outweighed by the substantial social costs exacted by the rule. Pp. 350–353.

(c) The contention that the application of the exclusionary rule is required because large numbers of people are affected by a warrantless administrative search statute is not persuasive. Although the number of individuals affected may be considered in weighing the costs and benefits of applying the rule, the fact that many are affected will not require the rule's application if such application will not have a meaningful deterrent effect. P. 353.

(d) The contention that the exception to the exclusionary rule recognized here will discourage criminal defendants from presenting meritorious Fourth Amendment claims is also not persuasive. Defendants will always be able to argue in a suppression motion that the officer's reliance on the warrantless search statute was not objectively reasonable, and therefore was not in good faith. Furthermore, persons covered by a statute may bring an action seeking a declaration of the statute's unconstitutionality and an injunction barring its implementation. Pp. 353–354.

(e) Under the exception to the exclusionary rule recognized here, a statute cannot support objectively reasonable reliance if, in passing it, the legislature wholly abandoned its responsibility to enact constitutional laws, or if the statutory provisions are such that a reasonable law enforcement officer should have known that the statute was unconstitutional. P. 355.

2. The detective's reliance on the Illinois statute was objectively reasonable. Even assuming that the statute was unconstitutional because it vested state officials with too much discretion, this constitutional defect would not have been obvious to a police officer acting in good faith. Pp. 356–360.

107 Ill. 2d 107, 481 N. E. 2d 703, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 361. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 361.

Michael J. Angarola argued the cause for petitioner. On the brief were *Neil F. Hartigan*, Attorney General of Il-

linois, *Roma J. Stewart*, Solicitor General, and *Mark L. Rotert*, Assistant Attorney General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Bryson*, *Andrew J. Pincus*, and *Robert J. Erickson*.

Miriam F. Miquelon argued the cause for respondents. With her on the brief was *Louis B. Garippo*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In *United States* v. *Leon*, 468 U. S. 897 (1984), this Court ruled that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate, but where the warrant was ultimately found to be unsupported by probable cause. See also *Massachusetts* v. *Sheppard*, 468 U. S. 981 (1984). The present case presents the question whether a similar exception to the exclusionary rule should be recognized when officers act in objectively reasonable reliance upon a *statute* authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment.

I

The State of Illinois, as part of its Vehicle Code, has a comprehensive statutory scheme regulating the sale of motor vehicles and vehicular parts. See Ill. Rev. Stat., ch. 95½, ¶¶ 5–100 to 5–801 (1985). A person who sells motor vehicles, or deals in automotive parts, or processes automotive scrap metal, or engages in a similar business must obtain a license from the Illinois Secretary of State. ¶¶ 5–101, 5–102, 5–301.

**Robert K. Corbin*, Attorney General of Arizona, *Daniel B. Hales*, *James A. Murphy*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak* filed a brief for the State of Arizona et al. as *amici curiae* urging reversal.

A licensee is required to maintain a detailed record of all motor vehicles and parts that he purchases or sells, including the identification numbers of such vehicles and parts, and the dates of acquisition and disposition. ¶ 5–401.2. In 1981, the statute in its then form required a licensee to permit state officials to inspect these records "at any reasonable time during the night or day" and to allow "examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records." Ill. Rev. Stat., ch. 95½, ¶ 5–401(e) (1981).[1]

Respondents in 1981 operated Action Iron & Metal, Inc., an automobile wrecking yard located in the city of Chicago. Detective Leilan K. McNally of the Chicago Police Department regularly inspected the records of wrecking yards pursuant to the state statute. Tr. 12.[2] On the morning of July 5, 1981, he entered respondents' yard. *Id.*, at 7. He identified himself as a police officer to respondent Lucas, who was working at the yard, and asked to see the license and records of vehicle purchases. Lucas could not locate the license or records, but he did produce a paper pad on which approximately five vehicle purchases were listed. *Id.*, at 25–26. McNally then requested and received permission from Lucas to look at the cars in the yard. Upon checking with his mobile computer the serial numbers of several of the vehicles, McNally ascertained that three of them were stolen. Also, the identification number of a fourth had been removed. McNally seized the four vehicles and placed Lucas under arrest. *Id.*, at 8–9, 16–17. Respondent Krull, the holder of the license, and respondent Mucerino, who was present at the yard the day of the search, were arrested later. Re-

[1] Paragraph 5–401 of the 1981 compilation was repealed by 1983 Ill. Laws No. 83–1473, § 2, effective Jan. 1, 1985. Its current compilation replacement bears the same paragraph number.

[2] Citations to the transcript refer to the Sept. 25, 1981, hearing on respondents' suppression motion held in the Circuit Court of Cook County. 2 Record 24.

spondents were charged with various criminal violations of the Illinois motor vehicle statutes.

The state trial court (the Circuit Court of Cook County) granted respondents' motion to suppress the evidence seized from the yard. App. 20–21. Respondents had relied on a federal-court ruling, issued the day following the search, that ¶5–401(e), authorizing warrantless administrative searches of licensees, was unconstitutional. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (ND Ill. 1981), aff'd in part, vacated in part, and remanded in part, 721 F. 2d 1072 (CA7 1983). The Federal District Court in that case had concluded that the statute permitted officers unbridled discretion in their searches and was therefore not "'a constitutionally adequate substitute for a warrant.'" 518 F. Supp., at 585–586, quoting *Donovan* v. *Dewey*, 452 U. S. 594, 603 (1981). The state trial court in the instant case agreed that the statute was invalid and concluded that its unconstitutionality "affects all pending prosecutions not completed." App. 20. On that basis, the trial court granted respondents' motion to suppress the evidence. *Id.*, at 20–21.[3]

The Appellate Court of Illinois, First Judicial District, vacated the trial court's ruling and remanded the case for further proceedings. *Id.*, at 22. It observed that recent developments in the law indicated that Detective McNally's good-faith reliance on the state statute might be relevant in assessing the admissibility of evidence, but that the trial court should first make a factual determination regarding McNally's good faith. *Id.*, at 25. It also observed that the trial court might wish to reconsider its holding regarding the unconstitutionality of the statute in light of the decision by the United States Court of Appeals for the Seventh Circuit upholding the amended form of the Illinois statute. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F. 2d 1072

[3]The trial court also concluded that Lucas had not consented to the search. App. 20. That ruling is not now at issue here.

(CA7 1983).[4] On remand, however, the state trial court adhered to its decision to grant respondents' motion to suppress. It stated that the relevant statute was the one in effect at the time McNally searched respondents' yard, and that this statute was unconstitutional for the reasons stated by the Federal District Court in *Bionic*. It further concluded that because the good faith of an officer is relevant, if at all, only when he acts pursuant to a warrant, Detective McNally's possible good-faith reliance upon the statute had no bearing on the case. App. 32–35.[5]

The Supreme Court of Illinois affirmed.[6] 107 Ill. 2d 107, 481 N. E. 2d 703 (1985). It first ruled that the state statute, as it existed at the time McNally searched respondents' yard, was unconstitutional. It noted that statutes authorizing warrantless administrative searches in heavily regulated industries had been upheld where such searches were necessary to promote enforcement of a substantial state interest, and where the statute "'in terms of [the] certainty and regularity of its application, provide[d] a constitutionally adequate substitute for a warrant.'" *Id.*, at 116, 481 N. E. 2d, at 707, quoting *Donovan* v. *Dewey*, 452 U. S., at 603. Although acknowledging that the statutory scheme authorizing

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[4] Following the decision of the District Court in *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (ND Ill. 1981), the Illinois Legislature amended the statute to limit the timing, frequency, and duration of the administrative search. 1982 Ill. Laws No. 82–984, codified, as amended, at Ill. Rev. Stat., ch. 95½, ¶ 5–403 (1985). See n. 1, *supra*. On appeal, the Court of Appeals for the Seventh Circuit did not address the validity of the earlier form of the statute, for it held that the amended statute satisfied the requirements of the Fourth Amendment. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F. 2d 1072, 1075 (1983).

[5] The trial court also indicated that McNally may have acted outside the scope of his statutory authority when he examined vehicles other than those listed on the pad offered by Lucas. App. 29; 5 Record 2, 8.

[6] The State bypassed the Illinois intermediate appellate court and appealed directly to the Supreme Court of Illinois pursuant to Illinois Supreme Court Rule 603.

warrantless searches of licensees furthered a strong public interest in preventing the theft of automobiles and the trafficking in stolen automotive parts, the Illinois Supreme Court concluded that the statute violated the Fourth Amendment because it "vested State officials with too much discretion to decide who, when, and how long to search." 107 Ill. 2d, at 116, 481 N. E. 2d, at 707.

The court rejected the State's argument that the evidence seized from respondents' wrecking yard should nevertheless be admitted because the police officer had acted in good-faith reliance on the statute authorizing such searches. The court observed that in *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979), this Court had upheld an arrest and search made pursuant to an ordinance defining a criminal offense, where the ordinance was subsequently held to violate the Fourth Amendment. The Illinois court noted that this Court in *DeFillippo* had contrasted the ordinance then before it, defining a substantive criminal offense, with a procedural statute directly authorizing searches without a warrant or probable cause, and had stated that evidence obtained in searches conducted pursuant to the latter type of statute traditionally had not been admitted. 107 Ill. 2d, at 118, 481 N. E. 2d, at 708. Because the Illinois statute did not define a substantive criminal offense, but, instead, was a procedural statute directly authorizing warrantless searches, the Illinois Supreme Court concluded that good-faith reliance upon that statute could not be used to justify the admission of evidence under an exception to the exclusionary rule. *Id.*, at 118–119, 481 N. E. 2d, at 708.

We granted certiorari, 475 U. S. 1080 (1986), to consider whether a good-faith exception to the Fourth Amendment exclusionary rule applies when an officer's reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional.

II

A

When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Weeks* v. *United States*, 232 U. S. 383 (1914); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The Court has stressed that the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). Application of the exclusionary rule "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" *United States* v. *Leon*, 468 U. S., at 906, quoting *Stone* v. *Powell*, 428 U. S. 465, 540 (1976) (WHITE, J., dissenting). Rather, the rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" 468 U. S., at 906, quoting *United States* v. *Calandra*, 414 U. S., at 348.

As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced. Thus, in various circumstances, the Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process. See, *e. g.*, *United States* v. *Janis*, 428 U. S. 433, 454 (1976) (evidence obtained by state officers in violation of Fourth Amendment may be used in federal civil proceeding because likelihood of deterring conduct of state officers does not outweigh societal costs imposed by exclusion); *United States* v. *Calandra*, 414 U. S., at 351–352 (evidence obtained in contravention of Fourth Amendment may be used in grand jury proceedings because minimal advance in deterrence of police

misconduct is outweighed by expense of impeding role of grand jury).

In *Leon*, the Court held that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective. On the basis of three factors, the Court concluded that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrants. First, the exclusionary rule was historically designed "to deter police misconduct rather than to punish the errors of judges and magistrates." 468 U. S., at 916. Second, there was "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Ibid.* Third, and of greatest importance to the Court, there was no basis "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Ibid.* The Court explained: "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.*, at 917. Thus, the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective was sufficient to inform the judicial officer of the error made.

The Court then considered whether application of the exclusionary rule in that context could be expected to alter the behavior of law enforcement officers. In prior cases, the Court had observed that, because the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the

search was unconstitutional under the Fourth Amendment." *United States* v. *Peltier*, 422 U. S. 531, 542 (1975); see also *Michigan* v. *Tucker*, 417 U. S. 433, 447 (1974). Where the officer's conduct is objectively reasonable, the Court explained in *Leon*,

> "'[e]xcluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" *United States* v. *Leon*, 468 U. S., at 920, quoting *Stone* v. *Powell*, 428 U. S., at 539–540 (WHITE, J., dissenting).

The Court in *Leon* concluded that a deterrent effect was particularly absent when an officer, acting in objective good faith, obtained a search warrant from a magistrate and acted within its scope. "In most such cases, there is no police illegality and thus nothing to deter." 468 U. S., at 920–921. It is the judicial officer's responsibility to determine whether probable cause exists to issue a warrant, and, in the ordinary case, police officers cannot be expected to question that determination. Because the officer's sole responsibility after obtaining a warrant is to carry out the search pursuant to it, applying the exclusionary rule in these circumstances could have no deterrent effect on a future Fourth Amendment violation by the officer. *Id.*, at 921.

B

The approach used in *Leon* is equally applicable to the present case. The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an

officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in *Leon:* "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Ibid.*[7]

Any difference between our holding in *Leon* and our holding in the instant case, therefore, must rest on a difference between the effect of the exclusion of evidence on judicial officers and the effect of the exclusion of evidence on legislators. Although these two groups clearly serve different functions in the criminal justice system, those differences are not controlling for purposes of this case. We noted in *Leon* as an initial matter that the exclusionary rule was aimed at deterring police misconduct. 468 U. S., at 916. Thus, legislators, like judicial officers, are not the focus of the rule. Moreover, to the extent we consider the rule's effect on legislators, our initial inquiry, as set out in *Leon*, is whether there is evidence to suggest that legislators "are inclined to ignore or subvert the Fourth Amendment." *Ibid.* Although legislators are not "neutral judicial officers," as are judges and magistrates, *id.*, at 917, neither are they "adjuncts to the

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[7] Indeed, the possibility of a deterrent effect may be even less when the officer acts pursuant to a statute rather than a warrant. In *Leon*, the Court pointed out: "One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or 'magistrate shopping' and thus promotes the ends of the Fourth Amendment." 468 U. S., at 918. Although the Court in *Leon* dismissed that argument as speculative, *ibid.*, the possibility that a police officer might modify his behavior does not exist at all when the officer relies on an existing statute that authorizes warrantless inspections and does not require any preinspection action, comparable to seeking a warrant, on the part of the officers.

law enforcement team." *Ibid.* The role of legislators in the criminal justice system is to enact laws for the purpose of establishing and perpetuating that system. In order to fulfill this responsibility, legislators' deliberations of necessity are significantly different from the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). Before assuming office, state legislators are required to take an oath to support the Federal Constitution. See U. S. Const., Art. VI, cl. 3. Indeed, by according laws a presumption of constitutional validity, courts presume that legislatures act in a constitutional manner. See *e. g.*, *McDonald* v. *Board of Election Comm'rs of Chicago*, 394 U. S. 802, 808–809 (1969); see generally 1 N. Singer, Sutherland on Statutory Construction § 2.01 (4th ed. 1985).

There is no evidence suggesting that Congress or state legislatures have enacted a significant number of statutes permitting warrantless administrative searches violative of the Fourth Amendment. Legislatures generally have confined their efforts to authorizing administrative searches of specific categories of businesses that require regulation, and the resulting statutes usually have been held to be constitutional. See, *e. g.*, *Donovan* v. *Dewey*, 452 U. S. 594 (1981); *United States* v. *Biswell*, 406 U. S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970); *United States* v. *Jamieson-McKames Pharmaceuticals, Inc.*, 651 F. 2d 532 (CA8 1981), cert. denied, 455 U. S. 1016 (1982); see also 3 W. LaFave, Search and Seizure § 10.2, pp. 132–134, n. 89.1 (Supp. 1986) (collecting cases). Thus, we are given no basis for believing that legislators are inclined to subvert their oaths and the Fourth Amendment and that "lawlessness among these actors requires application of the extreme sanction of exclusion." *United States* v. *Leon*, 468 U. S., at 916.

Even if we were to conclude that legislators are different in certain relevant respects from magistrates, because legislators are not officers of the judicial system, the next inquiry

necessitated by *Leon* is whether exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional will "have a significant deterrent effect," *ibid.*, on legislators enacting such statutes. Respondents have offered us no reason to believe that applying the exclusionary rule will have such an effect. Legislators enact statutes for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations. Thus, it is logical to assume that the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute, as happened in this very case. There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent.[8] Moreover, to the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against the "substantial social costs exacted by the exclusion-

[8] It is possible, perhaps, that there are some legislators who, for political purposes, are possessed with a zeal to enact a particular unconstitutionally restrictive statute, and who will not be deterred by the fact that a court might later declare the law unconstitutional. But we doubt whether a legislator possessed with such fervor, and with such disregard for his oath to support the Constitution, would be significantly deterred by the possibility that the exclusionary rule would preclude the introduction of evidence in a certain number of prosecutions. Moreover, and of equal importance, just as we were not willing to assume in *Leon* that the possibility of magistrates' acting as "rubber stamps for the police" was a problem of major proportions, see 468 U. S., at 916, n. 14, we are not willing to assume now that there exists a significant problem of legislators who perform their legislative duties with indifference to the constitutionality of the statutes they enact. If future empirical evidence ever should undermine that assumption, our conclusions may be revised accordingly. See *United States* v. *Leon*, 468 U. S., at 927–928 (concurring opinion).

ary rule." *Id.*, at 907.[9] When we indulge in such weighing, we are convinced that applying the exclusionary rule in this context is unjustified.

Respondents argue that the result in this case should be different from that in *Leon* because a statute authorizing warrantless administrative searches affects an entire industry and a large number of citizens, while the issuance of a defective warrant affects only one person. This distinction is not persuasive. In determining whether to apply the exclusionary rule, a court should examine whether such application will advance the deterrent objective of the rule. Although the number of individuals affected may be considered when "weighing the costs and benefits," *ibid.*, of applying the exclusionary rule, the simple fact that many are affected by a statute is not sufficient to tip the balance if the deterrence of Fourth Amendment violations would not be advanced in any meaningful way.[10]

We also do not believe that defendants will choose not to contest the validity of statutes if they are unable to benefit directly by the subsequent exclusion of evidence, thereby resulting in statutes that evade constitutional review. First, in *Leon*, we explicitly rejected the argument that the good-faith exception adopted in that case would "preclude review

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[9] In *Leon*, the Court pointed out: "An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." *Id.*, at 907.

[10] Moreover, it is not always true that the issuance of defective warrants will affect only a few persons. For example, it is possible that before this Court's rather controversial decision in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), see *Illinois* v. *Gates*, 462 U. S. 213, 238, and n. 11 (1983), a number of magistrates believed that probable cause could be established solely on the uncorroborated allegations of a police officer and a significant number of warrants may have been issued on that basis. Until that view was adjusted by this Court's ruling, many persons may have been affected by the systematic granting of warrants based on erroneous views of the standards necessary to establish probable cause.

of the constitutionality of the search or seizure" or would cause defendants to lose their incentive to litigate meritorious Fourth Amendment claims. We stated that "the magnitude of the benefit conferred on defendants by a successful [suppression] motion makes it unlikely that litigation of colorable claims will be substantially diminished." *Id.*, at 924, and n. 25. In an effort to suppress evidence, a defendant has no reason not to argue that a police officer's reliance on a warrant or statute was not objectively reasonable and therefore cannot be considered to have been in good faith. Second, unlike a person searched pursuant to a warrant, a person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation. Indeed, that course of action was followed with respect to the statute at issue in this case. Several businesses brought a declaratory judgment suit in Federal District Court challenging ¶5–401(e) of the Illinois Vehicle Code (1981), and the provision was declared unconstitutional. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp., at 585. Subsequent to that declaration, respondents, in their state-court criminal trial, challenged the admissibility of evidence obtained pursuant to the statute. App. 13–17.[11]

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[11] Other plaintiffs have challenged state statutes on Fourth Amendment grounds in declaratory judgment actions. See *California Restaurant Assn.* v. *Henning*, 173 Cal. App. 3d 1069, 219 Cal. Rptr. 630 (1985) (organization of restaurant owners challenged constitutionality of state statute vesting authority in State Labor Commissioner to issue subpoenas compelling production of books and records); *Hawaii Psychiatric Soc.* v. *Ariyoshi*, 481 F. Supp. 1028 (Haw. 1979) (action to enjoin enforcement of state statute that authorized issuance of administrative inspection warrants to search records of Medicaid providers); *Bilbrey* v. *Brown*, 738 F. 2d 1462 (CA9 1984) (parents sought declaration that school board guidelines authorizing warrantless searches by school principal and teacher were unconstitutional); see also *Mid-Atlantic Accessories Trade Assn.* v. *Maryland*, 500 F. Supp. 834, 848–849 (Md. 1980) (challenging constitutionality of

The Court noted in *Leon* that the "good-faith" exception to the exclusionary rule would not apply "where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo–Ji Sales, Inc.* v. *New York*, 442 U. S. 319 (1979)," or where the warrant was so facially deficient "that the executing officers cannot reasonably presume it to be valid." 468 U. S., at 923. Similar constraints apply to the exception to the exclusionary rule we recognize today. A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional. Cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). As we emphasized in *Leon*, the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers. See *United States* v. *Leon*, 468 U. S., at 919, n. 20.[12]

Maryland Drug Paraphernalia Act as violative of the Fourth Amendment and other constitutional provisions).

The dissent takes issue with the rule announced in this case because it can result in having a defendant, who has successfully challenged the constitutionality of a statute, denied the benefits of suppression of evidence. *Post*, at 368–369. As the dissent itself recognizes, however, this identical concern was present in *Leon*. The dissent offers no reason why this concern should be different when a defendant challenges the constitutionality of a statute rather than of a warrant.

[12] The Illinois Supreme Court did not consider whether an officer's objectively reasonable reliance upon a statute justifies an exception to the exclusionary rule. Instead, as noted above, the court rested its holding on the existence of a "substantive-procedural dichotomy," which it would derive

III

Applying the principle enunciated in this case, we necessarily conclude that Detective McNally's reliance on the

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from this Court's opinion in *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979). See 107 Ill. 2d 107, 118, 481 N. E. 2d 703, 708 (1985). We do not believe the distinction relied upon by the Illinois court is relevant in deciding whether the exclusionary rule should be applied in this case.

This Court in *DeFillippo*, which was decided before *Leon*, drew a distinction between evidence obtained when officers rely upon a statute that defines a substantive crime, and evidence obtained when officers rely upon a statute that authorizes searches without a warrant or probable cause. The Court stated that evidence obtained in searches conducted pursuant to the latter type of statute traditionally had been excluded. 443 U. S., at 39. None of the cases cited in *DeFillippo* in support of the distinction, however, addressed the question whether a good-faith exception to the exclusionary rule should be recognized when an officer's reliance on a statute was objectively reasonable. Rather, those cases simply evaluated the constitutionality of particular statutes, or their application, that authorized searches without a warrant or probable cause. See *Torres* v. *Puerto Rico*, 442 U.S 465 (1979) (statute that allowed police to search luggage of any person arriving at an airport or pier in Puerto Rico, without any requirement of probable cause, violated Fourth Amendment); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973) (search pursuant to statute that allowed United States Border Patrol to conduct warrantless searches within a "reasonable distance" from border, and regulation that defined such distance as 100 air miles, and without any requirement of probable cause violated Fourth Amendment); *Berger* v. *New York*, 388 U. S. 41 (1967) (statute that authorized court-ordered eavesdropping without requirement that information to be seized be particularized violated Fourth Amendment). See also *Sibron* v. *New York*, 392 U. S. 40 (1968) (search pursuant to statute that allowed officers to search an individual upon "reasonable suspicion" that he was engaged in criminal activity was unreasonable because it was conducted without probable cause). See *United States* v. *Leon*, 468 U. S., at 912, n. 8.

For purposes of deciding whether to apply the exclusionary rule, we see no valid reason to distinguish between statutes that define substantive criminal offenses and statutes that authorize warrantless administrative searches. In either situation, application of the exclusionary rule will not deter a violation of the Fourth Amendment by police officers, because the officers are merely carrying out their responsibilities in implementing the statute. Similarly, in either situation, there is no basis for assuming that

Illinois statute was objectively reasonable.[13] On several occasions, this Court has upheld legislative schemes that authorized warrantless administrative searches of heavily regulated industries. See *Donovan* v. *Dewey*, 452 U. S. 594 (1981) (inspections of underground and surface mines pursuant to Federal Mine Safety and Health Act of 1977); *United States* v. *Biswell*, 406 U. S. 311 (1972) (inspections of firearms dealers under Gun Control Act of 1968); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970) (inspections of liquor dealers under 26 U. S. C. §§ 5146(b) and 7606 (1964 ed.)). It has recognized that an inspection program may be a necessary component of regulation in certain industries, and has acknowledged that unannounced, warrantless inspections may be necessary "if the law is to be properly enforced and inspection made effective." *United States* v. *Biswell*, 406 U. S., at 316; *Donovan* v. *Dewey*, 452 U. S., at 603. Thus, the Court explained in *Donovan* that its prior decisions

> "make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his

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the exclusionary rule is necessary or effective in deterring a legislature from passing an unconstitutional statute. There is no basis for applying the exclusionary rule to exclude evidence obtained when a law enforcement officer acts in objectively reasonable reliance upon a statute, regardless of whether the statute may be characterized as "substantive" or "procedural."

[13] The question whether the Illinois statute in effect at the time of McNally's search was, in fact, unconstitutional is not before us. We are concerned here solely with whether the detective acted in good-faith reliance upon an apparently valid statute. The constitutionality of a statutory scheme authorizing warrantless searches of automobile junkyards will be considered in No. 86–80, *New York* v. *Burger*, cert. granted, 479 U. S. 812 (1986).

property will be subject to periodic inspections undertaken for specific purposes." *Id.*, at 600.

In *Donovan*, the Court pointed out that a valid inspection scheme must provide, "in terms of the certainty and regularity of its application . . . a constitutionally adequate substitute for a warrant." *Id.*, at 603. In *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), to be sure, the Court held that a warrantless administrative search under § 8(a) of the Occupational Safety and Health Act of 1970 was invalid, partly because the "authority to make warrantless searches devolve[d] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Id.*, at 323.[14] In contrast, the Court in *Donovan* concluded that the Federal Mine Safety and Health Act of 1977 imposed a system of inspection that was sufficiently tailored to the problems of unsafe conditions in mines and was sufficiently pervasive that it checked the discretion of Government officers and established "a predictable and guided federal regulatory presence." 452 U. S., at 604.

Under the standards established in these cases, Detective McNally's reliance on the Illinois statute authorizing warrantless inspections of licensees was objectively reasonable. In ruling on the statute's constitutionality, the Illinois Supreme Court recognized that the licensing and inspection scheme furthered a strong public interest, for it helped to "facilitate the discovery and prevention of automobile thefts." 107 Ill. 2d, at 116, 481 N. E. 2d, at 707. The court further concluded that it was "reasonable to assume that warrantless adminis-

[14] The Court expressly limited its holding in *Barlow's* to the inspection provisions of the Act. It noted that the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute," and that some statutes "apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply." 436 U. S., at 321.

trative searches are necessary in order to adequately control the theft of automobiles and automotive parts." *Ibid.* The Court of Appeals for the Seventh Circuit, upholding the amended version of the statute, pointed out that used-car and automotive-parts dealers in Illinois "are put on notice that they are entering a field subject to extensive state regulation." See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F. 2d, at 1079. The Illinois statute was thus directed at one specific and heavily regulated industry, the authorized warrantless searches were necessary to the effectiveness of the inspection system, and licensees were put on notice that their businesses would be subject to inspections pursuant to the state administrative scheme.

According to the Illinois Supreme Court, the statute failed to pass constitutional muster solely because the statute "vested State officials with too much discretion to decide who, when, and how long to search." 107 Ill. 2d, at 116, 481 N. E. 2d, at 707. Assuming, as we do for purposes of this case, that the Illinois Supreme Court was correct in its constitutional analysis, this defect in the statute was not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable. The statute provided that searches could be conducted "at any reasonable time during the night or day," and seemed to limit the scope of the inspections to the records the businesses were required to maintain and to the business premises "for the purposes of determining the accuracy of required records." Ill. Rev. Stat., ch. 95½, ¶5–401(e) (1981). While statutory provisions that circumscribe officers' discretion may be important in establishing a statute's constitutionality,[15] the additional restrictions on dis-

[15] For example, the amended version of the Illinois statute, upheld by the Court of Appeals for the Seventh Circuit, incorporated the following: (1) the inspections were to be initiated while business was being conducted; (2) each inspection was not to last more than 24 hours; (3) the licensee or his representative was entitled to be present during the inspection; and (4) no more than six inspections of one business location could be conducted

cretion that might have been necessary are not so obvious that an objectively reasonable police officer would have realized the statute was unconstitutional without them.[16] We therefore conclude that Detective McNally relied, in objective good faith, on a statute that appeared legitimately to allow a warrantless administrative search of respondents' business.[17]

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within any 6-month period except pursuant to a search warrant or in response to public complaints about violations. Ill. Rev. Stat., ch. 95½, ¶5–403 (1985).

[16] Indeed, less than a year and a half before the search of respondents' yard, the Supreme Court of Indiana upheld an Indiana statute, authorizing warrantless administrative searches of automobile businesses, that was similar to the Illinois statute and did not include extensive restrictions on police officers' discretion. See *State* v. *Tindell*, 272 Ind. 479, 399 N. E. 2d 746 (1980).

[17] Respondents also argue that Detective McNally acted outside the scope of the statute, and that such action constitutes an alternative ground for suppressing the evidence even if we recognize, as we now do, a good-faith exception when officers reasonably rely on statutes and act within the scope of those statutes. We have observed, see n. 5, *supra*, that the trial court indicated that McNally may have acted outside the scope of his statutory authority. In its brief to the Illinois Supreme Court, the State commented that "[McNally's] search was properly limited to examining the records and inventory of the Action Iron and Metal Company." Brief for Appellant in No. 60629 (Sup. Ct. Ill.), p. 26. The Illinois Supreme Court, however, made no reference to the trial court's discussion regarding the scope of McNally's authority; instead, it affirmed the suppression of the evidence on the ground that a good-faith exception was not applicable in the context of the statute before it.

We anticipate that the Illinois Supreme Court on remand will consider whether the trial court made a definitive ruling regarding the scope of the statute, whether the State preserved its objection to any such ruling, and, if so, whether the trial court properly interpreted the statute. At this juncture, we decline the State's invitation to recognize an exception for an officer who erroneously, but in good faith, believes he is acting within the scope of a statute. Not only would such a ruling be premature, but it does not follow inexorably from today's decision. As our opinion makes clear, the question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence. The answer to this question might well be different when police officers act outside the scope

Accordingly, the judgment of the Supreme Court of Illinois is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, dissenting.

While I join in JUSTICE O'CONNOR's dissenting opinion, I do not find it necessary to discuss the Court's holdings in *United States* v. *Calandra*, 414 U. S. 338 (1974), *Stone* v. *Powell*, 428 U. S. 465 (1976), and *United States* v. *Janis*, 428 U. S. 433 (1976). See *post*, at 368–369. Accordingly, I do not subscribe to that portion of the opinion.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

The Court today extends the good-faith exception to the Fourth Amendment exclusionary rule, *United States* v. *Leon*, 468 U. S. 897 (1984), in order to provide a grace period for unconstitutional search and seizure legislation during which the State is permitted to violate constitutional requirements with impunity. *Leon*'s rationale does not support this extension of its rule, and the Court is unable to give any independent reason in defense of this departure from established precedent. Accordingly, I respectfully dissent.

The Court, *ante*, at 348, accurately summarizes *Leon*'s holding:

> "In *Leon*, the Court held that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective."

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of a statute, albeit in good faith. In that context, the relevant actors are not legislators or magistrates, but police officers who concededly are "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948).

The Court also accurately summarizes the reasoning supporting this conclusion as based upon three factors: the historic purpose of the exclusionary rule, the absence of evidence suggesting that judicial officers are inclined to ignore Fourth Amendment limitations, and the absence of any basis for believing that the exclusionary rule significantly deters Fourth Amendment violations by judicial officers in the search warrant context. *Ibid.* In my view, application of *Leon*'s stated rationales leads to a contrary result in this case.

I agree that the police officer involved in this case acted in objective good faith in executing the search pursuant to Ill. Rev. Stat., ch. 95½, ¶5–401(e) (1981) (repealed 1985). *Ante*, at 360. And, as the Court notes, *ante*, at 357, n. 13, the correctness of the Illinois Supreme Court's finding that this statute violated the Fourth Amendment is not in issue here. Thus, this case turns on the effect to be given to statutory authority for an unreasonable search.

Unlike the Court, I see a powerful historical basis for the exclusion of evidence gathered pursuant to a search authorized by an unconstitutional statute. Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment. This Court has repeatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance, 7 & 8 Wm. III, c. 22, §6 (1696), was the moving force behind the Fourth Amendment. *Payton* v. *New York*, 445 U. S. 573, 583–584, and n. 21 (1980); *Stanford* v. *Texas*, 379 U. S. 476, 481–482 (1965); *Boyd* v. *United States*, 116 U. S. 616, 624–630 (1886). James Otis' argument to the royal Superior Court in Boston against such overreaching laws is as powerful today as it was in 1761:

> ". . . I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of

> slavery on the one hand, and villany on the other, as this writ of assistance is. . . .
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> . . . . . .
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> ". . . It is a power, that places the liberty of every man in the hands of every petty officer. . . .
>
> ". . . No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void." 2 Works of John Adams 523–525 (C. Adams ed. 1850).

See *Paxton's Case*, Quincy 51 (Mass. 1761). James Otis lost the case he argued; and, even had he won it, no exclusionary rule existed to prevent the admission of evidence gathered pursuant to a writ of assistance in a later trial. But, history's court has vindicated Otis. The principle that no legislative Act can authorize an unreasonable search became embodied in the Fourth Amendment.

Almost 150 years after Otis' argument, this Court determined that evidence gathered in violation of the Fourth Amendment would be excluded in federal court. *Weeks* v. *United States*, 232 U. S. 383 (1914). In *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the rule was further extended to state criminal trials. This exclusionary rule has, of course, been regularly applied to evidence gathered under statutes that authorized unreasonable searches. See, *e. g.*, *Ybarra* v. *Illinois*, 444 U. S. 85 (1979) (statute authorized search and detention of persons found on premises being searched pursuant to warrant); *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979) (statute authorized search of luggage of persons entering Puerto Rico); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973) (statute authorized search of automobiles without probable cause within border areas); *Sibron* v. *New York*, 392 U. S. 40 (1968) (statute authorized frisk absent constitutionally required suspicion that officer was in danger); *Berger* v. *New York*, 388 U. S. 41 (1967) (permissive eavesdrop statute).

Indeed, *Weeks* itself made clear that the exclusionary rule was intended to apply to evidence gathered by officers acting under "legislative . . . sanction." *Weeks* v. *United States*, *supra*, at 394.

Leon on its face did not purport to disturb these rulings. "'Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment.' *Michigan* v. *DeFillippo*, 443 U. S., at 39. The substantive Fourth Amendment principles announced in those cases are fully consistent with our holding here." *United States* v. *Leon*, 468 U. S., at 912, n. 8. In short, both the history of the Fourth Amendment and this Court's later interpretations of it, support application of the exclusionary rule to evidence gathered under the 20th-century equivalent of the Act authorizing the writ of assistance.

This history also supplies the evidence that *Leon* demanded for the proposition that the relevant state actors, here legislators, might pose a threat to the values embodied in the Fourth Amendment. Legislatures have, upon occasion, failed to adhere to the requirements of the Fourth Amendment, as the cited cases illustrate. Indeed, as noted, the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate. In stark contrast, the Framers did not fear that judicial officers, the state actors at issue in *Leon*, posed a serious threat to Fourth Amendment values. James Otis is as clear on this point as he was in denouncing the unconstitutional Act of Parliament:

> "In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, &c. specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that

> he suspects such goods to be concealed in those very places he desires to search." 2 Works of John Adams 524 (C. Adams ed. 1850).

The distinction drawn between the legislator and the judicial officer is sound. The judicial role is particularized, fact specific, and nonpolitical. Judicial authorization of a particular search does not threaten the liberty of everyone, but rather authorizes a single search under particular circumstances. The legislative Act, on the other hand, sweeps broadly, authorizing whole classes of searches, without any particularized showing. A judicial officer's unreasonable authorization of a search affects one person at a time; a legislature's unreasonable authorization of searches may affect thousands or millions and will almost always affect more than one. Certainly the latter poses a greater threat to liberty.

Moreover, the *Leon* Court relied explicitly on the tradition of judicial independence in concluding that, until it was presented with evidence to the contrary, there was relatively little cause for concern that judicial officers might take the opportunity presented by the good-faith exception to authorize unconstitutional searches. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *United States* v. *Leon*, *supra*, at 917. Unlike police officers, judicial officers are not "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). The legislature's objective in passing a law authorizing unreasonable searches, however, is explicitly to facilitate law enforcement. Fourth Amendment rights have at times proved unpopular; it is a measure of the Framers' fear that a passing majority might find it expedient to compromise Fourth Amendment values that these values were embodied in the Constitution itself. *Bram* v. *United States*, 168 U. S. 532, 544 (1897). Legislators by virtue of their political role are more often sub-

jected to the political pressures that may threaten Fourth Amendment values than are judicial officers.

Finally, I disagree with the Court that there is "no reason to believe that applying the exclusionary rule" will deter legislation authorizing unconstitutional searches. *Ante*, at 352. "The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals." Stewart, 83 Colum. L. Rev. 1365, 1393 (1983). Providing legislatures a grace period during which the police may freely perform unreasonable searches in order to convict those who might have otherwise escaped creates a positive incentive to promulgate unconstitutional laws. Cf. *Weeks* v. *United States*, 232 U. S., at 392–393. While I heartily agree with the Court that legislators ordinarily do take seriously their oaths to uphold the Constitution and that it is proper to presume that legislative Acts are constitutional, *ante*, at 351, it cannot be said that there is no reason to fear that a particular legislature might yield to the temptation offered by the Court's good-faith exception.

Accordingly, I find that none of *Leon*'s stated rationales, see *ante*, at 348, supports the Court's decision in this case. History suggests that the exclusionary rule ought to apply to the unconstitutional legislatively authorized search, and this historical experience provides a basis for concluding that legislatures may threaten Fourth Amendment values. Even conceding that the deterrent value of the exclusionary rule in this context is arguable, I am unwilling to abandon both history and precedent weighing in favor of suppression. And if I were willing, I still could not join the Court's opinion because the rule it adopts is both difficult to administer and anomalous.

The scope of the Court's good-faith exception is unclear. Officers are to be held not "to have acted in good-faith reliance upon a statute if its provisions are such that a rea-

sonable officer should have known that the statute was unconstitutional. Cf. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982)." *Ante*, at 355. I think the Court errs in importing *Harlow*'s "clearly established law" test into this area, because it is not apparent how much constitutional law the reasonable officer is expected to know. In contrast, *Leon* simply instructs courts that police officers may rely upon a facially valid search warrant. Each case is a fact-specific, self-terminating episode. Courts need not inquire into the officer's probable understanding of the state of the law except in the extreme instance of a search warrant upon which no reasonable officer would rely. Under the decision today, however, courts are expected to determine at what point a reasonable officer should be held to know that a statute has, under evolving legal rules, become "clearly" unconstitutional. The process of clearly establishing constitutional rights is a long, tedious, and uncertain one. Indeed, as the Court notes, *ante*, at 357, n. 13, the unconstitutionality of the Illinois statute is not clearly established to this day. The Court has granted certiorari on the question of the constitutionality of a similar statutory scheme in *New York* v. *Burger*, 479 U. S. 482 (1986). Thus, some six years after the events in question in this case, the constitutionality of statutes of this kind remains a fair ground for litigation. Nothing justifies a grace period of such extraordinary length for an unconstitutional legislative act.

The difficulties in determining whether a particular statute violates clearly established rights are substantial. See 5 K. Davis, Administrative Law Treatise § 27:24, p. 130 (2d ed. 1984) ("The most important effect of [*Davis* v. *Scherer*, 468 U. S. 183 (1984)] on future law relates to locating the line between established constitutional rights and clearly established constitutional rights. In assigning itself the task of drawing such a line the Court may be attempting the impossible. Law that can be clearly stated in the abstract usually becomes unclear when applied to variable and imperfectly

understood facts . . ."). The need for a rule so difficult of application outside the civil damages context is, in my view, dubious. The Court has determined that fairness to the defendant, as well as public policy, dictates that individual government officers ought not be subjected to damages suits for arguable constitutional violations. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982) (citing *Butz* v. *Economou*, 438 U. S. 478, 506 (1978)). But suppression of illegally obtained evidence does not implicate this concern.

Finally, I find the Court's ruling in this case at right angles, if not directly at odds, with the Court's recent decision in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). In *Griffith*, the Court held that "basic norms of constitutional adjudication" and fairness to similarly situated defendants, *id.*, at 322, require that we give our decisions retroactive effect to all cases not yet having reached final, and unappealable, judgment. While the extent to which our decisions ought to be applied retroactively has been the subject of much debate among Members of the Court for many years, *id.*, at 320–326, there has never been any doubt that our decisions are applied to the parties in the case before the Court. *Stovall* v. *Denno*, 388 U. S. 293, 301 (1967). The novelty of the approach taken by the Court in this case is illustrated by the fact that under its decision today, no effective remedy is to be provided in the very case in which the statute at issue was held unconstitutional. I recognize that the Court today, as it has done in the past, divorces the suppression remedy from the substantive Fourth Amendment right. See *United States* v. *Leon*, 468 U. S., at 905–908. This Court has held that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Moreover, the exclusionary remedy is not made available in all instances when Fourth Amendment rights are implicated. See, *e. g.*, *Stone*

v. *Powell*, 428 U. S. 465 (1976) (barring habeas corpus review of Fourth Amendment suppression claims); *United States* v. *Janis*, 428 U. S. 433 (1976) (no suppression remedy for state Fourth Amendment violations in civil proceedings by or against the United States). Nevertheless, the failure to apply the exclusionary rule in the very case in which a state statute is held to have violated the Fourth Amendment destroys all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights. In my view, whatever "basic norms of constitutional adjudication," *Griffith* v. *Kentucky*, *supra*, at 322, otherwise require, surely they mandate that a party appearing before the Court might conceivably benefit from a judgment in his favor. The Court attempts to carve out a proviso to its good-faith exception for those cases in which "the legislature wholly abandoned its responsibility to enact constitutional laws." *Ante*, at 355. Under what circumstances a legislature can be said to have "wholly abandoned" its obligation to pass constitutional laws is not apparent on the face of the Court's opinion. Whatever the scope of the exception, the inevitable result of the Court's decision to deny the realistic possibility of an effective remedy to a party challenging statutes not yet declared unconstitutional is that a chill will fall upon enforcement and development of Fourth Amendment principles governing legislatively authorized searches.

For all these reasons, I respectfully dissent.

STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL.

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

No. 85–184. Argued January 20, 1987—Decided March 9, 1987

Respondent nonprofit organization, whose members live near a hazardous waste dumpsite, moved to intervene in a suit brought by the United States and the State of California against petitioners, who owned or operated the dumpsite, or who allegedly dumped waste there. The suit sought injunctive relief that would require petitioners to abate the release of harmful substances from the site, to take remedial steps to correct the unsafe conditions, and to reimburse the costs of bringing about the cleanup. The Federal District Court denied respondent's request to intervene as a matter of right, but granted its alternative application to become a permissive intervenor, subject to the conditions that it could not (1) assert any claim for relief not already requested by one of the original parties; (2) intervene in the cleanup costs claim; or (3) file motions or conduct its own discovery unless it first conferred with all the original parties and obtained the permission of one of them. Respondent filed an immediate appeal, protesting both the denial of intervention as of right and the restrictions imposed on permissive intervention. The Court of Appeals allowed the appeal, holding that the denial of intervention was a final appealable order within the meaning of 28 U. S. C. § 1291, despite the grant of permissive intervention.

Held: A district court order granting permissive intervention but denying intervention as of right is not immediately appealable. Such an order is not "final" in the traditional sense since it does not end the litigation. Furthermore, it does not fall within one of the narrow categories the Court has deemed final for review purposes. Pp. 374–380.

(a) The District Court order is not covered by the "collateral order" exception to § 1291, because respondent's party status as a permissive intervenor will allow it to obtain effective review of its claims on appeal from the final judgment. Although, after a long and complex trial, it might be difficult for respondent to show that the harm from the intervention order is sufficiently great to overturn the final judgment, this has little bearing on whether respondent has the right to an interlocutory appeal under the collateral order doctrine. The complained-of difficulty is the same one faced by any party subject to an adverse pretrial order. Respondent has presented no compelling evidence why the

intervention order here should be treated differently than these other orders. Pp. 375–377.

(b) The limitations placed on respondent's right to participate cannot be construed as a complete denial of intervention sufficient to render the District Court order immediately reviewable. Respondent is, in fact, a participant in the case and has alternative means for challenging the order. It is significant that none of the limitations on permissive intervention interfere with respondent's ability to raise its claims on post-judgment appeal. Pp. 377–378.

(c) The District Court order does not come within 28 U. S. C. § 1292(a)(1), which authorizes interlocutory appeals from orders "refusing . . . injunctions." Even assuming the order had the effect of denying injunctions sought by respondent, such a denial is appealable under § 1292(a)(1) only if the order will have a serious, perhaps irreparable, consequence and can be effectively challenged only by an immediate appeal. Respondent's right, during post-trial review, to challenge the limits on its participation renders § 1292(a)(1) inapplicable. Pp. 378–379.

(d) Section 1291's finality rule protects a variety of interests that contribute to the efficiency of the legal system. The trial judge's ability to conduct efficient and orderly trials would be frustrated, rather than furthered, by piecemeal review. P. 380.

755 F. 2d 1383, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined, and in all but Part II–B of which BRENNAN and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 380.

David L. Mulliken argued the cause for petitioners. With him on the briefs were *Robert P. Dahlquist*, *Barry P. Goode*, *Vincent Fish*, *Michael A. Kahn*, *Peter R. Taft*, and *G. Richard Doty*.

Paul J. Larkin, Jr., argued the cause for the United States as respondent under this Court's Rule 19.6, in support of petitioners. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Wallace*, and *Anne S. Almy*.

Joel R. Reynolds argued the cause for respondents. With him on the briefs were *Fredric D. Woocher* and *Carlyle W. Hall, Jr.*

JUSTICE POWELL delivered the opinion of the Court.

The question before us is whether a district court order granting permissive intervention but denying intervention as of right is immediately appealable.

I

This case is part of the ongoing litigation concerning the Stringfellow Acid Pits, an abandoned hazardous waste disposal site near Glen Avon, California. Petitioners are 28 individuals, companies, or entities who formerly owned or operated the Acid Pits, or who allegedly produced or transported the wastes that were dumped at the disposal site. In 1983 the United States and the State of California filed suit against petitioners, claiming that the Acid Pits created a substantial danger to the surrounding area. The Government plaintiffs sought injunctive relief that would require petitioners to abate the release of harmful substances from the site, and to take remedial steps to correct the unsafe conditions. Both the United States and California also requested reimbursement for the costs incurred in bringing about the cleanup.

Shortly after the complaint was filed, respondent Concerned Neighbors in Action (CNA), a nonprofit organization whose members live near the dumpsite, moved to intervene in the litigation. CNA claimed that it was entitled to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a), because it had a substantial interest in the suit that would not be represented adequately by the existing parties.[1] CNA also asserted that the citizen suit provisions

[1] Federal Rule of Civil Procedure 24 provides in part:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the . . . subject of the action and . . . the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

of various environmental statutes allowed intervention as of right in these circumstances.[2] Alternatively, CNA claimed that it should be allowed to intervene by permission pursuant to Rule 24(b).

The District Court denied the request to intervene as of right, but granted CNA's application to become a permissive intervenor. The court concluded, however, that CNA's right to participate should be subject to three conditions. First, it held that CNA could not assert any claim for relief that had not already been requested by one of the original parties. The court found that "allowing applicants to assert their individualized damage and other claims would burden and expand an already complex litigation, and could jeopardize the possibility of settlement." App. to Pet. for Cert. A–19. Second, CNA could not intervene in the Government plaintiffs' claim for recovery of the clean-up costs. Finally, in an effort to "minimize any delay and confusion involved in discovery," the District Court ruled that CNA could not file any motions or conduct its own discovery unless it first conferred with all the original parties, and then obtained permission to go forward from at least one of these litigants. *Id.*, at A–20. The court emphasized, though, that CNA had the right to attend all depositions, to participate to the extent not duplicative of the original parties, and to receive copies of all discovery material produced by the other litigants.

"(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[2] CNA alleged that it had the right to intervene under the Safe Drinking Water Act, 88 Stat. 1690, as amended, 42 U. S. C. § 300j–8, the Resource Conservation and Recovery Act, 90 Stat. 2825, as amended, 42 U. S. C. § 6972 (1982 ed. and Supp. III), and the Clean Water Act, as added, 86 Stat. 888, 33 U. S. C. § 1365.

CNA filed an immediate appeal, protesting both the denial of the application to intervene as of right and the restrictions imposed on permissive intervention. The Court of Appeals for the Ninth Circuit initially dismissed the appeal, finding that the District Court order was not a "final decision" within the meaning of 28 U. S. C. § 1291.[3] The court's decision was largely based on the fact that CNA had been made a party to the litigation and could protect its interests fully during an appeal from the final judgment. The Ninth Circuit also noted that its decision was consistent with the results reached by other Courts of Appeals in similar cases.[4] The court subsequently withdrew its opinion, however, concluding that the holding was inconsistent with Ninth Circuit precedent. Relying on *California* v. *Block*, 690 F. 2d 753, 776 (1982), the court ruled that "[d]enial of intervention as of right is a final appealable order, despite the grant of permissive intervention." App. to Pet. for Cert. A–26. The court ordered further briefing on the merits of the intervention application, and ultimately held that CNA must be allowed to intervene as of right. *United States* v. *Stringfellow*, 755 F. 2d 1383 (1985) (order). See also 783 F. 2d 821 (1986) (opinion).

We granted certiorari to resolve the conflict among the Courts of Appeals as to whether this type of pretrial order is subject to immediate appeal. 476 U. S. 1157. We now vacate and remand.

II

CNA acknowledges that the District Court order in this case is not "final" in the traditional sense. The decision con-

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[3] Section 1291 provides: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

[4] See *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 687 F. 2d 543, 549–550 (CA1 1982); *Shore* v. *Parklane Hosiery Co.*, 606 F. 2d 354, 357 (CA2 1979); see also *Wheeler* v. *American Home Products Corp.*, 582 F. 2d 891, 896 (CA5 1977).

cerning CNA's intervenor status clearly is not one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." See *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). Instead, CNA argues that the order falls within one of the narrow categories of decisions that we have deemed final for purposes of review, even though the entire dispute has not yet been resolved.

A

CNA's primary argument is that the District Court ruling is covered by the "collateral order" exception to § 1291. This doctrine recognizes that a limited class of prejudgment orders is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). To qualify as a collateral order, a decision must: (i) "conclusively determine the disputed question"; (ii) "resolve an important issue completely separate from the merits of the action"; and (iii) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978) (footnote omitted). See also *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 375 (1981).

Although a party seeking appeal must show that all three requirements are satisfied, we find it unnecessary to address each part of the test. We assume, *arguendo*, that the District Court order conclusively determined CNA's right to intervene, and that the intervention issue is completely separate from the merits of the underlying action. We nevertheless find that the order is not "collateral" within the meaning of *Coopers & Lybrand*. We conclude that because CNA is now a party to the suit by virtue of its permissive intervention, it can obtain effective review of its claims on appeal from the final judgment.

An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a

trial court. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 280–283 (1946); *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 687 F. 2d 543 (CA1 1982). See also 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 24–15, pp. 24–169—24–170 (2d ed. 1985) (An intervenor may appeal from "all interlocutory and final orders that affect him . . . whether the right under which he intervened was originally absolute or discretionary"); 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1923, p. 517 (2d ed. 1986). Thus if CNA still wishes to challenge the denial of intervention as of right, or if it believes that the restrictions imposed by the District Court prevented it from protecting its interests, it can raise these claims before the Court of Appeals after the trial. That court then can decide whether the order was erroneous, and if so, whether CNA's inability to participate more fully in the proceedings may have affected the final judgment. We therefore cannot conclude that CNA's interests will be "irretrievably lost in the absence of an immediate appeal." See *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 431 (1985).

CNA does not dispute that it has the right to pursue a post-trial appeal. But it argues that, given the realities of complex litigation, a dispute over the right to intervene must be resolved before trial if it is to have any practical significance. CNA argues that once the district court enters a remedial order in a case such as this, involving numerous parties and years of litigation, an appellate court will be reluctant to vacate the judgment because of an erroneous intervention order. CNA suggests that the incentives to affirm the trial court's decision will be so strong at that point that the "right" to appeal will be academic at best, and thus CNA's ability to press for the strongest possible clean-up order will indeed be "irretrievably lost."

This contention may be true to some degree, but it is largely beside the point. Although it may be difficult for CNA to show that the harm from the intervention order is

sufficiently great to overturn the final judgment, this has little bearing on whether CNA has the right to an interlocutory appeal under the collateral order doctrine. The difficulties of which CNA complains are the same as those faced by any party who is subject to an adverse pretrial order. A party who has had one of several claims dismissed before trial, for example, may similarly believe that the chances of overturning the judgment on this ground are small, even if the dismissal turns out to be erroneous. Yet unless the district court specifically holds otherwise, challenges to this type of order can be raised only after judgment. See Fed. Rule Civ. Proc. 54(b). See also 10 Wright, Miller, & Kane, *supra*, § 2653, at 25–26, 31. CNA presents no compelling reason why the intervention order in this case should be treated differently. As a permissive intervenor, CNA will have the same rights of appeal from a final judgment as all other parties; we decline to extend the collateral order doctrine to provide more.

B

CNA also argues that because the District Court placed such onerous limitations on its right to participate in the case, the order should be construed as a *complete* denial of the right to intervene. CNA correctly notes that when an order prevents a putative intervenor from becoming a party in *any* respect, the order is subject to immediate review. *Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 524–525 (1947). Even though CNA is now a party to the action, it maintains that the restrictions on discovery and the right to request additional relief so severely undermine its ability to influence the litigation that the order is not different in effect from one denying all participation. Indeed, CNA argues that unless it can challenge these restrictions immediately, it will be in a worse position than if the District Court had rejected its intervention application in full: CNA will be unable to participate effectively, and yet still will be bound by the final judgment because of its permissive-

party status. We therefore are urged to give the District Court decision a "practical" interpretation and rule that the permissive-intervention order was a constructive denial.

We cannot accept this argument. In *Railroad Trainmen*, we found that the order denying all intervention was *by necessity* subject to immediate review, because the applicant "[could] not appeal from any subsequent order or judgment in the proceeding . . . ." 331 U. S., at 524. In that case the party seeking to intervene had no recourse other than pretrial review, since the trial court's order terminated that party's participation in the litigation. In the present case, however, CNA is a participant in the proceeding and has alternative means for challenging the order. Consequently, the justification for immediate review found in *Railroad Trainmen* is absent from this case. And while the District Court restricted CNA's ability to participate as fully as it might wish, it is significant that none of the limitations interfere with CNA's ability to raise its claims on postjudgment appeal. As noted, CNA was given access to discovery information and was permitted to participate to the extent not duplicative of other parties. We therefore refuse to find that the grant of permissive intervention, even though subject to conditions, should be treated as a complete denial of the right to participate.

C

Finally, CNA argues that the District Court order comes within the statutory exception to finality set forth in 28 U. S. C. § 1292(a)(1). That section provides that a party may take an interlocutory appeal from an order "granting, continuing, modifying, refusing or dissolving injunctions." CNA asserts that the order in this case constituted a "refusal" to grant an injunction in two respects. First, by ruling that CNA could not raise any claim not asserted by an original party, the District Court necessarily denied the injunctive relief CNA sought in its Complaint in Interven-

tion.[5] Second, by denying the right to file motions without the consent of another party, CNA claims that the order prevents it from even *requesting*, much less obtaining, a preliminary injunction.

This argument fails for the reasons discussed above. Even if we were convinced that the District Court order had the effect of denying an injunction, it still would not satisfy § 1292(a)(1). This Court has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a "'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176, 181 (1955)). Because we have concluded that CNA, during post-trial review, can challenge the limitations on its participation, we conclude that § 1292(a)(1) provides no basis for affirming the decision below.[6]

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[5] When CNA filed its application to intervene, it also lodged a proposed Complaint in Intervention that requested injunctive relief beyond that which was sought by the government plaintiffs. See *United States* v. *Stringfellow*, 783 F. 2d 821, 824 (CA9 1986).

[6] CNA also argues that recent congressional action demonstrates that the decision of the Court of Appeals for the Ninth Circuit is plainly correct. In October 1986, the Superfund Amendments and Authorization Act of 1986 was signed into law. Pub. L. 99–499, 100 Stat. 1613. CNA claims that § 113(c) of these amendments shows that affected groups such as CNA are allowed to intervene as of right in proceedings designed to clean up hazardous waste sites. We express no opinion on the new legislation, because we find it irrelevant to the question before us. CNA's argument addresses the *merits* of the District Court intervention order; we granted certiorari, however, only to decide whether this type of order is immediately appealable. The possibility that the District Court order is legally flawed has no bearing on our decision, given that "interlocutory orders are not appealable 'on the mere ground that they may be erroneous.'" *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 378 (1981) (citation omitted).

III

As we have noted in the past, the finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S., at 374. Particularly in a complex case such as this, a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference. Cf. Fed. Rule Civ. Proc. 24(b)(2) ("In exercising its discretion [concerning permissive intervention] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties"). The judge's ability to conduct efficient and orderly trials would be frustrated, rather than furthered, by piecemeal review. See *Richardson-Merrell Inc.* v. *Koller*, 472 U. S., at 434.

The decision of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and concurring in the judgment.

I join all of the Court's opinion except Part II–B. In that Part, the Court rejects CNA's argument that the District Court's order granting permissive intervention and placing constraints on CNA's participation in the litigation "constructively denied" CNA's motion to intervene and therefore rendered it an appealable order. *Ante*, at 378. I agree with the Court's decision to reject this argument, and with its rea-

soning that "CNA is a participant in the proceeding and has *alternative means* for challenging the order." *Ibid.* (emphasis added). In explaining what those alternative means are, however, the Court refers only to "CNA's ability to raise its claims on postjudgment appeal." *Ibid.* With all respect, this explanation is insufficient.

The premise of CNA's argument that its right to intervene was constructively denied is that CNA will not be able to obtain effective review of the restrictions placed on its participation on postjudgment appeal. CNA argues that in this complex protracted litigation, the "'right' to appeal will be academic at best," and that, consequently, "CNA's ability to press for the strongest possible clean-up order will indeed be 'irretrievably lost.'" *Ante*, at 376. The Court concedes that this premise "may be true to some degree." *Ibid.* To reject CNA's argument that its right of participation was *constructively* denied by pointing to the availability of a remedy that may be "academic at best," however, is to skirt the very question CNA is asking us to resolve.

There are more persuasive reasons to reject CNA's argument. First, it would be inconsistent to afford a permissive intervenor a right to appeal that would be denied an intervenor of right or an original party on whose participation severe restrictions had been placed. Second, if the conditions imposed on a party would have the practical effect of denying that party the right to participate in the litigation, and if postjudgment appeal is likely to prove ineffective, the available means of relief include a petition to the Court of Appeals for a writ of mandamus. Before elaborating on these points, however, it is necessary briefly to review the distinction between permissive intervention and intervention of right.

Federal Rule of Civil Procedure 24 distinguishes a permissive intervenor from an intervenor of right by the stake each has in the litigation. The intervenor of right has an interest in the litigation that it cannot fully protect without joining the litigation, while the permissive intervenor does not. Ac-

cordingly, a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor.[1]

This case illustrates the practical significance of the distinction between these types of intervention. While CNA's difficulties stem directly from the restrictions placed on its participation in the litigation, those restrictions are unlikely to be viewed as an abuse of discretion unless CNA was actually entitled to intervention of right. Nevertheless, even assuming, *arguendo*, that the District Court erred in denying intervention of right, and consequently that it erred in imposing severe restrictions on CNA's participation, CNA should

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[1] Even highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in another proceeding. Fed. Rule Civ. Proc. 24(b). Indeed, the decision whether to grant permissive intervention resides largely in the discretion of the district court. Rule 24(b) provides that a party that has demonstrated a conditional right to intervene granted by federal statute, or a claim or defense that shares with the main action a common question of law or fact, "*may* be permitted to intervene," and that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" (emphasis added). Accordingly, an order denying a motion for permissive intervention is assumed to "hav[e] no adverse effect on the applicant," and such an order is not appealable absent abuse of discretion. *Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 524 (1947).

By contrast, an intervenor of right has by definition either an unconditional right to intervene granted by federal statute, or an interest at stake which the other parties will not fully protect, and which the intervenor can fully protect only by joining the litigation. Rule 24(a). Such a party therefore has an interest in the subject matter of the litigation similar to that of the original parties. Rule 24(a) considerably restricts the court's discretion whether to allow intervention of right by providing that such a party "*shall* be permitted to intervene" (emphasis added). Thus, in *Railroad Trainmen*, the Court held that a party denied intervention of right (where no permissive intervention is sought) may appeal the order immediately. 331 U. S., at 524.

not be permitted to appeal the District Court's interlocutory order.

First, restrictions on participation may also be placed on an intervenor of right and on an original party.[2] If we were to accept CNA's theory of constructive denial, then it would follow that an intervenor of right also could appeal restrictions placed on its participation as a constructive denial of the right to intervene. And if an intervenor of right is to be afforded such an appeal, there is no reason to deny an appeal to an original party. For example, an original party could seek to appeal an order denying crucial discovery as an order which constructively entered summary judgment. To allow such appeals would seriously disrupt appellate procedure, and due respect for the finality doctrine counsels that the Court avoid taking steps toward that end.

Second, the alternative means of relief available to CNA, and available to an original party or intervenor of right facing similar restrictions, include the ability to petition the Court of Appeals for a writ of mandamus under the All Writs Act, 28 U. S. C. §1651. Mandamus is an appropriate avenue for relief from orders unsuited to appellate review under the collateral-order doctrine; such orders are not representative of a class of orders for which interlocutory review is generally needed, but sometimes involve extraordinary circumstances giving rise to a compelling demand for pretrial relief. See 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶110.10, p. 136 (2d ed. 1986); 16 C. Wright, A. Miller, E.

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[2] "An intervention of right under the amended rule [24(a)] may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of proceedings." Advisory Committee Notes on Fed. Rule Civ. Proc. 24, 28 U. S. C. App., p. 567. And as the Court observes, a district court will not infrequently issue pretrial orders dismissing claims or restricting the scope of discovery that may compromise the ability of original parties to protect their interests, and that may not be effectively reviewable on appeal. *Ante*, at 377; see, *e. g.*, *Kerr* v. *United States District Court*, 426 U. S. 394 (1976) (discovery order limiting ability of plaintiffs to pursue claims).

Cooper, & E. Gressman, Federal Practice and Procedure § 3934 (1977 and Supp. 1986); cf. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211, 232 (1979) (REHNQUIST, J., concurring) ("[O]ur cases and those of the Courts of Appeals hold that review of the granting or denial of discovery is not immediately reviewable, except perhaps by way of mandamus for gross abuse of discretion on the part of the trial court"); *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F. 2d 1022, 1028 (CA9 1976) (petition for writ of mandamus appropriate for orders which, as a class, do not qualify as collateral orders, but which in individual circumstances might work irreparable harm).

It is true, of course, that mandamus is to be granted "only in extraordinary situations," *Kerr* v. *United States District Court*, 426 U. S. 394, 402 (1976), and that "the All Writs Act [should not be construed to] confe[r] an independent appellate power in the Courts of Appeals to review interlocutory orders." *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 263 (1957) (BRENNAN, J., dissenting). The writ may properly issue, however, when "the action of the District Court tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law." *Id.*, at 264. Lower courts have therefore found the writ appropriate when "effective review by later appeal seems difficult." 16 Wright, Miller, Cooper, & Gressman, *supra*, § 3934, p. 238. See, *e. g.*, *In re EEOC*, 709 F. 2d 392 (CA5 1983) (issuing writ to vacate discovery order that was effectively unreviewable on appeal); *Hamilton* v. *Morial*, 644 F. 2d 351 (CA5 1981) (issuing writ to consolidate all pending suits alleging unconstitutional overcrowding in state prisons and jails). Thus, although CNA's argument that the order here is effectively unreviewable on appeal does not constitute persuasive grounds for affording CNA an interlocutory appeal, the argument could properly be made in support of a petition for mandamus. Through that petition, CNA could seek review of both the denial of

intervention of right and of the imposition of conditions, because, as explained above, the resolution of the former determines the scope of the District Court's discretion in issuing the latter.

I conclude that CNA cannot appeal the interlocutory orders limiting its participation in this lawsuit as a constructive denial of its motion to intervene. CNA has available to it the "alternative means" available to any original party or intervenor of right seeking relief from extraordinarily prejudicial interlocutory orders, including the right to appeal from a final judgment and the right to petition for a writ of mandamus. I therefore concur in the judgment and join all but Part II–B of the opinion of the Court.

TOWN OF NEWTON ET AL. *v.* RUMERY

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

No. 85–1449. Argued December 8, 1986—Decided March 9, 1987

After learning that a friend, David Champy, had been indicted by a New Hampshire county grand jury for aggravated felonious sexual assault, respondent sought more information from a mutual acquaintance, who coincidently was the victim of the assault and was expected to be the principal witness against Champy. The victim called the town of Newton's Chief of Police and told him that respondent was trying to force her to drop the charges against Champy. Ultimately, respondent was arrested and accused of the state-law felony of tampering with a witness. Respondent's attorney and the prosecutor negotiated an agreement whereby the prosecutor would dismiss the charges against him if he would agree to release any claims he might have against the town, its officials, or the victim for any harm caused by his arrest. Three days later, he signed the "release-dismissal agreement," and the criminal charges against him were dropped. Ten months later, he filed this action under 42 U. S. C. § 1983 in Federal District Court, alleging that the town and its officers had violated his constitutional rights by arresting him, defaming him, and imprisoning him falsely. The suit was dismissed on the basis of the assertion by the defendants (petitioners here) of the release-dismissal agreement as an affirmative defense. The court rejected respondent's argument that the agreement was unenforceable because it violated public policy, and concluded that a release of claims under § 1983 was valid if, as here, it resulted from a decision that was voluntary, deliberate, and informed. The Court of Appeals reversed, adopting a *per se* rule invalidating release-dismissal agreements.

Held: The judgment is reversed, and the case is remanded.

778 F. 2d 66, reversed and remanded.

JUSTICE POWELL delivered the opinion of the Court with respect to Parts I, II, III–A, IV, and V, concluding that:

1. The question whether the policies underlying § 1983 may in some circumstances render a waiver of the right to sue thereunder unenforceable is one of federal law, to be resolved by reference to traditional common-law principles. The relevant principle is that a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement. P. 392.

2. Although in some cases release-dismissal agreements may infringe important interests of the criminal defendant and of society as a whole, the mere possibility of harm to such interests does not call for a *per se* rule invalidating all such agreements. The risk, publicity, and expense of a criminal trial may intimidate a defendant, even if he believes his defense is meritorious. But this possibility does not justify invalidating *all* release-dismissal agreements. In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action. Respondent's voluntary decision to enter into the agreement here exemplifies such a judgment. Respondent, a sophisticated businessman, was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement. Respondent considered the agreement for three days before signing it. Because respondent voluntarily waived his right to sue under § 1983, the public interest opposing involuntary waiver of constitutional rights is no reason to hold the agreement here invalid. Pp. 392–394.

3. The District Court's decision to enforce the agreement was correct. Not only did respondent voluntarily enter into the agreement, but also the prosecutor had a legitimate reason to make this agreement that was directly related to his prosecutorial responsibilities and was independent of his discretion as to bringing criminal charges. A significant consideration in the prosecutor's decision was the fact that it spared the victim of the alleged sexual offense from the public scrutiny and embarrassment she would have endured if she had been required to testify in either the civil trial or the criminal trial concerning respondent. Pp. 397–398.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded in Part III–B that in some cases there may be a substantial basis for the Court of Appeals' concern that release-dismissal agreements offend public policy because they may tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave deprivations of constitutional rights unremedied. However, respondent had no public duty to institute a § 1983 action merely to further the public's interest in revealing police misconduct. Congress confined the decision to bring such actions to the injured individual, not to the public at large. Release-dismissal agreements may tempt prosecutors to bring frivolous charges or to dismiss meritorious charges in order to protect the interests of other officials. But a *per se* rule of invalidity fails to credit other relevant public interests and improperly assumes prosecutorial misconduct. Many § 1983 suits are marginal and some are frivolous, but the burden of defending such suits is substantial, requiring officials' time and

attention, to the detriment of their public duties. A *per se* rule of invalidity also improperly assumes that prosecutors will seize the opportunity for wrongdoing. Against the background of general judicial deference to prosecutorial discretion in bringing criminal charges, the mere opportunity to act improperly does not compel an assumption that all—or even a significant number of—release-dismissal agreements stem from prosecutors' abandoning the independence of judgment required by their public trust. Rather, tradition and experience justify the belief that the great majority of prosecutors will be faithful to their duty. Pp. 394–397.

JUSTICE O'CONNOR, agreeing that release-dismissal agreements are not void as against public policy in all cases, that a case-by-case approach appropriately balances the important interests on both sides of the question of the enforceability of such agreements, and that on the facts here respondent's covenant not to sue was enforceable, emphasized that it is the burden of those relying upon such covenants to establish that the agreement is neither involuntary nor the product of an abuse of the criminal process. The dangers of release-dismissal agreements—particularly the potential threats to the integrity of the criminal process and to the vindication of federal civil rights—do not preclude enforcement of such agreements in all cases. The defendants in a § 1983 suit may establish that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and was in the public interest. But they must *prove* that this is so; the courts should not presume it. Pp. 399–403.

POWELL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, IV, and V, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined, and an opinion with respect to Part III–B, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 399. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 403.

Donald E. Gardner argued the cause and filed a brief for petitioners.

Charles P. Bauer argued the cause and filed a brief for respondent.*

*Briefs of *amici curiae* urging reversal were filed for Americans for Effective Law Enforcement, Inc., et al. by *Daniel B. Hales, William C. Summers, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt,* and

JUSTICE POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, IV, and V, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join.

The question in this case is whether a court properly may enforce an agreement in which a criminal defendant releases his right to file an action under 42 U. S. C. § 1983 in return for a prosecutor's dismissal of pending criminal charges.

I

In 1983, a grand jury in Rockingham County, New Hampshire, indicted David Champy for aggravated felonious sexual assault. Respondent Bernard Rumery, a friend of Champy's, read about the charges in a local newspaper. Seeking information about the charges, he telephoned Mary Deary, who was acquainted with both Rumery and Champy. Coincidentally, Deary had been the victim of the assault in question and was expected to be the principal witness against Champy. The record does not reveal directly the date or substance of this conversation between Rumery and Deary, but Deary apparently was disturbed by the call. On March 12, according to police records, she called David Barrett, the Chief of Police for the town of Newton. She told him that Rumery was trying to force her to drop the charges against Champy. Rumery talked to Deary again on May 11. The substance of this conversation also is disputed. Rumery claims that Deary called him and that she raised the subject of Champy's difficulties. According to the police records, however, Deary told Chief Barrett that Rumery had threatened that, if Deary went forward on the Champy case, she would "end up like" two women who recently had been

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James P. Manak; and for the town of Milton, Massachusetts, by *Philip M. Cronin.*

John H. Henn, John Reinstein, and *Jack D. Novik* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

murdered in Lowell, Massachusetts. App. 49. Barrett arrested Rumery and accused him of tampering with a witness in violation of N. H. Rev. Stat. Ann. § 641:5(I)(b) (1986), a Class B felony.

Rumery promptly retained Stephen Woods, an experienced criminal defense attorney.[1] Woods contacted Brian Graf, the Deputy County Attorney for Rockingham County. He warned Graf that he "had better [dismiss] these charges, because we're going to win them and after that we're going to sue." App. 11. After further discussions, Graf and Woods reached an agreement, under which Graf would dismiss the charges against Rumery if Rumery would agree not to sue the town, its officials, or Deary for any harm caused by the arrest. All parties agreed that one factor in Graf's decision not to prosecute Rumery was Graf's desire to protect Deary from the trauma she would suffer if she were forced to testify. As the prosecutor explained in the District Court:

> "I had been advised by Chief Barrett that Mary Deary did not want to testify against Mr. Rumery. The witness tampering charge would have required Mary Deary to testify. . . .
>
> "I think that was a particularly sensitive type of case where you are dealing with a victim of an alleged aggravated felonious sexual assault." *Id.*, at 52 (deposition of Brian Graf).

See also App. to Pet. for Cert. B–2 (District Court's findings of fact); App. 20 (deposition of defense counsel Woods).

Woods drafted an agreement in which Rumery agreed to release any claims he might have against the town, its officials, or Deary if Graf agreed to dismiss the criminal charges (the release-dismissal agreement). After Graf approved the form of the agreement, Woods presented it to Rumery. Although Rumery's recollection of the events was quite different, the District Court found that Woods discussed the

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[1] By the time this case was litigated in the District Court, Woods had become the County Attorney for Rockingham County. App. 51.

agreement with Rumery in his office for about an hour and explained to Rumery that he would forgo all civil actions if he signed the agreement. Three days later, on June 6, 1983, Rumery returned to Woods' office and signed the agreement. The criminal charges were dropped.

Ten months later, on April 13, 1984, Rumery filed an action under § 1983 in the Federal District Court for the District of New Hampshire. He alleged that the town and its officers had violated his constitutional rights by arresting him, defaming him, and imprisoning him falsely. The defendants filed a motion to dismiss, relying on the release-dismissal agreement as an affirmative defense. Rumery argued that the agreement was unenforceable because it violated public policy. The court rejected Rumery's argument and concluded that a "release of claims under section 1983 is valid . . . if it results from a decision that is voluntary, deliberate and informed." App. to Pet. for Cert. B–6. The court found that Rumery

> "is a knowledgeable, industrious individual with vast experience in the business world. . . . [H]e intelligently and carefully, after weighing all the factors, concluded that it would be in his best interest and welfare to sign the covenant. He was also represented by a very competent attorney with more than ordinary expertise in the sometimes complex area of criminal law." *Id.*, at B–4.

The court then dismissed Rumery's suit.

On appeal, the Court of Appeals for the First Circuit reversed. It adopted a *per se* rule invalidating release-dismissal agreements. The court stated:

> "It is difficult to envision how release agreements, negotiated in exchange for a decision not to prosecute, serve the public interest. Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights." 778 F. 2d 66, 69 (1985).

Because the case raises a question important to the administration of criminal justice, we granted the town's petition for a writ of certiorari. 475 U. S. 1118 (1986). We reverse.

II

We begin by noting the source of the law that governs this case. The agreement purported to waive a right to sue conferred by a federal statute. The question whether the policies underlying that statute may in some circumstances render that waiver unenforceable is a question of federal law. We resolve this question by reference to traditional common-law principles, as we have resolved other questions about the principles governing § 1983 actions. *E. g.*, *Pulliam* v. *Allen*, 466 U. S. 522, 539–540 (1984). The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.[2]

III

The Court of Appeals concluded that the public interests related to release-dismissal agreements justified a *per se* rule of invalidity. We think the court overstated the perceived problems and also failed to credit the significant public interests that such agreements can further. Most importantly, the Court of Appeals did not consider the wide variety of factual situations that can result in release-dismissal agreements. Thus, although we agree that in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests calls for a *per se* rule.

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[2] Cf. Restatement (Second) of Contracts § 178(1) (1981). See also *Crampton* v. *Ohio*, decided with *McGautha* v. *California*, 402 U. S. 183, 213 (1971) ("The threshold question is whether compelling [a defendant to decide whether to waive constitutional rights] impairs to an appreciable extent any of the policies behind the rights involved").

A

Rumery's first objection to release-dismissal agreements is that they are inherently coercive. He argues that it is unfair to present a criminal defendant with a choice between facing criminal charges and waiving his right to sue under § 1983. We agree that some release-dismissal agreements may not be the product of an informed and voluntary decision. The risk, publicity, and expense of a criminal trial may intimidate a defendant, even if he believes his defense is meritorious. But this possibility does not justify invalidating *all* such agreements. In other contexts criminal defendants are required to make difficult choices that effectively waive constitutional rights. For example, it is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights. See *Brady* v. *United States*, 397 U. S. 742, 752–753 (1970); *Santobello* v. *New York*, 404 U. S. 257, 264 (1971) (Douglas, J., concurring).[3] We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted. *E. g.*, *Corbitt* v. *New Jersey*, 439 U. S. 212 (1978) (upholding a statute that imposed higher sentences on defendants who went to trial than on those who entered guilty pleas). As Justice Harlan explained:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow.

[3] We recognize that the analogy between plea bargains and release-dismissal agreements is not complete. The former are subject to judicial oversight. Moreover, when the State enters a plea bargain with a criminal defendant, it receives immediate and tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources, see *Brady* v. *United States*, 397 U. S., at 752. Also, the defendant's agreement to plead to some crime tends to ensure some satisfaction of the public's interest in the prosecution of crime and confirms that the prosecutor's charges have a basis in fact. The benefits the State may realize in particular cases from release-dismissal agreements may not be as tangible, but they are not insignificant.

> *McMann* v. *Richardson*, 397 U. S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Crampton* v. *Ohio*, decided with *McGautha* v. *California*, 402 U. S. 183, 213 (1971).

In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action. Rumery's voluntary decision to enter this agreement exemplifies such a judgment. Rumery is a sophisticated businessman. He was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement. Rumery considered the agreement for three days before signing it. The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost.

Because Rumery voluntarily waived his right to sue under § 1983, the public interest opposing involuntary waiver of constitutional rights is no reason to hold this agreement invalid. Moreover, we find that the possibility of coercion in the making of similar agreements insufficient by itself to justify a *per se* rule against release-dismissal bargains. If there is such a reason, it must lie in some external public interest necessarily injured by release-dismissal agreements.

B

As we noted above, the Court of Appeals held that all release-dismissal agreements offend public policy because it believed these agreements "tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights." 778 F. 2d, at 69. We can agree that in some cases there may be a substantial basis for this concern. It is true, of course, that § 1983 actions to

vindicate civil rights may further significant public interests. But it is important to remember that Rumery had no public duty to institute a § 1983 action merely to further the public's interest in revealing police misconduct. Congress has confined the decision to bring such actions to the injured individuals, not to the public at large. Thus, we hesitate to elevate more diffused public interests above Rumery's considered decision that he would benefit personally from the agreement.

We also believe the Court of Appeals misapprehended the range of public interests arguably affected by a release-dismissal agreement. The availability of such agreements may threaten important public interests. They may tempt prosecutors to bring frivolous charges, or to dismiss meritorious charges, to protect the interests of other officials.[4] But a *per se* rule of invalidity fails to credit other relevant public interests and improperly assumes prosecutorial misconduct.[5]

The vindication of constitutional rights and the exposure of official misconduct are not the only concerns implicated by § 1983 suits. No one suggests that all such suits are meritorious. Many are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial. Counsel may be retained by the official, as well as the governmental entity. Preparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of

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[4] Actions taken for these reasons properly have been recognized as unethical. See ABA Model Code of Professional Responsibility, Disciplinary Rule 7–105 (1980).

[5] Prosecutors themselves rarely are held liable in § 1983 actions. See *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (discussing prosecutorial immunity). Also, in many States and municipalities—perhaps in most—prosecutors are elected officials and are entirely independent of the civil authorities likely to be defendants in § 1983 suits. There may be situations, of course, when a prosecutor is motivated to protect the interests of such officials or of police. But the constituency of an elected prosecutor is the public, and such a prosecutor is likely to be influenced primarily by the general public interest.

their public duties. In some cases litigation will extend over a period of years. This diversion of officials from their normal duties and the inevitable expense of defending even unjust claims is distinctly not in the public interest. To the extent release-dismissal agreements protect public officials from the burdens of defending such unjust claims, they further this important public interest.

A *per se* rule invalidating release-dismissal agreements also assumes that prosecutors will seize the opportunity for wrongdoing. In recent years the Court has considered a number of claims that prosecutors have acted improperly. *E. g.*, *Wayte* v. *United States*, 470 U. S. 598 (1985); *United States* v. *Goodwin*, 457 U. S. 368 (1982); *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978). Our decisions in those cases uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute. The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. See *Wayte* v. *United States*, 470 U. S., at 607. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.[6] Because these decisions "are not readily susceptible to the kind of analysis the courts are competent to undertake," we have been "properly hesitant to examine the decision whether to prosecute." *Id.*, at 607–608. See *United States* v. *Goodwin*, *supra*, at 373.

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[6] In 1985, the federal district courts disposed of 47,360 criminal cases. Of these, only 6,053, or about 12.8%, ended after a trial. Annual Report of the Director of the Administrative Office of the U. S. Courts 374 (1985). As we have recognized, if every serious criminal charge were evaluated through a full-scale criminal trial, "the States and the Federal Government would need to multiply by many times the number of judges and court facilities," *Santobello* v. *New York*, 404 U. S. 257, 260 (1971).

Against this background of discretion, the mere opportunity to act improperly does not compel an assumption that all—or even a significant number of—release-dismissal agreements stem from prosecutors abandoning "the independence of judgment required by [their] public trust," *Imbler* v. *Pachtman*, 424 U. S. 409, 423 (1976).[7] Rather, tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty. Indeed, the merit of this view is illustrated by this case, where the only evidence of prosecutorial misconduct is the agreement itself.

Because release-dismissal agreements may further legitimate prosecutorial and public interests, we reject the Court of Appeals' holding that all such agreements are invalid *per se*.[8]

IV

Turning to the agreement presented by this case, we conclude that the District Court's decision to enforce the agreement was correct. As we have noted, *supra*, at 394, it is

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[7] Of course, the Court has found that certain actions are so likely to result from prosecutorial misconduct that it has "'presume[d]' an improper vindictive motive," *United States* v. *Goodwin*, 457 U. S. 368, 373 (1982). *E. g.*, *Blackledge* v. *Perry*, 417 U. S. 21 (1974) (holding that it violates the Due Process Clause for a prosecutor to increase charges in response to a defendant's exercise of his right to appeal). But the complexity of pretrial decisions by prosecutors suggests that judicial evaluation of those decisions should be especially deferential. Thus, the Court has never accepted such a blanket claim with respect to pretrial decisions. See *United States* v. *Goodwin*, *supra*; *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978).

[8] JUSTICE STEVENS' evaluation of the public interests associated with release-dismissal agreements relies heavily on his view that Rumery is a completely innocent man. *Post*, at 404–407. He rests this conclusion on the testimony Rumery and his attorney presented to the District Court, but fails to acknowledge that the District Court's factual findings gave little credence to this testimony. JUSTICE STEVENS also gives great weight to the fact that Rumery "must be presumed to be innocent." *Post*, at 404. But this is not a criminal case. This is a civil case, in which Rumery bears the ultimate burden of proof.

clear that Rumery voluntarily entered the agreement. Moreover, in this case the prosecutor had an independent, legitimate reason to make this agreement directly related to his prosecutorial responsibilities. The agreement foreclosed both the civil and criminal trials concerning Rumery, in which Deary would have been a key witness. She therefore was spared the public scrutiny and embarrassment she would have endured if she had had to testify in either of those cases.[9] Both the prosecutor and the defense attorney testified in the District Court that this was a significant consideration in the prosecutor's decision. *Supra*, at 390.

In sum, we conclude that this agreement was voluntary, that there is no evidence of prosecutorial misconduct, and that enforcement of this agreement would not adversely affect the relevant public interests.[10]

V

We reverse the judgment of the Court of Appeals and remand the case to the District Court for dismissal of the complaint.

It is so ordered.

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[9] Cf. ABA Standards for Criminal Justice 14–1.8(a)(iii) (2d ed. 1980) (following a guilty plea, it is proper for the sentencing judge to consider that the defendant "by making public trial unnecessary, has demonstrated genuine consideration for the victims . . . by . . . prevent[ing] unseemly public scrutiny or embarrassment").

[10] We note that two Courts of Appeals have applied a voluntariness standard to determine the enforceability of agreements entered into *after* trial, in which the defendants released possible § 1983 claims in return for sentencing considerations. See *Bushnell* v. *Rossetti*, 750 F. 2d 298 (CA4 1984); *Jones* v. *Taber*, 648 F. 2d 1201 (CA9 1981). We have no occasion in this case to determine whether an inquiry into voluntariness alone is sufficient to determine the enforceability of release-dismissal agreements. We also note that it would be helpful to conclude release-dismissal agreements under judicial supervision. Although such supervision is not essential to the validity of an otherwise-proper agreement, it would help ensure that the agreements did not result from prosecutorial misconduct.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join in Parts I, II, III–A, IV, and V of the Court's opinion. More particularly, I join the Court in disapproving the Court of Appeals' broad holding that a criminal defendant's promise not to sue local governments and officials for constitutional violations arising out of his arrest and prosecution, given in exchange for the prosecutor's agreement to dismiss pending criminal charges, is void as against public policy under all circumstances. I agree with the Court that a case-by-case approach appropriately balances the important interests on both sides of the question of the enforceability of these agreements, and that on the facts of this particular case Bernard Rumery's covenant not to sue is enforceable. I write separately, however, in order to set out the factors that lead me to conclude that this covenant should be enforced and to emphasize that it is the burden of those relying upon such covenants to establish that the agreement is neither involuntary nor the product of an abuse of the criminal process.

As the Court shows, *ante*, at 395–396, 398, there are substantial policy reasons for permitting release-dismissal bargains to be struck in appropriate cases. Certainly some § 1983 litigation is meritless, and the inconvenience and distraction of public officials caused by such suits is not inconsiderable. Moreover, particular release-dismissal agreements may serve bona fide criminal justice goals. Here, for example, the protection of Mary Deary, the complaining witness in an aggravated sexual assault case, was an important, legitimate criminal justice objective served by the release-dismissal agreement. Similarly, prosecutors may legitimately believe that, though the police properly defused a volatile situation by arresting a minor misdemeanant, the public interest in further prosecution is outweighed by the cost of litigation. Sparing the local community the expense of litigation associated with some minor crimes for which

there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement. See *Hoines* v. *Barney's Club, Inc.*, 28 Cal. 3d 603, 610–611, n. 7, 620 P. 2d 628, 633, n. 7 (1980).

On the other hand, as the Court acknowledges, release-dismissal agreements potentially threaten the integrity of the criminal process and preclude vindication of federal civil rights. Permitting such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil complaints. The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated. *Ante*, at 393. The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole.

In addition, the availability of the release option may tempt officials to ignore their public duty by dropping meritorious criminal prosecutions in order to avoid the risk, expense, and publicity of a § 1983 suit. *Ante*, at 395. The public has an interest in seeing its laws faithfully executed. But, officials may give more weight to the private interest in seeing a civil claim settled than to the public interest in seeing the guilty convicted. By introducing extraneous considerations into the criminal process, the legitimacy of that process may be compromised. Release-dismissal bargains risk undermining faith in the fairness of those who administer the criminal process. Finally, the execution of release-dismissal agreements may result in having to determine whether the prosecutor violated any of his ethical obligations as a lawyer. *Ante*, at 395, n. 4.

As the Court indicates, a release-dismissal agreement is not directly analogous to a plea bargain. *Ante*, at 393, n. 3. The legitimacy of plea bargaining depends in large measure upon eliminating extraneous considerations from the process. See *Santobello* v. *New York*, 404 U. S. 257, 260–261 (1971);

Brady v. *United States*, 397 U. S. 742, 753 (1970); ALI, Model Code of Pre-Arraignment Procedure § 350.5(2) (1975). No court would knowingly permit a prosecutor to agree to accept a defendant's plea to a lesser charge in exchange for the defendant's cash payment to the police officers who arrested him. Rather, the prosecutor is permitted to consider only legitimate criminal justice concerns in striking his bargain—concerns such as rehabilitation, allocation of criminal justice resources, the strength of the evidence against the defendant, and the extent of his cooperation with the authorities. The central problem with the release-dismissal agreement is that public criminal justice interests are explicitly traded against the private financial interest of the individuals involved in the arrest and prosecution. Moreover, plea bargaining takes place only under judicial supervision, an important check against abuse. *Ante*, at 393, n. 3. Release-dismissal agreements are often reached between the prosecutor and defendant with little or no judicial oversight.

Nevertheless, the dangers of the release-dismissal agreement do not preclude its enforcement in all cases. The defendants in a § 1983 suit may establish that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public interest. But they must *prove* that this is so; the courts should not presume it as I fear portions of Part III–B of the plurality opinion may imply.

Many factors may bear on whether a release was voluntary and not the product of overreaching, some of which come readily to mind. The knowledge and experience of the criminal defendant and the circumstances of the execution of the release, including, importantly, whether the defendant was counseled, are clearly relevant. The nature of the criminal charges that are pending is also important, for the greater the charge, the greater the coercive effect. The existence of a legitimate criminal justice objective for obtaining the

release will support its validity. And, importantly, the possibility of abuse is clearly mitigated if the release-dismissal agreement is executed under judicial supervision.

Close examination of all the factors in this case leads me to concur in the Court's decision that this covenant not to sue is enforceable. There is ample evidence in the record concerning the circumstances of the execution of this agreement. Testimony of the prosecutor, defense counsel, and Rumery himself leave little doubt that the agreement was entered into voluntarily. *Ante*, at 390–391. While the charge pending against Rumery was serious—subjecting him to up to seven years in prison, N. H. Rev. Stat. Ann. § 641:5(I)(b) (1986)—it is one of the lesser felonies under New Hampshire law, and a long prison term was probably unlikely given the absence of any prior criminal record and the weaknesses in the case against Rumery. Finally, as the Court correctly notes, the prosecutor had a legitimate reason to enter into this agreement directly related to his criminal justice function. The prosecutor testified that:

> "I had been advised by Chief Barrett that Mary Deary did not want to testify against Mr. Rumery. The witness tampering charge would have required Mary Deary to testify. She would have been the primary source of evidence against Mr. Rumery. There was still considerable concern about Mary Deary because the David Champy case was still pending.
>
> "I think that was a particular sensitive type of case where you are dealing with a victim of an alleged aggravated felonious sexual assault. And I think I was taking into consideration the fact that I had her as a victim of one case, and now, the State was in a position of perhaps having to force her to testify against her will perhaps causing more trauma or upset to her forcing her to go through more things than what I felt comfortable with doing. So that was one of the considerations I was taking into play at that time, that I had been informed that

> Mary Deary did not want to go forward with the prosecution, that she felt she had gone through enough." App. 52.

Thus, Mary Deary's emotional distress, her unwillingness to testify against Rumery, presumably in later civil as well as criminal proceedings, and the necessity of her testimony in the pending sexual assault case against David Champy all support the prosecutor's judgment that the charges against Rumery should be dropped if further injury to Deary, and therefore the Champy case, could thereby be avoided.

Against the convincing evidence that Rumery voluntarily entered into the agreement and that it served the public interest, there is only Rumery's blanket claim that agreements such as this one are inherently coercive. While it would have been preferable, and made this an easier case, had the release-dismissal agreement been concluded under some form of judicial supervision, I concur in the Court's judgment, and all but Part III–B of its opinion, that Rumery's § 1983 suit is barred by his valid, voluntary release.

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

The question whether the release-dismissal agreement signed by respondent is unenforceable is much more complex than the Court's opinion indicates. A complete analysis of the question presented by this case cannot end with the observation that respondent made a knowing and voluntary choice to sign a settlement agreement. Even an intelligent and informed, but completely innocent, person accused of crime should not be required to choose between a threatened indictment and trial, with their attendant publicity and the omnipresent possibility of wrongful conviction, and surrendering the right to a civil remedy against individuals who have violated his or her constitutional rights. Moreover, the prosecutor's representation of competing and possibly conflicting interests compounds the dangerous potential of release-

dismissal agreements. To explain my disagreement with the majority, I shall first discuss the dilemma confronted by respondent at the time his lawyer advised him to sign the agreement, then comment on the three different interests the prosecutor represented, and finally discuss the plurality's evaluation of the relevant public interests in this case.

I

Respondent is an innocent man. As a matter of law, he must be presumed to be innocent. As a matter of fact, the uncontradicted sworn testimony of respondent,[1] and his

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[1] "Q. And she called you you say.
"A. That's correct.
"Q. At your office.
"A. Right.

. . . . .

"Q. After that conversation on that subject was any other subject brought up?
"A. Yes. She asked me if I knew that Dave Champay's [Champy's] wife had left him and I says no, I didn't.
"Q. What else did she say?
"A. And she says, she said,
"'Well, I didn't want'—she says, 'David is a victim. I like David and he's the victim.'

. . . . .

"A. And so she said she didn't know—she says, 'I don't know what to do. I don't want to hurt him.' She says, 'I don't know what to do.'
"So I said, 'Well, if you feel that way towards him,' I says, 'then you can—it's possible to, to end this case.' I didn't say end the case. I says, 'It's possible to stop the case,' or whatever. And she says, 'Well, I was told I couldn't.'
"And I says, 'Well, you can call the county attorney if you want and talk to them about it.'
"But she kept saying she was—she kept saying—well, she says, 'I'm not a bad person. I'm not vindictive.'
"And I says, 'Well, that's up to you.' I said, 'That's all I can say.'
"And I says,—she kept rambling on about different things and finally I says, 'Look, Mary, I have to leave. I have an appointment. If you want to call me I'll be in the office 11 o'clock tomorrow morning.'
"And that's all there was to the telephone conversation." App. 26–27.

lawyer,[2] buttressed by the circumstantial evidence,[3] overwhelmingly attest to his innocence.[4] There was no written statement by the alleged victim, sworn or unsworn, implicating respondent in any criminal activity. The charge that respondent had threatened the victim was reported to the police by the victim's daughter, and the substance of the conversation as summarized in Chief Barrett's report was based in part on his conversation with the daughter, in part on conversations between another police officer and the victim, and in part on his own conversation with the victim when she was

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[2] "A. Mr. Rumery felt that he had been wronged by the criminal justice system and he wished redress from the criminal justice system. And he was reluctant to have criminal charges dropped in exchange for surrendering his possibility of redress from the system which he felt had wronged him." *Id.*, at 13.

"Q. Now, in your direct testimony you indicated that you thought that probable cause would have been found by the district court. Would you explain your answer?

"A. I certainly don't want to cast any aspersions on the criminal justice system in the State of New Hampshire, but it has been my experience that the district court's really not designed for sophisticated fact-finding and that what amounts to probable cause is really possible cause in the district court.

"If they find that there's a possibility that the named defendant committed an offense they will find probable cause . . . .

"[T]he tendency of the district court justices is to always find probable cause." *Id.*, at 23.

"Q. Mr. Woods, it was a concern of yours that innocent parties sometimes are convicted in the criminal justice system; wasn't it?

"A. Yes." Tr. 65.

[3] It may well be true that respondent expressed the opinion to his alleged victim that it would be in her best interest not to press criminal charges against a mutual friend. It seems highly improbable, however, in a telephone conversation that she initiated after they had not communicated with one another for approximately two months, that he suddenly threatened her life and gave her an ultimatum that would expire at 11 o'clock the following morning.

[4] The District Court made no findings of fact on the question of respondent's innocence or credibility, or on the credibility of his lawyer, but their testimony was uncontradicted. App. to Pet. for Cert. B–1 to B–4.

in a state of extreme emotional distress.[5] Respondent was never indicted, and the warrant for his arrest was issued on the basis of a sketchy statement by Chief Barrett.[6] Even the assistant prosecutor who was in charge of the case was surprised to learn that Chief Barrett had arrested respondent on the basis of the information in the police report.[7]

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[5] Chief Barrett's report reads, in part, as follows:

"On May 11, 1983 at approximately 1600 hours I received a telephone call from victim Deary's daughter, Karen, and she was highly agitated. While we were talking I could hear an intense argument and sobbing in the background. I was finally able to talk with victim, Mary Deary, who was hysterical, distraight *[sic]* and terrified. She rambled and sobbed as she spoke with me.

. . . . . .

"The above information was acquired through several telephone calls and a subsequent personal visit by Officer K. Marino to victim Deary." App. to Brief for Appellant in No. 85–1508 (CA1), p. 178.

In his report, Chief Barrett speculated that the reason for the victim's hysteria was her telephone conversation with respondent (which had occurred some five hours earlier); it is, of course, equally possible that the reason related to her recollection of the underlying assault and the fact that she was in the midst of a heated argument with her daughter at the time her daughter made the call.

[6] In a complaint dated May 12, 1983, Chief Barrett stated that Rumery tampered with witnesses and informants, in that he

"[p]urposely, while having a phone conversation with one Mary A. Deary of 64 Highland Street, Newton New Hampshire, who is a victim and a witness in a *[sic]* official proceeding, to wit Felonious Sexual Assault, attempt to induce by intimidation, coercion, and threat of violence [to] withhold testimony and information in said proceedings." *Id.*, at 129.

A warrant for his arrest was issued by a Justice of the Peace on the basis of this statement, and he was arrested, all on the same day. *Id.*, at 130.

[7] "Q. Okay. Did Mr. Barrett call you and advise you that an arrest had been made and give you reasons why?

"A. He advised me. Again I don't recall whether he called me or he came into the office, but he did advise me that he had arrested Mr. Rumery.

"I was a little bit surprised because I had hoped that we would be able to put something into effect where we might be able to get some independent evidence of the alleged tampering with a witness, so that it would not be a situation where the State had to rely exclusively on Mary Deary, and I

Thus, when the Newton police officers arrested respondent in his home they had not even obtained a written statement from the complaining witness. Prior to the arrest, and prior to the police chief's press conference concerning it, respondent was a respected member of a small community who had never been arrested, even for a traffic offense.

A few days before respondent was scheduled for a probable-cause hearing on the charge of witness tampering, respondent's attorney advised him to sign a covenant not to sue the town of Newton, its police officers, or the witness Deary in exchange for dismissal of the charge against him. The advice was predicated on the lawyer's judgment that the value of a dismissal outweighed the harmful consequences of an almost certain indictment on a felony charge together with the risk of conviction in a case in which the outcome would depend on the jury's assessment of the relative credibility of respondent and his alleged victim. The lawyer correctly advised respondent that even if he was completely innocent, there could be no guarantee of acquittal.[8] He therefore

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recall Chief Barrett telling me that he felt the situation had gotten out of control to such an extent that he didn't know whether or not Mary Deary would be able to testify with respect to the David Champy matter because she was so upset about what was going on, and he felt he had to act. So that's why the arrest was made." App. 50.

"As I indicated, I was surprised at that point in time that he had been arrested. And then I believe the case was probably either scheduled or prepared to be scheduled for the grand jury." *Id.*, at 51.

Apparently the prosecutor never discussed the alleged witness-tampering episode with the witness Deary.

[8] The lawyer, who was a prosecutor when he testified in this case, explained:

"[S]omeone in criminal defense work begins to appreciate that very often the trial does not result in a verdict which corresponds to actual, the actual facts. Therefore, I suppose a criminal defense attorney begins to develop sort of a philosophy that a trial becomes a clash of wills between attorneys and there's always a risk and it's sort of a crap shoot and all of those things.

"Now whereas Mr. Rumery had a great deal of confidence in the criminal justice system, I had less confidence, not so much in the criminal justice system but in the trial system; that I recognized that, you know, no lawyer

placed a higher value on his client's interest in terminating the criminal proceeding promptly than on the uncertain benefits of pursuing a civil remedy against the town and its police department.[9] After delaying a decision for three days, respondent reluctantly followed his lawyer's advice.

From respondent's point of view, it is unquestionably true that the decision to sign the release-dismissal agreement was, as the Court emphasizes, "voluntary, deliberate, and informed." *Ante*, at 391. It reflected "a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Ante*, at 394. As the plurality iterates and reiterates, respondent made a "considered decision that he would benefit personally from the agreement." *Ante*, at 395. I submit, however, that the deliberate and rational character of respondent's decision is not a sufficient reason for concluding that the agreement is enforceable. Otherwise, a promise to pay a state trooper $20 for not issuing a ticket for a traffic violation, or a promise to contribute to the police department's retirement fund in exchange for the dismissal of a felony charge, would be enforceable. Indeed, I would suppose that virtually all contracts that courts refuse to enforce nevertheless reflect perfectly rational decisions by the parties who entered into them. There is nothing irrational about an agreement to bribe a police officer, to enter into a wagering arrangement, to pay usurious rates of interests, or to threaten to indict an innocent man in order to induce him to surrender something of value.

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is going to guarantee a result regardless of the guilt or innocence of their client.

"And so I was less, perhaps personally less willing to subject, to want to subject Mr. Rumery to the full panoply of the trial aspects of the system than he was willing to subject himself." Tr. 56.

[9] *Id.*, at 56–57. Although the witness Deary was a covenantee, she was not named as a defendant in the civil case.

The "voluntary, deliberate, and informed" character of a defendant's decision generally provides an acceptable basis for upholding the validity of a plea bargain. But it is inappropriate to assume that the same standard determines the validity of a quite different agreement to forgo a civil remedy for the violation of the defendant's constitutional rights in exchange for complete abandonment of a criminal charge.

The net result of every plea bargain is an admission of wrongdoing by the defendant and the imposition of a criminal sanction with its attendant stigma. Although there may be some cases in which an innocent person pleads guilty to a minor offense to avoid the risk of conviction on a more serious charge, it is reasonable to presume that such cases are rare and represent the exception rather than the rule. See Fed. Rule Crim. Proc. 11(f) (court may not enter judgment on a guilty plea unless it is satisfied the plea has a factual basis). Like a plea bargain, an agreement by the suspect to drop § 1983 charges and to pay restitution to the victim in exchange for the prosecutor's termination of criminal proceedings involves an admission of wrongdoing by the defendant.[10] The same cannot be said about an agreement that completely exonerates the defendant. Not only is such a person presumptively innocent as a matter of law; as a factual matter the prosecutor's interest in obtaining a covenant not to sue will be strongest in those cases in which he realizes that the defendant was innocent and was wrongfully accused. Moreover, the prosecutor will be most willing—indeed, he is ethically obligated—to drop charges when he believes that probable cause as established by the available, admissible evidence is lacking.

The plea bargain represents a practical compromise between the prosecutor and the defendant that takes into ac-

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[10] The enforceability of these kinds of agreements may well involve considerations different from the enforceability of agreements, such as the one at issue in this case, in which the defendant makes no admission of wrongdoing at all.

count the burdens of litigation and its probable outcome, as well as society's interest in imposing appropriate punishment upon an admitted wrongdoer. The defendant admits wrongdoing for conduct upon which the guilty plea is based and avoids further prosecution; the prosecutor need not go to trial; and an admitted wrongdoer is punished, all under close judicial supervision. See Fed. Rule Crim. Proc. 11(e). By simultaneously establishing and limiting the defendant's criminal liability, plea bargains delicately balance individual and social advantage. This mutuality of advantage does not exist in release-dismissal agreements. A defendant entering a release-dismissal agreement is forced to waive claims based on official conduct under color of state law, in exchange merely for the assurance that the State will not prosecute him for conduct for which he has made no admission of wrongdoing. The State is spared the necessity of going to trial, but its willingness to drop the charge completely indicates that it might not have proceeded with the prosecution in any event.[11] No social interest in the punishment of wrongdoers is satisfied; the only interest vindicated is that of resolving once and for all the question of § 1983 liability.

Achieving this result has no connection with the give-and-take over the defendant's wrongdoing that is the essence of the plea-bargaining process, and thus cannot be justified by reference to the principles of mutual advantage that support plea bargaining. Although the outcome of a criminal proceeding may affect the value of the civil claim, as a matter of law the claims are quite distinct. Even a guilty defendant may be entitled to receive damages for physical abuse, and conversely, the fact that a defendant is ultimately acquitted is entirely consistent with the possibility that the police had

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[11] In this case the prosecutor had been advised that the witness Deary was unwilling to testify against respondent. He may also have known that she would not testify against Champy, her alleged assailant, on the sexual assault charge.

probable cause to arrest him and did not violate any of his constitutional rights.[12]

The plurality assumes that many § 1983 suits "are marginal and some are frivolous," *ante*, at 395. Whether that assumption is correct or incorrect, the validity of each ought to be tested by the adversary process.[13] Experience teaches us that *some* § 1983 suits in which release-dismissal agreements are sought are meritorious.[14] Whatever the true value of a § 1983 claim may be, a defendant who is required to give up such a claim in exchange for a dismissal of a criminal charge is being forced to pay a price that is unrelated to his possible wrongdoing as reflected in that charge. Indeed, if the defendant is forced to abandon a claim that has a value of $1,000, the price that he pays is the functional equivalent of a $1,000 payment to a police department's retirement benefit fund.

Thus, even though respondent's decision in this case was deliberate, informed, and voluntary, this observation does not address two distinct objections to enforcement of the release-dismissal agreement. The prosecutor's offer to drop charges if the defendant accedes to the agreement is inherently coercive; moreover, the agreement exacts a price unrelated to the character of the defendant's own conduct.

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[12] See, *e. g.*, *Palhava de Varella-Cid* v. *Boston Five Cents Savings Bank*, 787 F. 2d 676 (CA1 1986).

[13] The plurality seems to overlook the fact that respondent has not yet had an opportunity to present evidence in support of his underlying claim which, incidentally, alleged police misconduct rather than prosecutorial misconduct.

[14] See, *e. g.*, *Dixon* v. *District of Columbia*, 129 U. S. App. D. C. 341, 394 F. 2d 966 (1968) (prosecutor may not file charges when defendant reneged on agreement not to sue); *MacDonald* v. *Musick*, 425 F. 2d 373 (CA9) (prosecutor may not condition dismissal of charges on defendant's admission of probable cause which would preclude enforcement of civil claim against arresting officers), cert. denied, 400 U. S. 852 (1970); *Boyd* v. *Adams*, 513 F. 2d 83 (CA7 1975) (postarrest release of § 1983 claim, executed while on conditional bail, is void as against public policy).

II

When the prosecutor negotiated the agreement with respondent, he represented three potentially conflicting interests. His primary duty, of course, was to represent the sovereign's interest in the evenhanded and effective enforcement of its criminal laws. See *Berger* v. *United States*, 295 U. S. 78, 88 (1935). In addition, as the covenant demonstrates, he sought to represent the interests of the town of Newton and its Police Department in connection with their possible civil liability to respondent. Finally, as the inclusion of Mary Deary as a covenantee indicates, the prosecutor also represented the interest of a potential witness who allegedly accused both respondent and a mutual friend of separate instances of wrongdoing.

If we view the problem from the standpoint of the prosecutor's principal client, the State of New Hampshire, it is perfectly clear that the release-dismissal agreement was both unnecessary and unjustified. For both the prosecutor and the State of New Hampshire enjoy absolute immunity from common-law and § 1983 liability arising out of a prosecutor's decision to initiate criminal proceedings. See *Imbler* v. *Pachtman*, 424 U. S. 409, 427 (1976). The agreement thus gave the State and the prosecutor no protection that the law did not already provide.

The record in this case indicates that an important reason for obtaining the covenant was "[t]o protect the police department."[15] There is, however, an obvious potential conflict between the prosecutor's duty to enforce the law and his objective of protecting members of the Police Department who are accused of unlawful conduct. The public is entitled to have the prosecutor's decision to go forward with a criminal case, or to dismiss it, made independently of his concerns about the potential damages liability of the Police Department. It is equally clear that this separation of functions

[15] See Tr. 48.

cannot be achieved if the prosecutor may use the threat of criminal prosecution as a weapon to obtain a favorable termination of a civil claim against the police.

In negotiating a release-dismissal agreement, the prosecutor inevitably represents both the public and the police. When release agreements are enforceable, consideration of the police interest in avoiding damages liability severely hampers the prosecutor's ability to conform to the strictures of professional responsibility in deciding whether to prosecute. In particular, the possibility that the suspect will execute a covenant not to sue in exchange for a decision not to prosecute may well encourage a prosecutor to bring or to continue prosecutions in violation of his or her duty to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." ABA Model Rules of Professional Conduct, Rule 3.8(a) (1984).[16]

This ethical obligation of every prosecutor is consistent with the general and fundamental rule that "[a] lawyer should exercise independent professional judgment on behalf of a client." ABA Model Code of Professional Responsibility, Canon 5 (1980). Every attorney should avoid situations in which he is representing potentially conflicting interests. See *id.*, at Ethical Consideration 5–2. As we noted in *Imbler* v. *Pachtman*, prosecutorial immunity from § 1983 lawsuits "does not leave the public powerless to deter misconduct or to punish that which occurs," in large part because

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[16] See also ABA Model Code of Professional Responsibility, Disciplinary Rule 7–103 (1980) ("A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"), and Ethical Consideration 7–14 ("A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair"); ABA Standards for Criminal Justice 3–3.9(a) (2d ed. 1980) ("It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause").

"a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U. S., at 429 (footnote omitted).[17]

The prosecutor's potential conflict of interest increases in magnitude in direct proportion to the seriousness of the charges of police wrongdoing. Yet a rule that determines the enforceability of a release-dismissal agreement by focusing entirely on the quality of the defendant's decision to sign the agreement cannot detect the seriousness of this conflict of interest because it cannot distinguish the meritorious § 1983 claims from the frivolous ones. On the other hand, if the merits of the claim must be evaluated in each case in order to decide whether the agreement should be enforced, the agreement would not serve the goal of saving the litigation costs associated with a trial of the claim itself. The efficiency argument on behalf of enforcing a release-dismissal agreement thus requires inattention to conflicts of interest in precisely those circumstances in which the agreement to be enforced is most likely to have been exacted by a prosecutor serving the interests of more than one constituency.

At bottom, the Court's holding in this case seems to rest on concerns related to the potential witness, Mary Deary.[18] As

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[17] As the Court of Appeals for the Ninth Circuit has observed:

"It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case." *MacDonald* v. *Musick*, 425 F. 2d, at 375.

[18] Despite a good deal of unfortunate language in its opinion, in the final analysis the Court merely rejects a *per se* rule invalidating all release-dismissal agreements and holds that this particular agreement is enforceable. See *ante*, at 397; see also JUSTICE O'CONNOR's opinion, *ante*, at 399 (concurring in part and in judgment). If the interest in protecting the potential witness were not present, presumably the author of the Court's

is true with the prosecutor's concerns for police liability, there is a potential conflict between the public interest represented by the prosecutor and the private interests of a recalcitrant witness. As a general matter there is no reason to fashion a rule that either requires or permits a prosecutor always to defer to the interests of a witness. The prosecutor's law enforcement responsibilities will sometimes diverge from those interests; there will be cases in which the prosecutor has a plain duty to obtain critical testimony despite the desire of the witness to remain anonymous or to avoid a courtroom confrontation with an offender. There may be other cases in which a witness has given false or exaggerated testimony for malicious reasons. It would plainly be unwise for the Court to hold that a release-dismissal agreement is enforceable simply because it affords protection to a potential witness.

Arguably a special rule should be fashioned for witnesses who are victims of sexual assaults. The trauma associated with such an assault leaves scars that may make it especially difficult for a victim to press charges or to testify publicly about the event. It remains true, however, that uncorroborated, unsworn statements by persons who claim to have been victims of any crime, including such an assault, may be inaccurate, exaggerated, or incomplete—and sometimes even malicious. It is even more clear that hearsay descriptions of statements by such persons may be unreliable. Rather than adopting a general rule that upholds a release-dismissal agreement whenever the criminal charge was based on a statement by the alleged victim of a sexual assault, I believe the Court should insist upon a "close examination" of the facts that purportedly justified the agreement.

Thus, in this case JUSTICE O'CONNOR has suggested that three special facts support the conclusion that the prosecutor was legitimately interested in protecting the witness Deary from "further injury": (1) her "emotional distress"; (2) her

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opinion would adhere to the views he expressed in *Bordenkircher* v. *Hayes*, 434 U. S. 357, 372–373 (1978) (POWELL, J., dissenting).

unwillingness to testify against Rumery; and (3) the necessity of her testimony in the pending sexual assault case against Champy. *Ante*, at 403. Each of these facts merits a brief comment.

The only evidence of Deary's emotional distress in the record is found in Chief Barrett's report of his telephone conversation on the afternoon of May 11, 1983. While he was talking to Deary's daughter he "could hear an intense argument and sobbing in the background"; after he was finally able to talk to Deary herself, he characterized her conversation as "hysterical, distra[u]ght, and terrified." See n. 5, *supra*. It is, of course, reasonable to assume that Deary's emotional distress may have affected her unwillingness to testify against either Champy or Rumery, and thereby influenced the prosecutor's decision to dismiss the witness tampering charge. But the testimony of the prosecutor, who appears only to have talked to her about the sexual assault charge, does not even mention the possibility that she might have to testify in any civil litigation. App. 48.

Deary's unwillingness to testify against Rumery is perfectly obvious.[19] That fact unquestionably supports the prosecutor's decision to dismiss the charge against respondent, but it is not a sufficient reason for exonerating police officers from the consequences of actions that they took when they must have known that Deary was unwilling to testify. For it was the precipitate character of the police decision to make an arrest without first obtaining a written statement from the witness and contrary to the expectations—and presum-

[19] Indeed, that fact must have been obvious to the police before they arrested respondent. For it was Deary's daughter, not Deary herself, who advised the police of Deary's call to respondent on May 11. Since the allegedly incriminating version of that call is based on two police officers' summary of what they had been told by Deary and her daughter—rather than a coherent statement by Deary herself—it is reasonable to assume that Deary was unwilling to provide the police with a statement of her recollection of exactly what was said in her conversation with respondent.

ably the advice—of the prosecutor that created the risk that the victim might have to testify in open court.[20]

The need for Deary's testimony in the pending sexual assault case against Champy simply cannot justify denying this respondent a remedy for a violation of his Fourth Amendment rights. Presumably, if there had been an actual trial of the pending charge against Champy,[21] that trial would have concluded long before Deary would have been required to testify in any § 1983 litigation.

It may well be true that a full development of all the relevant facts would provide a legitimate justification for enforcing the release-dismissal agreement. In my opinion, however, the burden of developing those facts rested on the defendants in the § 1983 litigation, and that burden has not been met by mere conjecture and speculation concerning the emotional distress of one reluctant witness.

III

Because this is the first case of this kind that the Court has reviewed, I am hesitant to adopt an absolute rule invalidating all such agreements.[22] I am, however, persuaded that the

[20] Moreover, it is by no means apparent that testimony in a § 1983 action arising out of Rumery's telephone conversations with Deary would require any inquiry about the facts of the underlying assault or about the victim's relationship with Champy, the alleged assailant.

[21] Champy pleaded guilty to a lesser included offense and the felony charge against him was dismissed without a trial.

[22] It seems likely, however, that the costs of having courts determine the validity of release-dismissal agreements will outweigh the benefits that most agreements can be expected to provide. A court may enforce such an agreement only after a careful inquiry into the circumstances under which the plaintiff signed the agreement and into the legitimacy of the prosecutor's objective in entering into the agreement. See *ante*, at 397–398; *ante*, at 399, 401–402 (O'CONNOR, J., concurring in part and in judgment). This inquiry will occupy a significant amount of the court's and the parties' time, and will subject prosecutorial decisionmaking to judicial review. But the only benefit most of these agreements will provide is another line of defense for prosecutors and police in § 1983 actions. This extra protection is unnecessary because prosecutors already enjoy absolute immunity, see *supra*, at

federal policies reflected in the enactment and enforcement of § 1983 mandate a strong presumption against the enforceability of such agreements and that the presumption is not overcome in this case by the facts or by any of the policy concerns discussed by the plurality.[23] The very existence of the statute identifies the important federal interests in providing a remedy for the violation of constitutional rights and in having

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412, and because police have been afforded qualified immunity, see *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). Thus, the vast majority of "marginal or frivolous" § 1983 suits can be dismissed under existing standards with little more burden on the defendants than is entailed in defending a release-dismissal agreement. Moreover, there is an oddly suspect quality to this extra protection; the agreement is one that a public official signs, presumably in good faith, but that a court must conclude is invalid unless that official proves otherwise. *Ante*, at 399 (O'CONNOR, J., concurring in part and in judgment). In most cases, if social and judicial resources are to be expended at all, they would seem better spent on an evaluation of the merits of the § 1983 claim rather than on a detour into the enforceability of a release-dismissal agreement.

[23] The Courts of Appeals which have found agreements not to sue void as against public policy demonstrate, in my view, much more sensitivity to the possibility of prosecutorial abuse than does the Court's opinion today. As the Seventh Circuit has held:

"[W]e think that the release is void as against public policy. . . . As well stated in Dixon v. District of Columbia, 129 U. S. App. D. C. 341, 394 F. 2d 966, 968–969 (1968), a case where the arrestee violated his 'tacit' agreement not to sue and the prosecutor retaliated by filing the traffic charges, which had been held in abeyance pursuant to the tacit agreement:

" 'The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.

. . . . . .

" 'The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society. And they tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint. The danger of concocted charges is particularly great because complaints against the police usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.' " *Boyd* v. *Adams*, 513 F. 2d, at 88–89.

the merits of such claims resolved openly by an impartial adjudicator rather than *sub silentio* by a prosecutor whose primary objective in entering release-dismissal agreements is definitely not to ensure that all meritorious § 1983 claims prevail. The interest in vindication of constitutional violations unquestionably outweighs the interest in avoiding the expense and inconvenience of defending unmeritorious claims. Paradoxically, the plurality seems more sensitive to that burden than to the cost to the public and the individual of denying relief in meritorious cases. In short, the plurality's decision seems to rest on the unstated premise that § 1983 litigation imposes a net burden on society. If that were a correct assessment of the statute, it should be repealed. Unless that is done, however, we should respect the congressional decision to attach greater importance to the benefits associated with access to a federal remedy than to the burdens of defending these cases.[24]

The plurality also suggests that these agreements must be enforced in order to give proper respect to the prosecutor's exercise of discretion. I must confess that I do not understand this suggestion.[25] The prosecutor is adequately pro-

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[24] JUSTICE O'CONNOR suggests that these agreements might serve a legitimate purpose when the charges dismissed are misdemeanors rather than felonies. "Sparing the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement." *Ante*, at 399–400 (concurring in part and in judgment). Implicit in this reasoning, I think, is the assumption that the court has independently determined that the arrest was proper. Otherwise, a valid § 1983 claim could be barred under this reasoning because of a factor wholly unrelated to the merits of the claim—the public's lack of interest in prosecuting the misdemeanor charges that were dismissed. These agreements could then be routinely upheld in circumstances where they were improperly employed. For example, one would expect that an officer attempting to cover up an illegal arrest would find it easier to trump up misdemeanor charges (such as resisting arrest) than felony charges.

[25] Particularly, I do not understand the relevance of the statistics in footnote 6, *ante*, at 396, of the plurality's opinion. In support of the proposi-

tected by the shield of absolute immunity. Moreover, in this case it is police misconduct—not that of the prosecutor—that is challenged in the § 1983 litigation. A holding that the agreement is unenforceable need not rest on an assumption that "prosecutors will seize the opportunity for wrongdoing." *Ante*, at 396. On the contrary, it would merely respect the wholly unrelated premise that undergirds § 1983 itself—that law enforcement officers *sometimes* violate the constitutional rights of individual citizens.[26] The public interest in identifying and redressing such violations is, in my judgment, paramount to the prosecutor's interest in using the threat of a felony indictment and trial as a means of avoiding an independent appraisal of the merits of a § 1983 claim.

Accordingly, although I am not prepared to endorse all of the reasoning of the Court of Appeals, I would affirm its judgment.

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tion that the criminal justice system lacks sufficient resources to litigate every serious criminal charge, the plurality refers to statistics which indicate that most serious criminal charges are not taken through a full criminal trial. The facts that most criminal cases are settled by a guilty plea and that only 12.8 percent go to trial tell us nothing about the number in which the prosecution is completely abandoned, either for no special consideration or in connection with the execution of a release-dismissal agreement. Moreover, the plurality's invocation of prosecutorial discretion not to prosecute reinforces my view that release-dismissal agreements are unnecessary. If the pressure of being unable to bring every serious criminal charge to trial is immense, it will encourage the prosecutor to drop charges in marginal cases.

[26] The purpose of § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961).

Syllabus

IMMIGRATION AND NATURALIZATION SERVICE *v.* CARDOZA-FONSECA

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

No. 85–782. Argued October 7, 1986—Decided March 9, 1987

Section 243(h) of the Immigration and Nationality Act (Act) requires that the Attorney General withhold deportation of an alien who demonstrates that his "life or freedom would be threatened" thereby on account of specified factors. The above-quoted phrase requires a showing that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned. In contrast, § 208(a) of the Act authorizes the Attorney General, in his discretion, to grant asylum to a "refugee," who, under § 101(a)(42)(A) of the Act, is unable or unwilling to return to his home country because of persecution or "a well founded fear" thereof on account of particular factors. At respondent illegal alien's deportation hearing, the Immigration Judge applied the § 243(h) "more likely than not" proof standard to her § 208(a) asylum claim, holding that she had not established "a clear probability of persecution" and therefore was not entitled to relief. The Board of Immigration Appeals (BIA) affirmed, but the Court of Appeals reversed, holding that § 208(a)'s "well-founded fear" standard is more generous than the § 243(h) standard in that it only requires asylum applicants to show either past persecution or "good reason" to fear future persecution. Accordingly, the asylum claim was remanded so that BIA could evaluate it under the proper legal standard.

Held: The § 243(h) "clear probability" standard of proof does not govern asylum applications under § 208(a). Pp. 427–449.

(a) The plain meaning of the statutory language indicates a congressional intent that the proof standards under §§ 208(a) and 243(h) should differ. Section 243(h)'s "would be threatened" standard has no subjective component, but, in fact, requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation. In contrast, § 208(a)'s reference to "fear" makes the asylum eligibility determination turn to some extent on the alien's subjective mental state, and the fact that the fear must be "well founded" does not transform the standard into a "more likely than not" one. Moreover, the different emphasis of the two standards is highlighted by the fact that, although Congress simultaneously drafted § 208(a)'s new standard and amended § 243(h), it left § 243(h)'s old standard intact. Pp. 430–432.

(b) The legislative history demonstrates the congressional intent that different standards apply under §§ 208(a) and 243(h). Pp. 432–443.

(c) The argument of the Immigration and Naturalization Service (INS) that it is anomalous for § 208(a) to have a less stringent eligibility standard than § 243(h) since § 208(a) affords greater benefits than § 243(h) fails because it does not account for the fact that an alien who satisfies the § 208(a) standard must still face a discretionary asylum decision by the Attorney General, while an alien satisfying § 243(h)'s stricter standard is automatically entitled to withholding of deportation. Pp. 443–445.

(d) The INS's argument that substantial deference should be accorded BIA's position that the "well-founded fear" and "clear probability" standards are equivalent is unpersuasive, since the narrow legal question of identicality is a pure question of statutory construction within the traditional purview of the courts, and is not a question of case-by-case interpretation of the type traditionally left to administrative agencies. Pp. 445–448.

767 F. 2d 1448, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 450. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 452. POWELL, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE, J., joined, *post*, p. 455.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Kuhl*, *Bruce N. Kuhlik*, and *David V. Bernal*.

Dana Marks Keener argued the cause for respondent. With her on the brief was *Bill Ong Hing*.*

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*Briefs of *amici curiae* urging affirmance were filed for the United Nations High Commissioner for Refugees by *Ralph G. Steinhardt;* for the American Civil Liberties Union et al. by *Carol Leslie Wolchok*, *Burt Neuborne*, *Lucas Guttentag*, *Jack Novik*, and *Robert N. Weiner;* for the American Immigration Lawyers Association by *Ira J. Kurzban;* for the International Human Rights Law Group et al. by *E. Edward Bruce;* and for the Lawyers Committee for Human Rights et al. by *Richard F. Ziegler*, *Arthur C. Helton*, *Samuel Rabinove*, *Richard T. Foltin*, *Ruti G. Teitel*, *Steven M. Freeman*, and *Richard J. Rubin*.

JUSTICE STEVENS delivered the opinion of the Court.

Since 1980, the Immigration and Nationality Act has provided two methods through which an otherwise deportable alien who claims that he will be persecuted if deported can seek relief. Section 243(h) of the Act, 8 U. S. C. § 1253(h), requires the Attorney General to withhold deportation of an alien who demonstrates that his "life or freedom would be threatened" on account of one of the listed factors if he is deported. In *INS* v. *Stevic*, 467 U. S. 407 (1984), we held that to qualify for this entitlement to withholding of deportation, an alien must demonstrate that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned. *Id.*, at 429–430. The Refugee Act of 1980, 94 Stat. 102, also established a second type of broader relief. Section 208(a) of the Act, 8 U. S. C. § 1158(a), authorizes the Attorney General, in his discretion, to grant asylum to an alien who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." § 101(a)(42), 8 U. S. C. § 1101(a)(42).

In *Stevic*, we rejected an alien's contention that the § 208(a) "well-founded fear" standard governs applications for withholding of deportation under § 243(h).[1] Similarly, today we reject the Government's contention that the § 243(h) standard, which requires an alien to show that he is more likely than not to be subject to persecution, governs applications for asylum under § 208(a). Congress used different, broader language to define the term "refugee" as used in § 208(a) than it used to describe the class of aliens who have

[1] We explained that the Court of Appeals' decision had rested "on the mistaken premise that every alien who qualifies as a 'refugee' under the statutory definition is also entitled to a withholding of deportation under § 243(h). We find no support for this conclusion in either the language of § 243(h), the structure of the amended Act, or the legislative history." *INS* v. *Stevic*, 467 U. S., at 428.

a right to withholding of deportation under § 243(h). The Act's establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980. In addition, the legislative history of the 1980 Act makes it perfectly clear that Congress did not intend the class of aliens who qualify as refugees to be coextensive with the class who qualify for § 243(h) relief.

I

Respondent is a 38-year-old Nicaraguan citizen who entered the United States in 1979 as a visitor. After she remained in the United States longer than permitted, and failed to take advantage of the Immigration and Naturalization Service's (INS) offer of voluntary departure, the INS commenced deportation proceedings against her. Respondent conceded that she was in the country illegally, but requested withholding of deportation pursuant to § 243(h) and asylum as a refugee pursuant to § 208(a).

To support her request under § 243(h), respondent attempted to show that if she were returned to Nicaragua her "life or freedom would be threatened" on account of her political views; to support her request under § 208(a), she attempted to show that she had a "well-founded fear of persecution" upon her return. The evidence supporting both claims related primarily to the activities of respondent's brother who had been tortured and imprisoned because of his political activities in Nicaragua. Both respondent and her brother testified that they believed the Sandinistas knew that the two of them had fled Nicaragua together and that even though she had not been active politically herself, she would be interrogated about her brother's whereabouts and

activities. Respondent also testified that because of her brother's status, her own political opposition to the Sandinistas would be brought to that government's attention. Based on these facts, respondent claimed that she would be tortured if forced to return.

The Immigration Judge applied the same standard in evaluating respondent's claim for withholding of deportation under § 243(h) as he did in evaluating her application for asylum under § 208(a). He found that she had not established "a clear probability of persecution" and therefore was not entitled to either form of relief. App. to Pet. for Cert. 27a. On appeal, the Board of Immigration Appeals (BIA) agreed that respondent had "failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act." *Id.*, at 21a.

In the Court of Appeals for the Ninth Circuit, respondent did not challenge the BIA's decision that she was not entitled to withholding of deportation under § 243(h), but argued that she was eligible for consideration for asylum under § 208(a), and contended that the Immigration Judge and BIA erred in applying the "more likely than not" standard of proof from § 243(h) to her § 208(a) asylum claim. Instead, she asserted, they should have applied the "well-founded fear" standard, which she considered to be more generous. The court agreed. Relying on both the text and the structure of the Act, the court held that the "well-founded fear" standard which governs asylum proceedings is different, and in fact more generous, than the "clear probability" standard which governs withholding of deportation proceedings. 767 F. 2d 1448, 1452–1453 (1985). Agreeing with the Court of Appeals for the Seventh Circuit, the court interpreted the standard to require asylum applicants to present "'specific facts' through objective evidence to prove either past persecution or 'good reason' to fear future persecution." *Id.*, at 1453 (citing *Carvajal-Munoz* v. *INS*, 743 F. 2d 562, 574 (CA7 1984)).

The court remanded respondent's asylum claim to the BIA to evaluate under the proper legal standard. We granted certiorari to resolve a Circuit conflict on this important question.[2] 475 U. S. 1009 (1986).[3]

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[2] Compare *Carcamo-Flores* v. *INS*, 805 F. 2d 60 (CA2 1986); *Guevara-Flores* v. *INS*, 786 F. 2d 1242 (CA5 1986), cert. pending, No. 86–388; *Cardoza-Fonseca* v. *INS*, 767 F. 2d 1448 (CA9 1985) (case below); *Carvajal-Munoz* v. *INS*, 743 F. 2d 562, 574 (CA7 1984); *Youkhanna* v. *INS*, 749 F. 2d 360, 362 (CA6 1984); with *Sankar* v. *INS*, 757 F. 2d 532, 533 (CA3 1985).

The Third Circuit is the only Circuit to decide since our decision in *INS* v. *Stevic*, 467 U. S. 407 (1984), that the standards remain identical. It reached this conclusion, however, not because post-*Stevic* analysis compelled it, but because it considered itself bound by its pre-*Stevic* decision in *Rejaie* v. *INS*, 691 F. 2d 139 (1982). See *Sankar*, *supra*, at 533.

[3] We have considered whether this case has been rendered moot by the recent enactment of the Immigration Reform and Control Act of 1986. Pub. L. No. 99–603, 100 Stat. 3359. While nothing in that Act affects the statutory provisions related to asylum or withholding of deportation, Title II of the 1986 Act creates a mechanism by which certain aliens may obtain legalization of their status. Section 201(a) of the 1986 Act establishes that, with certain exceptions, an alien who has resided continuously in the United States in an unlawful status since before January 1, 1982, is entitled to have his or her status adjusted to that of an alien lawfully admitted for temporary residence. An alien who obtains this adjustment of status under the new Act is then eligible for a second adjustment to the status of permanent resident after a waiting period of 18 months. See § 245A(a). An alien who obtains permanent residence status through this route is not, however, eligible for all benefits usually available to permanent residents. For example, aliens who obtain permanent residence through this program are not eligible for certain public welfare benefits for five years after the grant of the new status. See § 245A(H).

The record indicates that respondent may well be eligible for eventual adjustment of status if she makes a timely application after the Attorney General establishes the procedures for administering Title II. It would therefore appear that respondent might become a permanent resident by invoking the new procedures even if she is unsuccessful in her pending request for asylum. Nonetheless the possibility of this relief does not render her request for asylum moot. First, the legalization provisions of the 1986 Act are not self-executing, and the procedures for administering the new Act are not yet in place. Even if the benefits were identical, therefore,

II

The Refugee Act of 1980 established a new statutory procedure for granting asylum to refugees.[4] The 1980 Act added a new § 208(a) to the Immigration and Nationality Act of 1952, reading as follows:

> "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." 94 Stat. 105, 8 U. S. C. § 1158(a).

Under this section, eligibility for asylum depends entirely on the Attorney General's determination that an alien is a

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there is no way of knowing at this time whether respondent will be able to satisfy whatever burden is placed upon her to demonstrate eligibility. Cf. *INS* v. *Chadha*, 462 U. S. 919, 937 (1983). Second, respondent might be able to obtain permanent residence through the asylum procedure sooner than through the legalization program; if she satisfies certain conditions, she may become eligible for adjustment of status to that of permanent resident 12 months after a grant of asylum. See 8 CFR §§ 209.1–209.2 (1986). Under Title II of the new Act, by contrast, there is an 18-month waiting period. In light of these factors, we are persuaded that the controversy is not moot.

Nor do we believe that the new Act makes it appropriate to exercise our discretion to dismiss the writ of certiorari as improvidently granted. The question presented in this case will arise, and has arisen, in hosts of other asylum proceedings brought by aliens who arrived in the United States after January 1, 1982, or who are seeking entry as refugees from other countries. The importance of the legal issue makes it appropriate for us to address the merits now.

[4] Prior to the amendments, asylum for aliens who were within the United States had been governed by regulations promulgated by the INS, pursuant to the Attorney General's broad parole authority. See n. 14, *infra*. Asylum for applicants who were not within the United States was generally governed by the now-repealed § 203(a)(7) of the Act, 8 U. S. C. § 1153(a)(7) (1976 ed.). See *infra*, at 433.

"refugee," as that term is defined in § 101(a)(42), which was also added to the Act in 1980. That section provides:

> "The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." 94 Stat. 102, 8 U. S. C. § 1101(a)(42).

Thus, the "persecution or well-founded fear of persecution" standard governs the Attorney General's determination whether an alien is eligible for asylum.[5]

In addition to establishing a statutory asylum process, the 1980 Act amended the withholding of deportation provision,[6]

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[5] It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that "the alien *may* be granted asylum *in the discretion of the Attorney General*." § 208(a) (emphasis added). See *Stevic*, 467 U. S., at 423, n. 18; see also *infra*, at 441–444.

[6] Asylum and withholding of deportation are two distinct forms of relief. First, as we have mentioned, there is no entitlement to asylum; it is only granted to eligible refugees pursuant to the Attorney General's discretion. Once granted, however, asylum affords broader benefits. As the BIA explained in the context of an applicant from Afghanistan who was granted § 243(h) relief but was denied asylum:

"Section 243(h) relief is 'country specific' and accordingly, the applicant here would be presently protected from deportation to Afghanistan pursuant to section 243(h). But that section would not prevent his exclusion and deportation to Pakistan or any other hospitable country under section 237(a) if that country will accept him. In contrast, asylum is a greater form of relief. When granted asylum the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U. S. C. 1159, after residing here one year, subject to

§ 243(h). See *Stevic*, 467 U. S., at 421, n. 15. Prior to 1968, the Attorney General had discretion whether to grant withholding of deportation to aliens under § 243(h). In 1968, however, the United States agreed to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees. See 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); see generally *Stevic*, *supra*, at 416–417. Article 33.1 of the Convention, 189 U.N.T.S. 150, 176 (1954), reprinted in 19 U.S.T. 6259, 6276, which is the counterpart of § 243(h) of our statute, imposed a mandatory duty on contracting States not to return an alien to a country where his "life or freedom would be threatened" on account of one of the enumerated reasons.[7] See *infra*, at 441. Thus, although § 243(h) itself did not constrain the Attorney General's discretion after 1968, presumably he honored the dictates of the United Nations Convention.[8] In any event, the 1980 Act removed the Attorney General's discretion in § 243(h) proceedings.[9]

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numerical limitations and the applicable regulations." *Matter of Salim*, 18 I. & N. Dec. 311, 315 (1982).

See also *Matter of Lam*, 18 I. & N. Dec. 15, 18 (BIA 1981).

[7] Article 33.1 of the Convention provides: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 189 U.N.T.S. 150, 176 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968).

[8] While the Protocol constrained the Attorney General with respect to § 243(h) between 1968 and 1980, the Protocol does not *require* the granting of asylum to anyone, and hence does not subject the Attorney General to a similar constraint with respect to his discretion under § 208(a). See *infra*, at 440–441.

[9] As amended, the new § 243(h) provides: "The Attorney General *shall not* deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particu-

In *Stevic* we considered it significant that in enacting the 1980 Act Congress did not amend the standard of eligibility for relief under § 243(h). While the terms "refugee" and hence "well-founded fear" were made an integral part of the § 208(a) procedure, they continued to play no part in § 243(h). Thus we held that the prior consistent construction of § 243(h) that required an applicant for withholding of deportation to demonstrate a "clear probability of persecution" upon deportation remained in force. Of course, this reasoning, based in large part on the plain language of § 243(h), is of no avail here since § 208(a) expressly provides that the "well-founded fear" standard governs eligibility for asylum.

The Government argues, however, that even though the "well-founded fear" standard is applicable, there is no difference between it and the "would be threatened" test of § 243(h). It asks us to hold that the only way an applicant can demonstrate a "well-founded fear of persecution" is to prove a "clear probability of persecution." The statutory language does not lend itself to this reading.

To begin with, the language Congress used to describe the two standards conveys very different meanings. The "would be threatened" language of § 243(h) has no subjective component, but instead requires the alien to establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation.[10] See *Stevic*, *supra*. In contrast, the reference to "fear" in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the

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lar social group, or political opinion." 8 U. S. C. § 1253(h)(1) (emphasis added).

[10] "The section literally provides for withholding of deportation only if the alien's life or freedom 'would' be threatened in the country to which he would be deported; it does not require withholding if the alien 'might' or 'could' be subject to persecution." *Stevic*, 467 U. S., at 422.

lien.[11] "The linguistic difference between the words 'well-ounded fear' and 'clear probability' may be as striking as that etween a subjective and an objective frame of reference. . . We simply cannot conclude that the standards are identi-al." *Guevara-Flores* v. *INS*, 786 F. 2d 1242, 1250 (CA5 1986), cert. pending, No. 86–388; see also *Carcamo-Flores* v. *INS*, 805 F. 2d 60, 64 (CA2 1986); 767 F. 2d, at 1452 (case below).

That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As one leading authority has pointed out:

> "Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return." 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966).

This ordinary and obvious meaning of the phrase is not to be lightly discounted. See *Russello* v. *United States*, 464 U. S. 16, 21 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 198–199 (1976). With regard to this very statutory scheme, we have considered ourselves bound to "'assume "that the legislative purpose is expressed by the ordinary meaning of the words used."'" *INS* v. *Phinpathya*, 464 U. S. 183, 189 (1984) (quoting *American Tobacco Co.* v. *Patterson*, 456

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[11] The BIA agrees that the term "fear," as used in this statute, refers to "a subjective condition, an emotion characterized by the anticipation or awareness of danger." *Matter of Acosta*, Interim Decision No. 2986, p. 14 (Mar. 1, 1985) (citing Webster's Third New International Dictionary 831 (16th ed. 1971)).

U. S. 63, 68 (1982), in turn quoting *Richards* v. *United States*, 369 U. S. 1, 9 (1962)).

The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted § 208(a) and amended § 243(h). In doing so, Congress chose to maintain the old standard in § 243(h), but to incorporate a different standard in § 208(a). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, *supra*, at 23 (quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972)). The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term "refugee," certainly indicate that Congress intended the two standards to differ.

III

The message conveyed by the plain language of the Act is confirmed by an examination of its history.[12] Three aspects of that history are particularly compelling: The pre-1980 experience under § 203(a)(7), the only prior statute dealing with asylum; the abundant evidence of an intent to conform the definition of "refugee" and our asylum law to the United Nations Protocol to which the United States has been bound

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[12] As we have explained, the plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is "clearly expressed legislative intention" contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses. See *United States* v. *James*, 478 U. S. 597, 606 (1986); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). In this case, far from causing us to question the conclusion that flows from the statutory language, the legislative history adds compelling support to our holding that Congress never intended to restrict eligibility for asylum to aliens who can satisfy § 243(h)'s strict, objective standard.

since 1968; and the fact that Congress declined to enact the Senate version of the bill that would have made a refugee ineligible for asylum unless "his deportation or return would be prohibited by § 243(h)."

The Practice Under § 203(a)(7).

The statutory definition of the term "refugee" contained in § 101(a)(42) applies to two asylum provisions within the Immigration and Nationality Act.[13] Section 207, 8 U. S. C. § 1157, governs the admission of refugees who seek admission from foreign countries. Section 208, 8 U. S. C. § 1158, sets out the process by which refugees currently in the United States may be granted asylum. Prior to the 1980 amendments there was no statutory basis for granting asylum to aliens who applied from within the United States.[14] Asylum for aliens applying for admission from foreign countries had, however, been the subject of a previous statutory provision, and Congress' intent with respect to the changes that it sought to create in that statute are instructive in discerning the meaning of the term "well-founded fear."

Section § 203(a)(7) of the pre-1980 statute authorized the Attorney General to permit "conditional entry" to a certain number of refugees fleeing from Communist-dominated areas or the Middle East "because of persecution or fear of persecution on account of race, religion, or political opinion." 79

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[13] The definition also applies to § 209, 8 U. S. C. § 1159, which governs the adjustment of status of refugees after they have been granted asylum.

[14] Such a procedure had been authorized by regulation since 1974, see 8 CFR pt. 108 (1976), but it was administered by INS District Directors rather than the BIA. As we noted in *Stevic*, these "regulations did not explicitly adopt a standard for the exercise of discretion on the application, but did provide that a denial of an asylum application 'shall not preclude the alien, in a subsequent expulsion hearing, from applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees.' 8 CFR § 108.2 (1976)." 467 U. S., at 420, n. 13. In 1979, the regulations were amended to confer jurisdiction over asylum requests on the BIA for the first time. *Ibid.*

Stat. 913, 8 U. S. C. § 1153(a)(7) (1976 ed.). The standard that was applied to aliens seeking admission pursuant to § 203(a)(7) was unquestionably more lenient than the "clear probability" standard applied in § 243(h) proceedings. In *Matter of Tan*, 12 I. & N. Dec. 564, 569–570 (1967), for example, the BIA "found no support" for the argument that "an alien deportee is required to do no more than meet the standards applied under section 203(a)(7) of the Act when seeking relief under section 243(h)." Similarly, in *Matter of Adamska*, 12 I. & N. Dec. 201, 202 (1967), the Board held that an alien's inability to satisfy § 243(h) was not determinative of her eligibility under the "substantially broader" standards of § 203(a)(7). One of the differences the Board highlighted between the statutes was that § 243(h) requires a showing that the applicant "would be" subject to persecution, while § 203(a)(7) only required a showing that the applicant was unwilling to return "because of *persecution or fear of persecution.*" 12 I. & N., at 202 (emphasis in original). In sum, it was repeatedly recognized that the standards were significantly different.[15]

At first glance one might conclude that this wide practice under the old § 203(a)(7), which spoke of "fear of persecution," is not probative of the meaning of the term "well-founded fear of persecution" which Congress adopted in 1980. Analysis of the legislative history, however, demonstrates that Congress added the "well-founded" language only because that was the language incorporated by the United Nations Protocol to which Congress sought to conform. See *infra*, at 436–437. Congress was told that the extant asylum proce-

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[15] See also *Matter of Janus and Janek*, 12 I. & N. Dec. 866, 876 (BIA 1968). On the District Director level, where § 203(a)(7) claims were generally processed, see n. 14, *supra*, this distinction was also recognized. In *Matter of Ugricic*, 14 I. & N. Dec. 384 (1972), a District Director articulated the test under § 203(a)(7) as whether the applicant could prove that "he was persecuted or had good reason to fear persecution." *Id.*, at 385–386.

dure for refugees outside of the United States was acceptable under the Protocol, except for the fact that it made various unacceptable geographic and political distinctions.[16] The legislative history indicates that Congress in no way wished to modify the standard that had been used under § 203(a)(7).[17]

[16] See S. Rep. No. 96–256, p. 9 (1979) (hereafter S. Rep.) (substantive standard for asylum is not changed); H. R. Rep. No. 96–608, p. 9 (1979) (hereafter H. R. Rep.) (discussing geographic limitations); Hearings before the House Subcommittee on International Operations of the Committee on Foreign Affairs on H. R. 2816, 96th Cong., 1st Sess., 72 (1979) (remarks of David Martin).

[17] The INS argues that Congress intended to perpetuate the standard being used in the informal parole proceedings under the regulations, see n. 14, *supra*, not the asylum procedure under § 203(a)(7). Until 1979 the regulations provided no standard, but they were amended in 1979 to provide that the applicant has the "burden of satisfying the immigration judge that he would be subject to persecution." 8 CFR § 108.3(a) (1980). This standard was identical to the one that was set forth in the regulations for the treatment of applications for withholding of deportation. See 8 CFR § 242.17(c) (1980).

The argument that Congress intended to adhere to the standard used in the informal parole proceedings cannot be squared with Congress' use of an entirely different formulation of the standard for defining "refugee"—one much closer to § 203(a)(7), than to § 243(h) (the statute which was the focus of the standard developed in the 1980 regulations). Moreover, to the extent that Congress was ambiguous as to which practice it sought to incorporate, it is far more reasonable to conclude that it sought to continue the practice under § 203(a)(7), a statutory provision, than to adhere to the informal parole practices of the Attorney General, a matter in which Congress had no involvement.

The Government relies on the following passage from the Senate Report to support its contention that Congress sought to incorporate the standard from the parole proceedings—not from § 203(a)(7):

"[T]he bill establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States. The substantive standard is not changed." S. Rep., at 9.

The bill that the Senate Committee was discussing indeed made no change in the standards to be applied to applications for asylum from aliens within the United States; the Senate version explicitly incorporated the same standard as used in § 243(h). See *infra*, at 441–442. But the Senate ver-

Adoption of the INS's argument that the term "well-founded fear" requires a showing of clear probability of persecution would clearly do violence to Congress' intent that the standard for admission under § 207 be no different than the one previously applied under § 203(a)(7).[18]

The United Nations Protocol.

If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States

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sion was rejected by Congress, and the well-founded fear standard that was adopted mirrored § 203(a)(7), not § 243(h).

JUSTICE POWELL's claim that the House Report also sought to incorporate the informal asylum standard is unfounded. *Post*, at 462–463. As the passage he quotes and the context plainly indicate, the House Report referred to "means of entry"—an issue dealt with under § 203(a)(7), not the asylum regulations. See H. R. Rep., at 10. The Committee's reference to the Attorney General's asylum procedures, seven pages later in the text, in a discussion labeled "Asylum," and not even dealing with the definition of "well-founded fear," see *id.*, at 17, certainly does nothing to support JUSTICE POWELL's conclusion.

[18] Although this evidence concerns application of the term "refugee" to § 207, not § 208, the term is defined in § 101(a)(42), and obviously can have only one meaning. JUSTICE POWELL suggests that the definition of "well-founded fear" be interpreted as incorporating the standard from the asylum regulations, rather than the standard from § 203(a)(7), because "[i]t is more natural to speak of 'preserving' an interpretation that had governed the *same* form of relief than one that had applied to a *different* form of relief," *post*, at 462 (emphasis added). Since the definition in § 101(a)(42) applies to all asylum relief—that corresponding to the old § 203(a)(7) as well as that corresponding to the old Attorney General regulations—it is difficult to understand how JUSTICE POWELL reasons that it is likely that Congress preserved the "*same* form of relief" (emphasis added). The question is: the "same" as which? Our answer, based on Congress' choice of language and the legislative history, is that Congress sought to incorporate the "same" standard as that used in § 203(a)(7).

acceded in 1968.[19] Indeed, the definition of "refugee" that Congress adopted, see *supra*, at 428, is virtually identical to the one prescribed by Article 1(2) of the Convention which defines a "refugee" as an individual who

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

Compare 19 U.S.T. 6225 with 19 U.S.T. 6261. Not only did Congress adopt the Protocol's standard in the statute, but there were also many statements indicating Congress' intent that the new statutory definition of "refugee" be interpreted in conformance with the Protocol's definition. The Conference Committee Report, for example, stated that the definition was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." S. Rep. No. 96–590, p. 20 (1980); see also H. R. Rep., at 9. It is thus appropriate to consider what the phrase "well-founded fear" means with relation to the Protocol.

The origin of the Protocol's definition of "refugee" is found in the 1946 Constitution of the International Refugee Organization (IRO). See 62 Stat. 3037. The IRO defined a "refugee" as a person who had a "valid objection" to returning to his country of nationality, and specified that "fear, based on reasonable grounds of persecution because of race, religion, nationality, or political opinions . . ." constituted a valid objection. See IRO Constitution, Annex 1, Pt. 1, § C1(a)(i). The term was then incorporated in the United Nations Con-

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[19] See H. R. Conf. Rep. No. 96–781, p. 19 (1980); H. R. Rep., at 9; S. Rep., at 4.

vention Relating to the Status of Refugees,[20] 189 U.N.T.S. 150 (July 28, 1951). The Committee that drafted the provision explained that "[t]he expression 'well-founded fear of being the victim of persecution . . .' means that a person has either been actually a victim of persecution or can show good reason why he fears persecution." U. N. Rep., at 39. The 1967 Protocol incorporated the "well-founded fear" test, without modification. The standard, as it has been consistently understood by those who drafted it, as well as those drafting the documents that adopted it, certainly does not require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a "refugee."[21]

In interpreting the Protocol's definition of "refugee" we are further guided by the analysis set forth in the Office of the

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[20] In the Displaced Persons Act of 1948, 62 Stat. 1009, §§ 2(a), (d), Congress adopted the IRO definition of the term "refugee" and thus used the "fear of persecution" standard. This standard was retained in the Refugee Relief Act of 1953, 67 Stat. 400 § 2(a), as well as in the Refugee Escapee Act of 1957, 71 Stat. 643 § 15(c)(1). In 1965, when Congress enacted § 203(a)(7) of the Act, it again used the "fear of persecution" standard.

The interpretation afforded to the IRO definition is important in understanding the United Nations' definition since the Committee drafting the United Nations' definition made it clear that it sought to "assure that the new consolidated convention should afford at least as much protection to refugees as had been provided by previous agreements." United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 37 (Feb. 17, 1950) (U. N. Doc. E/1618, E/AC.32/5 (hereafter U. N. Rep.)). In its Manual for Eligibility Officers, the IRO had stated:

"Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to his religious or political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution." International Refugee Organization, Manual for Eligibility Officers No. 175, ch. IV, Annex 1, Pt. 1, § C19, p. 24 (undated, circulated in 1950).

[21] Although the United States has never been party to the 1951 Convention, it is a party to the Protocol, which incorporates the Convention's definition in relevant part. See 19 U.S.T. 6225, T.I.A.S. No. 6577 (1968).

United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979).[22] The Handbook explains that "[i]n general, the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there." *Id.*, at Ch. II B(2)(a) § 42; see also *id.*, §§ 37–41.

The High Commissioner's analysis of the United Nations' standard is consistent with our own examination of the origins of the Protocol's definition,[23] as well as the conclusions of

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[22] We do not suggest, of course, that the explanation in the U. N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a). Indeed, the Handbook itself disclaims such force, explaining that "the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself." Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 1 (ii) (Geneva, 1979).

Nonetheless, the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes. See *McMullen* v. *INS*, 658 F. 2d 1312, 1319 (CA9 1981); *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982); *Matter of Rodriguez-Palma*, 17 I. & N. Dec. 465 (BIA 1980).

[23] The Board's decision in *Matter of Dunar*, 14 I. & N. Dec. 310 (1973), is not particularly probative of what the Protocol means and how it interacts with the provisions of the 1980 Act. In *Dunar*, the Board was faced with the question whether the United States' accession to the Protocol modified the standard of proof to be applied under § 243(h). The Board, after elaborating on the principle that treaties are not lightly to be read as superseding prior Acts of Congress, *id.*, at 313–314, found no evidence that Congress sought to modify the § 243(h) standard, and therefore construed the provisions as not inherently inconsistent. Even so, the Board recognized some tension between the standards, but was satisfied that they could "be reconciled on a case-by-case consideration as they arise." *Id.*, at 321.

Whether or not the Board was correct in *Dunar*, its holding based on a presumption that the two provisions were consistent says little about how the Protocol should be interpreted absent such a presumption, and given Congress' amendment of the statute to make it conform with the Pro-

many scholars who have studied the matter.[24] There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening. See *supra*, at 431. As we pointed out in *Stevic*, a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." 467 U. S., at 424–425.

In *Stevic*, we dealt with the issue of withholding of deportation, or *nonrefoulement*, under § 243(h). This provision corresponds to Article 33.1 of the Convention.[25] Significantly though, Article 33.1 does not extend this right to everyone who meets the definition of "refugee." Rather, it provides that "[n]o Contracting State shall expel or return ('refouler') a *refugee* in any manner whatsoever to the frontiers or territories *where his life or freedom would be threatened* on account of his race, religion, nationality, membership or a particular social group or political opinion." 19 U.S.T., at 6276, 189 U.N.T.S., at 176 (emphasis added). Thus, Article 33.1 requires that an applicant satisfy two burdens: first, that he or she be a "refugee," *i. e.*, prove at least a "well-

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tocol. See *Carvajal-Munoz*, 743 F. 2d, at 574 (distinguishing pre-1980 "prediction" about the relation of the standards with post-1980 analysis of Congress' actual intent).

[24] See 1 A. Grahl-Madsen, The Status of Refugees in International Law 181 (1966) ("If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded' "); G. Goodwin-Gill, The Refugee in International Law 22–24 (1983) (balance of probability test is inappropriate; more appropriate test is "reasonable chance," "substantial grounds for thinking," or "serious possibility"); see generally Cox, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status, 10 Brooklyn J. Int'l Law 333 (1984).

[25] The 1980 Act made withholding of deportation under § 243(h) mandatory in order to comply with Article 33.1. See *supra*, at 428–429.

founded fear of persecution"; second, that the "refugee" show that his or her life or freedom "would be threatened" if deported. Section 243(h)'s imposition of a "would be threatened" requirement is entirely consistent with the United States' obligations under the Protocol.

Section 208(a), by contrast, is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34. See *Carvajal-Munoz*, 743 F. 2d, at 574, n. 15. That Article provides that the contracting States "shall as far as possible facilitate the assimilation and naturalization of refugees. . . ." Like § 208(a), the provision is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible. Also like § 208(a), an alien must only show that he or she is a "refugee" to establish eligibility for relief. No further showing that he or she "would be" persecuted is required.

Thus, as made binding on the United States through the Protocol, Article 34 provides for a precatory, or discretionary, benefit for the entire class of persons who qualify as "refugees," whereas Article 33.1 provides an entitlement for the subcategory that "would be threatened" with persecution upon their return. This precise distinction between the broad class of refugees and the subcategory entitled to § 243(h) relief is plainly revealed in the 1980 Act. See *Stevic*, 467 U. S., at 428, n. 22.

Congress' Rejection of S. 643.

Both the House bill, H. R. 2816, 96th Cong., 1st Sess. (1979), and the Senate bill, S. 643, 96th Cong., 1st Sess. (1979), provided that an alien must be a "refugee" within the meaning of the Act in order to be eligible for asylum. The two bills differed, however, in that the House bill authorized the Attorney General, in his discretion, to grant asylum to any refugee, whereas the Senate bill imposed the additional

requirement that a refugee could not obtain asylum unless "his deportation or return would be prohibited under section 243(h)."[26] S. Rep., at 26. Although this restriction, if adopted, would have curtailed the Attorney General's discretion to grant asylum to refugees pursuant to § 208(a), it would not have affected the standard used to determine whether an alien is a "refugee." Thus, the inclusion of this prohibition in the Senate bill indicates that the Senate recognized that there is a difference between the "well-founded fear" standard and the clear-probability standard.[27] The enactment of the House bill rather than the Senate bill in turn demonstrates that Congress eventually refused to restrict eligibility for asylum only to aliens meeting the stricter standard. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub*

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[26] Section 207(b)(1) of the Senate bill provided: "The Attorney General shall establish a uniform procedure for an alien physically present in the United States, irrespective of his status, to apply for asylum, and the alien shall be granted asylum if he is a refugee within the meaning of section 101(a)(42)(A) and his deportation or return would be prohibited under section 243(h) of this Act." See S. Rep., at 26.

[27] The 1980 Act was the culmination of a decade of legislative proposals for reform in the refugee laws. See generally Anker & Posner, The Forty Year Crisis: A Legislative History of the Refugee Act of 1980, 19 San Diego L. Rev. 9, 20–64 (1981). On a number of occasions during that period, the Government objected to the "well-founded fear" standard, arguing: "[I]t should be limited by providing that it be a 'well-founded fear in the opinion of the Attorney General.' Failure to add 'in the opinion of the Attorney General' would make it extremely difficult to administer this section since it would be entirely subjective." Western Hemisphere Immigration, Hearings on H. R. 981 before Subcommittee No. 1 of the Committee on the Judiciary, 93d Cong., 1st Sess., 95 (1973) (statement of Hon. Francis Kellogg, Special Assistant to the Secretary of State). See also Anker & Posner, *supra*, at 25; Helton, Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise, 10 Mich. J. L. Ref. 243, 249–252 (1984). In light of this kind of testimony and attention to the issue, it is unrealistic to suggest that Congress did not realize that the "well-founded fear" standard was significantly different from the standard that has continuously been part of § 243(h).

silentio to enact statutory language that it has earlier discarded in favor of other language." *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 392–393 (1980) (Stewart, J., dissenting); cf. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 200 (1974); *Russello* v. *United States*, 464 U. S., at 23.

IV

The INS makes two major arguments to support its contention that we should reverse the Court of Appeals and hold that an applicant can only show a "well-founded fear of persecution" by proving that it is more likely than not that he or she will be persecuted. We reject both of these arguments: the first ignores the structure of the Act; the second misconstrues the federal courts' role in reviewing an agency's statutory construction.

First, the INS repeatedly argues that the structure of the Act dictates a decision in its favor, since it is anomalous for § 208(a), which affords greater benefits than § 243(h), see n. 6, *supra*, to have a less stringent standard of eligibility. This argument sorely fails because it does not take into account the fact that an alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it. An alien satisfying § 243(h)'s stricter standard, in contrast, is automatically entitled to withholding of deportation.[28] In *Matter of Salim*, 18 I. & N. Dec. 311 (1982), for example, the Board held that the alien was eligible for both asylum and withholding of deportation, but granted him the more limited remedy only, exercising its discretion to deny him asylum. See also *Walai* v. *INS*, 552 F. Supp. 998 (SDNY 1982); *Mat-*

[28] There are certain exceptions, not relevant here. See, *e. g.*, § 243(h)(2)(A) (alien himself participated in "the persecution of any person . . ."); § 243(h)(2)(B) (alien was convicted of "serious crime" and "constitutes a danger to the community of the United States").

ter of Shirdel, Interim Decision No. 2958 (BIA Feb. 21, 1984). We do not consider it at all anomalous that out of the entire class of "refugees," those who can show a clear probability of persecution are *entitled* to mandatory suspension of deportation and *eligible* for discretionary asylum, while those who can only show a well-founded fear of persecution are not *entitled* to anything, but are *eligible* for the discretionary relief of asylum.

There is no basis for the INS's assertion that the discretionary/mandatory distinction has no practical significance. Decisions such as *Matter of Salim*, *supra*, and *Matter of Shirdel*, *supra*, clearly demonstrate the practical import of the distinction. Moreover, the 1980 Act amended § 243(h) for the very purpose of changing it from a discretionary to a mandatory provision. See *supra*, at 428–429. Congress surely considered the discretionary/mandatory distinction important then, as it did with respect to the very definition of "refugee" involved here. The House Report provides:

> "The Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group comes within the definition will not guarantee resettlement in the United States." H. R. Rep., at 10.

This vesting of discretion in the Attorney General is quite typical in the immigration area, see, *e. g.*, *INS* v. *Jong Ha Wang*, 450 U. S. 139 (1981). If anything is anomalous, it is that the Government now asks us to restrict its discretion to a narrow class of aliens. Congress has assigned to the Attorney General and his delegates the task of making these hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the At-

torney General to determine which, if any, eligible refugees should be denied asylum.

The INS's second principal argument in support of the proposition that the "well-founded fear" and "clear probability" standard are equivalent is that the BIA so construes the two standards. The INS argues that the BIA's construction of the Refugee Act of 1980 is entitled to substantial deference, even if we conclude that the Court of Appeals' reading of the statutes is more in keeping with Congress' intent.[29] This argument is unpersuasive.

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[29] In view of the INS's heavy reliance on the principle of deference as described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we set forth the relevant text in its entirety:

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

"We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is

The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical.[30] In *Chevron*

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entrusted to administer, and the principle of deference to administrative interpretations

" 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. . . .

" '. . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' *United States* v. *Shimer*, 367 U. S. 374, 382, 383 (1961).

"Accord, *Capital Cities Cable, Inc.* v. *Crisp*, [467 U. S. 691, 699–700 (1984)].

"In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make." *Id.*, at 842–845 (citations and footnotes omitted).

[30] An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. *Watt* v. *Alaska*, 451 U. S. 259, 273 (1981); see also *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976).

U. S. A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we explained:

> "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional

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The BIA has answered the question of the relationship between the objective § 243(h) standard and the fear-based standard of §§ 203(a)(7), 208, and the United Nations Protocol in at least three different ways. During the period between 1965, when § 203(a)(7) was enacted, and 1972, the BIA expressly recognized that § 203(a)(7) and § 243(h) prescribed different standards. See *supra*, at 433–434. Moreover, although the BIA decided in 1973 that the two standards were not irreconcilably different, see *Matter of Dunar*, 14 I. & N. Dec. 310 (1973), as of 1981 the INS was still instructing its officials to apply a "good reason" test to requests for asylum from aliens not within the United States. See Dept. of Justice, INS Operating Instructions Regulations TM 101, § 208.4, p. 766.9 (Nov. 11, 1981) (explaining that "well-founded fear" is satisfied if applicant "can show good reason why he/she fears persecution"). In 1984, when this case was decided by the BIA, it adhered to the view that the INS now espouses—complete identity of the standards. In 1985, however, the BIA decided to reevaluate its position and issued a comprehensive opinion to explain its latest understanding of the "well-founded fear" standard. *Matter of Acosta*, Interim Decision No. 2986 (Mar. 1, 1985).

In *Acosta*, the BIA noted a number of similarities between the two standards and concluded that in practical application they are "comparable" or "essentially comparable," and that the differences between them are not "meaningful," but the agency never stated that they are identical, equivalent, or interchangeable. On the contrary, the *Acosta* opinion itself establishes that the two standards differ. In describing the objective component of the asylum standard, the BIA concluded that the alien is not required to establish the likelihood of persecution to any "particular degree of certainty." *Id.*, at 22. There must be a "real chance" that the alien will become a victim of persecution, *ibid.*, but it is not necessary to show "that persecution 'is more likely than not' to occur." *Id.*, at 25. The *Acosta* opinion was written after we had decided in *Stevic* that the § 243(h) standard "requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution," 467 U. S., at 429–430. The decision in *Acosta* and the long pattern of erratic treatment of this issue make it apparent that the BIA has not consistently agreed, and even today does not completely agree, with the INS's litigation position that the two standards are equivalent.

> intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.*, at 843, n. 9 (citations omitted).

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "'any gap left, implicitly or explicitly, by Congress,'" the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. See *Chevron*, *supra*, at 843, quoting *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974). But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied.[31] Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.[32]

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[31] How "meaningful" the differences between the two standards may be is a question that cannot be fully decided in the abstract, but the fact that Congress has prescribed two different standards in the same Act certainly implies that it intended them to have significantly different meanings.

We cannot accept the INS's argument that it is impossible to think about a "well-founded fear" except in "more likely than not" terms. The Board was able to do it for a long time under § 203(a)(7), see *Matter of Tan*, 12 I. & N. Dec. 564 (1967); *Matter of Adamska*, 12 I. & N. Dec. 201 (1967), and has apparently had little trouble applying the two separate standards in compliance with the recent Courts of Appeals' decisions. See, *e. g.*, *Matter of Sanchez and Escobar*, Interim Decision No. 2996 (Oct. 15, 1985).

[32] JUSTICE POWELL argues that the Court of Appeals should be reversed for a different reason—that it misinterpreted the BIA's decision. See

Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a "well-founded fear of persecution," an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country. We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. See *INS* v. *Errico*, 385 U. S. 214, 225 (1966); *Costello* v. *INS*, 376 U. S. 120, 128 (1964); *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948).

Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 Congress sought to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." H. R. Rep., at 9. Our holding today increases that flexibility by rejecting the Government's contention that the Attorney General may not even consider granting asylum to one who

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post, at 465–468. This issue was not raised in any of the parties' briefs, and was neither "set forth" nor "fairly included" within the question presented in the petition for certiorari. See this Court's Rule 20.1. The question presented asked:

"Whether an alien's burden of proving eligibility for asylum pursuant to Section 208 (a) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1158 (a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243 (h) of the Act, 8 U. S. C. 1253 (h)." Pet. for Cert. (I).

This question cannot be read as challenging the Court of Appeals' determination that the BIA in fact required respondent "to demonstrate a clear probability of persecution in order to be declared eligible for asylum." 767 F. 2d, at 1454. We therefore decline to address the issue. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981); *Irvine* v. *California*, 347 U. S. 128, 129.(1954).

fails to satisfy the strict § 243(h) standard. Whether or not a "refugee" is eventually granted asylum is a matter which Congress has left for the Attorney General to decide. But it is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion and judgment. Thus, I accept its "narrow" conclusion that "the Immigration Judge and the BIA were incorrect in holding that the [standards for withholding of deportation and granting asylum] are identical." *Ante*, at 448. In accordance with this holding, the Court eschews any attempt to give substance to the term "well-founded fear" and leaves that task to the "process of case-by-case adjudication" by the INS, the agency in charge of administering the immigration laws. *Ibid.* I write separately and briefly to emphasize my understanding that, in its opinion, the Court has directed the INS to the appropriate sources from which the agency should derive the meaning of the "well-founded fear" standard, a meaning that will be refined in later adjudication. This emphasis, I believe, is particularly needed where, as here, an agency's previous interpretation of the statutory term is so strikingly contrary to plain language and legislative history.

Thus, as the Court observes, *ante*, at 430–431, the very language of the term "well-founded fear" demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear. Moreover, in describing how, in the 1980 Act, Congress was attempting to bring this country's refugee laws into conformity with the United Nations Protocol, the Court notes that the Act's definition of refugee, wherein the "well-founded fear" term appears, *ante*, at 427, tracks the language of the

Protocol. See *ante*, at 436–437. Such language has a rich history of interpretation in international law and scholarly commentaries. See *ante*, at 437–440, and nn. 20, 24. While the INS need not ignore other sources of guidance, the above directions by the Court should be significant in the agency's formulation of the "well-founded fear" standard.

Finally, in my view, the well-reasoned opinions of the Courts of Appeals, that almost uniformly have rejected the INS's misreading of statutory language and legislative history, provide an admirable example of the very "case-by-case adjudication" needed for the development of the standard. Although the Court refers to a conflict among these courts, see *ante*, at 426, n. 2, with one exception, see *ibid.*, *all* the Courts of Appeals that have addressed this question have concluded that the standards for withholding of deportation and granting asylum are not the same. Rather, differences in opinion have arisen as to the precise formulation of the "well-founded fear" standard.* Such differences can arise only when courts or agencies seriously grapple with the problems of developing a standard, whose form is at first given by the statutory language and the intimations of the legislative

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*See, *e. g.*, *Carcamo-Flores* v. *INS*, 805 F. 2d 60, 68 (CA2 1986) ("What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is facing the possibility of persecution, perhaps including a loss of freedom or even, in some cases, the loss of life"); *Guevara-Flores* v. *INS*, 786 F. 2d 1242, 1249 (CA5 1986), cert. pending, No. 86–388 ("An alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country"); *Cardoza-Fonseca* v. *INS*, 767 F. 2d 1448, 1452–1453 (CA9 1985) (case below) ("In contrast, the term 'well-founded fear' requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded"); *Carvajal-Munoz* v. *INS*, 743 F. 2d 562, 574 (CA7 1984) ("The applicant must present *specific* facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear that he or she will be *singled out* for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion") (emphasis in original).

history, but whose final contours are shaped by the application of the standard to the facts of specific cases. The efforts of these courts stand in stark contrast to—but, it is sad to say, alone cannot make up for—the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court that the plain meaning of "well-founded fear" and the structure of the Immigration and Nationality Act (Act) clearly demonstrate that the "well-founded fear" standard and the "clear probability" standard are not equivalent. I concur in the judgment rather than join the Court's opinion, however, for two reasons. First, despite having reached the above conclusion, the Court undertakes an exhaustive investigation of the legislative history of the Act. *Ante*, at 432–443. It attempts to justify this inquiry by relying upon the doctrine that if the legislative history of an enactment reveals a "'clearly expressed legislative intention' contrary to [the enactment's] language," the Court is required to "question the strong presumption that Congress expresses its intent through the language it chooses." *Ante*, at 432, n. 12. Although it is true that the Court in recent times has expressed approval of this doctrine, that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity. See, *e. g.*, *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96 (1820) (opinion of Marshall, C. J.); *United States* v. *Hartwell*, 6 Wall. 385 (1868); *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 34 (1895) (opinion of Harlan, J.); *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917); *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 492 (1947) (opinion of Jackson, J.); *United States* v. *Sullivan*, 332 U. S. 689, 693 (1948) (opinion of Black, J.); *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59, 64 (1953) (opinion of Douglas, J.). Judges interpret laws rather than reconstruct

legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.

Even by its own lights, however, the Court's explication of the legislative history of the Act is excessive. The INS makes a number of specific arguments based upon the legislative history of the Act. It would have sufficed, it seems to me, for the Court to determine whether these specific arguments establish a "clearly expressed legislative intent" that the two standards be equivalent. I think it obvious that they do not, as apparently does the Court. That being so, there is simply no need for the lengthy effort to ascertain the import of the entire legislative history. And that effort is objectionable not only because it is gratuitous. I am concerned that it will be interpreted to suggest that similarly exhaustive analyses are generally appropriate (or, worse yet, required) in cases where the language of the enactment at issue is clear. I also fear that in this case the Court's conduct of that inquiry will be interpreted as a betrayal of its assurance that it does "not attempt to set forth a detailed description of how the well-founded fear test should be applied," *ante*, at 448. See, *e. g.*, *ante*, at 438–440 (appearing to endorse a particular interpretation of "well-founded fear").

I am far more troubled, however, by the Court's discussion of the question whether the INS's interpretation of "well-founded fear" is entitled to deference. Since the Court quite rightly concludes that the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act, see *ante*, at 431–432, 449, and n. 12, there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" (footnote omitted)). Even more

unjustifiable, however, is the Court's use of this superfluous discussion as the occasion to express controversial, and I believe erroneous, views on the meaning of this Court's decision in *Chevron*. *Chevron* stated that where there is no "unambiguously expressed intent of Congress," *id.*, at 843, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency," *id.*, at 844. This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals—as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent. See, *e. g.*, *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, 233–234 (1986); *United States* v. *Fulton*, 475 U. S. 657, 666–667 (1986); *Hillsborough County, Florida* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 714 (1985); *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125, 126 (1985). The Court's discussion is flatly inconsistent with this well-established interpretation. The Court first implies that courts may substitute their interpretation of a statute for that of an agency whenever, "[e]mploying traditional tools of statutory construction," they are able to reach a conclusion as to the proper interpretation of the statute. *Ante*, at 446. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.

The Court also implies that courts may substitute their interpretation of a statute for that of an agency whenever they face "a pure question of statutory construction for the courts to decide," *ante*, at 446, rather than a "question of interpretation [in which] the agency is required to apply [a legal standard] to a particular set of facts," *ante*, at 448.

No support is adduced for this proposition, which is contradicted by the case the Court purports to be interpreting, since in *Chevron* the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase "stationary source."

In my view, the Court badly misinterprets *Chevron*. More fundamentally, however, I neither share nor understand the Court's eagerness to refashion important principles of administrative law in a case in which such questions are completely unnecessary to the decision and have not been fully briefed by the parties.

I concur in the judgment.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

Many people come to our country because they fear persecution in their homeland. Congress has provided two forms of relief for such people: asylum, see Immigration and Nationality Act of 1952, § 208(a), as added by 94 Stat. 105, 8 U. S. C. § 1158(a); and withholding of deportation, see 66 Stat. 212, § 243(h), as amended, 94 Stat. 107, 8 U. S. C. § 1253(h). The Board of Immigration Appeals (BIA) has concluded that there is no practical distinction between the objective proofs an alien must submit to be eligible for these two forms of relief. The Court rejects this conclusion. Because I believe the BIA's interpretation of the statute is reasonable, I dissent.

I

The Court's opinion seems to assume that the BIA has adopted a rigorous mathematical approach to asylum cases, requiring aliens to demonstrate an objectively quantifiable risk of persecution in their homeland that is more than 50%. The Court then argues that such a position is inconsistent with the language and history of the Act. But this has never been the BIA's position. Thus, it is useful to examine the BIA's approach in some detail before evaluating the Court's

rejection of the BIA's approach. After all, the BIA is the tribunal with the primary responsibility for applying the Act and the greatest experience in doing so.

The BIA's interpretation of the statutory term "well-founded fear" appears in *Matter of Acosta*, Interim Decision No. 2986 (Mar. 1, 1985).[1] Under the BIA's analysis, an immigration judge evaluating an asylum application should begin by determining the underlying historical facts. The burden of persuasion rests on the applicant, who must establish the truth of these facts by a preponderance of the evidence. See *id.*, at 7 (citing, *inter alia*, 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.10b, p. 5–121 (rev. ed. 1986)).

Once the immigration judge has decided what historical facts the applicant has demonstrated, he then decides whether those facts meet the definition of "refugee" set forth in § 101(a)(42)(A) of the Act, 8 U. S. C. § 1101(a)(42)(A). The major point of contention in this case concerns that section's requirement that the fear be "well-founded."[2] In

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[1] The Court suggests that the BIA's interpretation of the "well-founded fear" standard has been "erratic." *Ante*, at 446–447, n. 30. An examination of the *relevant* BIA decisions leads to a contrary conclusion. The BIA first addressed the standard in *Matter of Dunar*, 14 I. & N. Dec. 310 (1973). In that case, the BIA considered the meaning of the term "well-founded fear" in the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, T.I.A.S. No. 6577 (1968). When Congress inserted this language in the asylum provisions of the Act in 1980, the BIA interpreted the language to mean exactly the same thing as the language in the Protocol. *Matter of Acosta*, Interim Decision No. 2986 (Mar. 1, 1985). Thus, the BIA's position has never changed. The Court bases its characterization of the BIA's record on decisions applying the more lenient "fear" standard. If anything about these statutes is clear, it is that a "well-founded fear" is something more than a "fear." It is unfair to characterize the BIA's decisions as "erratic" when the agency was in fact interpreting two different standards.

[2] The BIA has interpreted the statutory definition to require proof of four elements: (i) the alien must have a "fear" of "persecution"; (ii) the fear must be "well-founded"; (iii) the persecution must be "on account of race,

Acosta, the BIA adhered to the interpretation of that language it had developed in *Matter of Dunar*, 14 I. & N. Dec. 310 (1973):

> "'[T]he requirement that the fear be "well-founded" rules out an apprehension which is purely subjective. . . . Some sort of showing must be made and this can ordinarily be done only by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; *but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted.*'" *Acosta*, *supra*, at 18–19 (quoting *Dunar*, *supra*, at 319) (emphasis added by *Acosta* Board).

The *Acosta* Board went on to caution:

> "By use of such words [as 'realistic likelihood'] we do not mean that 'a well-founded fear of persecution' requires an alien to establish to a particular degree of certainty, such as a 'probability' as opposed to a 'possibility,' that he will become a victim of persecution. Rather as a practical matter, what we mean can best be described as follows: the evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien." *Acosta*, *supra*, at 22.

Finally, the *Acosta* opinion compared this "realistic likelihood" standard to the "clear probability" standard applied to

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religion, nationality, membership in a particular social group, or political opinion"; and (iv) the alien must be unable or unwilling to return to his homeland because of persecution or his well-founded fear of persecution. See *id.*, at 11.

applications for withholding of deportation. The BIA's comments are insightful:

> "One might conclude that 'a well-founded fear of persecution,' which requires a showing that persecution is likely to occur, refers to a standard that is different from 'a clear probability of persecution,' which requires a showing that persecution is 'more likely than not' to occur. As a practical matter, however, the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, *i. e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur. . . . Accordingly, we conclude that the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge." *Id.*, at 25.

In sum, contrary to the Court's apparent conclusion, the BIA does not contend that both the "well-founded fear" standard and the "clear probability" standard require proof of a 51% chance that the alien will suffer persecution if he is returned to his homeland. The BIA plainly eschews analysis resting on mathematical probabilities. Rather, the BIA has adopted a four-part test requiring proof of facts that demonstrate a realistic likelihood of persecution actually occurring. The heart of the *Acosta* decision is the BIA's empirical conclusion, based on its experience in adjudicating asylum applications, that if the facts establish such a basis for an alien's

fear, it rarely will make a difference whether the judge asks if persecution is "likely" to occur or "more likely than not" to occur. If the alien can establish such a basis, he normally will be eligible for relief under either standard.

II

In Part II of its opinion, the Court examines the language of the Act. Section 243(h) provides that the Attorney General shall grant withholding of deportation to any country where "such alien's life or freedom would be threatened." 8 U. S. C. § 1253(h). Section 208(a) provides that the Attorney General has discretion to grant asylum "if the Attorney General determines that such alien is a refugee." § 1158(a). The crucial language of § 101(a)(42)(A) of the Act, as added by 94 Stat. 102, defines a refugee as a person who has "a well-founded fear of persecution." § 1101(a)(42)(A). In the Court's view, this language all but disposes of the case. *Ante*, at 427–432.

With respect to the issue presented by this case, I find the language far more ambiguous than the Court does. Respondent contends that the BIA has fallen into error by equating the objective showings required under §§ 208(a) and 243(h). The Court notes that the language of § 208(a) differs from the language of § 243(h) in that it contemplates a partially subjective inquiry. From this premise, the Court moves with little explanation to the conclusion that the objective inquiries under the two sections necessarily are different.

In reaching this conclusion, the Court gives short shrift to the words "well-founded," that clearly require some objective basis for the alien's fear. The critical question presented by this case is whether the objective basis required for a fear of persecution to be "well-founded" differs *in practice* from the objective basis required for there to be a "clear probability" of persecution. Because both standards necessarily contemplate some objective basis, I cannot agree with the Court's

implicit conclusion that the statute resolves this question on its face. In my view, the character of evidence sufficient to meet these two standards is a question best answered by an entity familiar with the types of evidence and issues that arise in such cases. Congress limited eligibility for asylum to those persons whom "the Attorney General determines" to be refugees. See § 208(a), 8 U. S. C. § 1158(a). The Attorney General has delegated the responsibility for making these determinations to the BIA. That Board has examined more of these cases than any court ever has or ever can. It has made a considered judgment that the difference between the "well-founded" and the "clear probability" standards is of no practical import: that is, the evidence presented in asylum and withholding of deportation cases rarely, if ever, will meet one of these standards without meeting both. This is just the type of expert judgment—formed by the entity to whom Congress has committed the question—to which we should defer.

The Court ignores the practical realities recognized by the expert agency and instead concentrates on semantic niceties. It posits a hypothetical situation in which a government sought to execute every 10th adult male. In its view, fear of such executions would be "well-founded" even if persecution of a particular individual would not be "more likely than not" to occur. See *ante*, at 431. But this hypothetical is irrelevant; it addresses a mathematically demanding interpretation of "well-founded" that has no relation to the BIA's actual treatment of asylum applications. Nor does it address the validity of the BIA's judgment that evidence presenting this distinction will be encountered infrequently, if ever.

Common sense and human experience support the BIA's conclusion. Governments rarely persecute people by the numbers. It is highly unlikely that the evidence presented at an asylum or withholding of deportation hearing will demonstrate the mathematically specific risk of persecution posited by the Court's hypothetical. Taking account of the

types of evidence normally available in asylum cases, the BIA has chosen to make a *qualitative* evaluation of "realistic likelihoods." As I read the *Acosta* opinion, an individual who fled his country to avoid mass executions might be eligible for both withholding of deportation *and* asylum, whether or not he presented evidence of the numerical reach of the persecution. See *Acosta*, Interim Decision No. 2986, at 18–25.[3] Nowhere does the Court consider whether the BIA's four-element interpretation of "well-founded" is unreasonable. Nor does the Court consider the BIA's view of the types of evidentiary presentations aliens generally make in asylum cases.

In sum, the words Congress has chosen—"well-founded" fear—are ambiguous. They contemplate some objective basis without specifying a particular evidentiary threshold. There is no reason to suppose this formulation is inconsistent with the analysis set forth in *Acosta*. The BIA has concluded that a fear is not "well-founded" unless the fear has an objective basis indicating that there is a "realistic likelihood" that persecution would occur. Based on the text of the Act alone, I cannot conclude that this conclusion is unreasonable.

III

The Court bolsters its interpretation of the language of the Act by reference to three parts of the legislative history. A closer examination of these materials demonstrates that each of them is ambiguous. Nothing the Court relies on provides a positive basis for arguing that there is a material difference between the two standards.

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[3] Of course, the applicant would have to meet all four elements of the well-founded fear standards. See *supra*, at 457 (quoting *Acosta*, Interim Decision No. 2986, at 22). Although these requirements restrict grants of relief in some cases, none of them rests on the mathematical considerations that the Court suggests govern current BIA practice. Moreover, the Court's exegesis of the "plain meaning" of the phrase "well-founded" in no way suggests that the BIA's four-part test is a misinterpretation of the statute.

A

First, the Court cites legislative history indicating that Congress wished to preserve some existing standard when it placed the words "well-founded fear" in the Act. The Court concludes that the standard Congress intended to preserve was the BIA's practice under the old § 203(a)(7), 79 Stat. 913 (1965). That section authorized the Attorney General to grant conditional entry to aliens fleeing from Communist countries or the Middle East, so long as they established a "fear of persecution." The Court argues that Congress chose the words "well-founded fear" to "preserve" as an asylum standard the prior interpretation of the word "fear" in the standard for conditional entry.

In contrast, the United States argues that Congress chose the words "well-founded fear" to preserve the Attorney General's regulations governing applications for asylum by aliens in the United States.[4] These regulations were substantially in accord with the BIA's view, namely that there is no significant difference between the "well-founded fear" and "clear probability" standards. Compare 8 CFR §§ 108.3(a) and 236.3 (a)(2) (1980) (asylum) with 8 CFR § 242.17(c) (1980) (withholding of deportation). Common sense suggests that the United States has the better of this argument. It is more natural to speak of "preserving" an interpretation that had governed the same form of relief than one that had applied to a different form of relief.

Moreover, the legislative history makes it clear that Congress was referring to the regulations rather than to § 203(a)(7). The Senate Report states that the bill "im-

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[4] Those regulations constituted this country's informal attempt to comply with the exhortation of the Convention Relating to the Status of Refugees to "facilitate the assimilation and naturalization," Art. 34, Jan. 31, 1967, [1968] 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577, of persons who have a "well-founded fear of being persecuted," Art. 1(A)(2), *id.*, at 6261. All parties agree that the Convention's language was the ultimate source of the language Congress placed in the Act.

prov[es] and clarif[ies] the procedures for determining asylum claims filed by aliens who are physically present in the United States. The substantive standard is not changed." S. Rep. No. 96–256, p. 9 (1979). As the Court recognizes, *ante*, at 435, n. 17, this statement unquestionably refers to the informal procedures for aliens in the United States, not the statutory procedures under § 203(a)(7).[5] Similarly, the House Report states that "the new definition does not create a new and expanded means of entry, but instead regularizes and *formalizes* the policies and practices that have been followed in recent years." H. R. Rep. No. 96–608, p. 10 (1979) (emphasis added). Congress hardly would have felt a need to "formalize" the statutory procedures under § 203(a)(7). Indeed, the House Report cites the Attorney General's regulations as the extant procedures to which it was referring. H. R. Rep., at 17.

In my view, the legislative history indicates that Congress' choice of the words "well-founded" fear as the standard of eligibility for asylum was intended to carry forward the practice of the Attorney General in adjudicating asylum applications. The Attorney General had concluded that the standard for asylum was substantially identical to the standard for withholding of deportation. His decision to interpret the language of § 208 in the same way is entirely reasonable.

B

Second, the Court relies on materials interpreting the United Nations Protocol. *Ante*, at 437–440. For several reasons, I find these materials to be only marginally rele-

[5] The Court concludes that the Senate Report has no probative force because the Conference Committee adopted the House language rather than the Senate language. But the changes in language made by the Conference Committee do not help the Court's position. As I explain *infra* this page, the House Report indicates that the House bill also was intended to adopt the standards set forth in the regulations. Moreover, there is no suggestion in the Conference Report that this change in language affected the substantive standard. See *infra*, at 464–465.

vant. Both the President and the Senate thought that the Protocol was perfectly consistent with our country's immigration laws. See *INS* v. *Stevic*, 467 U. S. 407, 417 (1984) (citing legislative history). We should be reluctant to assume that our country has been violating the Protocol during the 20 years since its adoption. Moreover, as the Court recognizes, statements by the United Nations High Commissioner for Refugees have no binding force, because "'the determination of refugee status under the . . . Protocol . . . is incumbent upon the Contracting State.'" *Ante*, at 439, n. 22 (quoting Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 1(ii) (Geneva, 1979)).

In any event, the materials discussed by the Court shed little or no light on the question presented by this case. None of them states that the burden of proof for nonrefoulement under Article 33.1 of the United Nations Protocol of 1967—a remedy essentially identical to withholding of deportation under § 243(h) of the Act—is higher than the burden of proof for asylum under Article 34. The only thing the materials tend to establish is that a mathematical approach to the likelihood of persecution in asylum cases is arguably inconsistent with the sense of the drafters of the Protocol. The BIA has declined to adopt such an approach. See *supra*, at 457–459. It is simply irrelevant that this approach might be inconsistent with the views of commentators on the Protocol.

C

Finally, the Court places great weight on the changes in the Act made by the Conference Committee. The Court notes that the Senate bill, S. 643, authorized the Attorney General to grant asylum if the applicant "is a refugee within the meaning of section 101(a)(42)(A) and his deportation or return would be prohibited under section 243(h) of this Act." S. Rep. No. 96–256, at 26. The Court conjectures that this language "indicates that the Senate recognized that

there is a difference between the 'well-founded fear' standard and the clear-probability standard. The enactment of the House bill rather than the Senate bill in turn demonstrates that Congress eventually refused to restrict eligibility for asylum only to aliens meeting the stricter standard." *Ante*, at 442 (footnote omitted).

Neither the premise of the Court nor its conclusion is justified. The language of the Senate bill does not demonstrate that the Senate recognized a difference between the two standards. The Senate just as easily could have included the language to ensure that the Attorney General held to his position that there was no difference between the standards. Moreover, there is no reason to believe that the changes made by the Conference Committee reflected a considered rejection of this portion of the Senate's definition of refugee. Rather, the Conference Committee Report demonstrates that the Conference thought both bills adopted the same general definition of refugee—the U. N. definition. See H. R. Conf. Rep. No. 96–781, p. 19 (1980). The differences the Conference saw between the bills related to treatment of refugees still in their homeland, and to refugees who have been "firmly resettled" in another country. See *ibid.*

In short, I see no reason to believe that the minor differences in wording between the Senate bill and the Act as passed reflect a rejection of the position that there is no significant difference between the two standards.[6] Thus, I place no weight on the Conference Committee's choice of the language of the House bill.

IV

Even if I agreed with the Court's conclusion that there is a significant difference between the standards for asylum and

[6] This interpretation is supported by evidence that the House bill, like the Senate bill, was intended to preserve the Attorney General's regulations treating the two standards as substantially identical. See *supra*, at 463.

withholding of deportation, I would reverse the decision of the Court of Appeals and uphold the decision of the BIA *in this case.*[7] A careful reading of the decisions of the BIA and the Immigration Judge demonstrates that the BIA applied the lower asylum standard to this case.

Respondent's claim for asylum rested solely on testimony that her brother had experienced difficulties with the authorities in Nicaragua. The Immigration Judge rejected respondent's claim because he found "no evidence of any substance in the record other than her brother's claim to asylum." App. to Pet. for Cert. 27a. He further found:

> "None of the evidence indicates that the respondent would be persecuted for political beliefs, whatever they may be, or because she belongs to a particular social group. She has not proven that she or any other members of her family, other than her brother, has *[sic]* been detained, interrogated, arrested and imprisoned, tortured and convicted and sentenced by the regime presently in power in Nicaragua." *Ibid.*

The absence of such evidence was particularly probative, because many of the other members of respondent's family—her parents, two sisters, her brother's wife, and her broth-

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[7] The Court contends that this question is not before us. *Ante*, at 448, n. 31. I find this suggestion quite strange. The Immigration and Naturalization Service asked the Court to determine "[w]hether an alien's burden of proving eligibility for asylum . . . is equivalent to his burden of proving eligibility for withholding of deportation." Pet. for Cert. (I). The question whether the two standards are equivalent "fairly includes," under this Court's Rule 21.1(a) the problem of defining the appropriate standard for asylum. And that question can only be answered on the facts of this case. The Court does not sit to answer hypothetical questions of statutory construction. Normally we resolve such questions only by examining the facts of the case before us. In this case, the Court affirms the Court of Appeals' decision that the BIA required an intolerably high burden of proof in this case. Yet, like the Court of Appeals, the Court examines neither the facts of the case before us nor the legal standard the BIA applied. In my view, Rule 21 does not contemplate this result.

er's two children—were still in Nicaragua and thus presumably subject to the persecution respondent feared.

On appeal, the BIA affirmed. It decided this case after the passage of the Act, but before its opinion in *Acosta*. At that time, the BIA was confronted with a number of conflicting decisions by Courts of Appeals as to the correct standard for evaluating asylum applications. The BIA noted three different formulations of the "well-founded fear" standard: the "clear probability" test, see *Rejaie* v. *INS*, 691 F. 2d 139 (CA3 1982); the "good reason" test, see *Stevic* v. *Sava*, 678 F. 2d 401 (CA2 1982), rev'd on other grounds, *INS* v. *Stevic*, 467 U. S. 407 (1984); and the "realistic likelihood" test the BIA had adopted in *Matter of Dunar*, 14 I. & N. Dec. 310 (1973). App. to Pet. for Cert. 21a. See *supra*, at 456–459 (discussing *Acosta*). Reviewing the evidence respondent had submitted to the Immigration Judge, the BIA concluded that respondent could not obtain relief under any of the standards. The BIA focused especially on the fact that respondent

> "has openly admitted that she herself has taken no actions against the Nicaraguan government. She admits that she has never been politically active. She testified that she never assisted her brother in any of his political activities. Moreover, she admits that she has never been singled out for persecution by the present government." App. to Pet. for Cert. 22a.[8]

Respondent filed a petition for review with the Court of Appeals for the Ninth Circuit. Without examining either the factual or legal basis for the BIA's decision, the court granted the petition, reversed the BIA's decision, and remanded the application to the BIA for further consideration.

[8] In terms of the four-element *Acosta* test for well-founded fear, respondent's claim would have failed both the first and the second elements. Respondent failed to show either that she "possesses a belief or characteristic the persecutor seeks to overcome" or that "the persecutor is already aware, or could easily become aware, that [she] possesses this belief or characteristic." *Acosta*, Interim Decision No. 2986, at 22.

767 F. 2d 1448 (1985). The sole basis articulated for this action was a conclusion that the BIA had applied the wrong legal standard. The Court of Appeals repeated its position that the standards for asylum and withholding of deportation are different. According to that court, an asylum applicant must "present 'specific facts' through objective evidence to prove either past persecution or '*good reason*' to fear future persecution." *Id.*, at 1453 (quoting *Carvajal-Munoz* v. *INS*, 743 F. 2d 562, 574 (CA7 1984)) (emphasis added). It then noted that the BIA had reached a different conclusion in *Acosta* and stated:

> "[T]he Board appears to feel that it is exempt from the holding of *Marbury* v. *Madison* . . . and not constrained by circuit court opinions. . . . [T]he Board applied its own construction of the applicant's burden of proof in an asylum case to the claims of both Cardoza-Fonseca and [her copetitioner]. It held that they were required to demonstrate a clear probability of persecution in order to be declared eligible for asylum." 767 F. 2d, at 1454 (citation omitted).

This statement is simply inconsistent with the BIA's opinion. As I have explained, the BIA acknowledged the conflicting decisions of the various Courts of Appeals and explicitly tested the application under three different standards. The least burdensome of these—the "good reason" standard—is identical to the court's statement quoted *supra* this page. The Court of Appeals completely ignored the words in which the BIA framed its decision. It failed to examine the factual findings on which the decision rested. At least in this case, it appears that the Court of Appeals, and not the BIA, has misunderstood the proper relation between courts and agencies. That court properly could have considered whether substantial evidence supported the BIA's conclusion that respondent failed to demonstrate a "good reason" to fear persecution, but it should not have assumed that

the BIA tested respondent's application by a higher standard than the BIA's own opinion reflects.

V

In my view, the Court misconstrues the Act and misreads its legislative history. Moreover, neither this Court nor the Court of Appeals has identified an error in the decision of the BIA in *this* case. Neither court has examined the factual findings on which the decision rested, or the legal standard the BIA applied to these facts. I would reverse the decision of the Court of Appeals.

KEYSTONE BITUMINOUS COAL ASSN. ET AL. *v.* DEBENEDICTIS, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ET AL.

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

No. 85–1092. Argued November 10, 1986—Decided March 9, 1987

Section 4 of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (Act) prohibits coal mining that causes subsidence damage to pre-existing public buildings, dwellings, and cemeteries. Implementing regulations issued by Pennsylvania's Department of Environmental Resources (DER) require 50% of the coal beneath § 4-protected structures to be kept in place to provide surface support, and extend § 4's protection to water courses. Section 6 of the Act authorizes the DER to revoke a mining permit if the removal of coal causes damage to a § 4-protected structure or area and the operator has not within six months repaired the damage, satisfied any claim arising therefrom, or deposited the sum that repairs will reasonably cost as security. Petitioners, who own or control substantial coal reserves under Act-protected property, filed suit in Federal District Court seeking to enjoin the DER from enforcing the Act and regulations. The complaint alleged, *inter alia*, that Pennsylvania recognizes a separate "support estate" in addition to the surface and mineral estates in land; that approximately 90% of the coal petitioners will mine was severed from surface estates between 1890 and 1920; that petitioners typically acquired waivers of any damages claims that might result from coal removal; that § 4, as implemented by the 50% rule, and § 6 violate the Fifth Amendment's Takings Clause; and that § 6 violates Article I's Contracts Clause. Because petitioners had not yet alleged or proved any specific injury caused by the enforcement of §§ 4 and 6 or the regulations, the only question before the District Court was whether the mere enactment of §§ 4 and 6 and the regulations constituted a taking. The District Court granted DER's motion for summary judgment on this facial challenge. The Court of Appeals affirmed, holding that *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, does not control; that the Act does not effect a taking; and that the impairment of private contracts effectuated by the Act was justified by the public interests protected by the Act.

Held:

1. Petitioners have not satisfied their burden of showing that §§ 4 and 6 and the regulations' 50% rule constitute a taking of private property without compensation in violation of the Fifth and Fourteenth Amendments. *Pennsylvania Coal* does not control this case because the two factors there considered relevant—the Commonwealth's interest in enacting the law and the extent of the alleged taking—here support the Act's constitutionality. Pp. 481–502.

(a) Unlike the statute considered in *Pennsylvania Coal*, the Act is intended to serve genuine, substantial, and legitimate public interests in health, the environment, and the fiscal integrity of the area by minimizing damage to surface areas. None of the indicia of a statute enacted solely for the benefit of private parties identified in *Pennsylvania Coal* are present here. Petitioners' argument that § 6's remedies are unnecessary to satisfy the Act's public purposes because of the Commonwealth's insurance program that reimburses repair costs is not persuasive, since the public purpose is served by deterring mine operators from causing damage in the first place by making them assume financial responsibility. Thus, the Commonwealth has merely exercised its police power to prevent activities that are tantamount to public nuisances. The character of this governmental action leans heavily against finding a taking. Pp. 485–493.

(b) The record in this case does not support a finding similar to the one in *Pennsylvania Coal* that the Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations. Because this case involves only a facial constitutional challenge, such a finding is necessary to establish a taking. However, petitioners have never claimed that their mining operations, or even specific mines, have been unprofitable since the Act was passed; nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable. In fact, the only relevant evidence is testimony indicating that § 4 requires petitioners to leave 27 million tons (less than 2%) of their coal in place. Petitioners' argument that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined fails because the 27 million tons do not constitute a separate segment of property for taking law purposes. The record indicates that only 75% of petitioners' underground coal can be profitably mined in any event, and there is no showing that their reasonable "investment-backed expectations" have been materially affected by the § 4-imposed duty. Petitioners' argument that the Act constitutes a taking because it entirely destroys the value of their unique support estate also fails. As a practical matter, the support estate has value only insofar as it is used to exploit another

estate. Thus, the support estate is not a separate segment of property for takings law purposes since it constitutes just one part of the mine operators' bundle of property rights. Because petitioners retain the right to mine virtually all the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Moreover, since there is no evidence as to what percentage of petitioners' support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act, their Takings Clause facial challenge fails. Pp. 493–502.

2. Section 6 does not impair petitioners' contractual agreements in violation of Article I, § 10, of the Constitution by denying petitioners their right to hold surface owners to their contractual waivers of liability for surface damage. The Contracts Clause has not been read literally to obliterate valid exercises of the States' police power to protect the public health and welfare. Here, the Commonwealth has a significant and legitimate public interest in preventing subsidence damage to the § 4-protected buildings, cemeteries, and water courses, and has determined that the imposition of liability on coal companies is necessary to protect that interest. This determination is entitled to deference because the Commonwealth is not a party to the contracts in question. Thus, the impairment of petitioners' right to enforce the generations-old damages waivers is amply justified by the public purposes served by the Act. Pp. 502–506.

771 F. 2d 707, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which POWELL, O'CONNOR, and SCALIA, JJ., joined, *post*, p. 506.

Rex E. Lee argued the cause for petitioners. With him on the briefs were *Benjamin W. Heineman, Jr.*, *Michael A. Nemeroff*, *Carter G. Phillips*, *Henry McC. Ingram*, and *Thomas C. Reed.*

Andrew S. Gordon, Chief Deputy Attorney General of Pennsylvania, argued the cause for respondent. With him on the brief was *LeRoy S. Zimmerman*, Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the Mid-Atlantic Legal Foundation et al. by *Richard B. McGlynn;* for the National Coal Association et al. by *Harold P. Quinn, Jr.;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun*, *Robert K. Best*, and *Lucinda Low Swartz.*

JUSTICE STEVENS, delivered the opinion of the Court.

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), the Court reviewed the constitutionality of a Pennsylvania statute that admittedly destroyed "previously existing rights of property and contract." *Id.*, at 413. Writing for the Court, Justice Holmes explained:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Briefs of *amici curiae* urging affirmance were filed for the State of California *ex rel.* John K. Van de Kamp et al. by *Mr. Van de Kamp*, Attorney General of California, *pro se*, *Richard C. Jacobs*, *N. Gregory Taylor*, and *Theodora Berger*, Assistant Attorneys General, *Richard M. Frank*, and *Craig C. Thompson*, and by the Attorneys General for their respective States as follows: *John Steven Clark* of Arkansas, *Jim Smith* of Florida, *Corinne K. A. Watanabe* of Hawaii, *Linley E. Pearson*, of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Stephen H. Sachs* of Maryland, *Francis X. Bellotti* of Massachusetts, *James E. Tierney* of Maine, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Edwin L. Pittman* of Mississippi, *William L. Webster* of Missouri, *Robert M. Spire* of Nebraska, *Stephen E. Merrill* of New Hampshire, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Michael Turpin* of Oklahoma, *Dave Frohnmayer* of Oregon, *Mark V. Meierhenry* of South Dakota, *W. J. Michael Cody* of Tennessee, *Jeffrey L. Amestoy* of Vermont, *Kenneth O. Eikenberry* of Washington, and *Bronson C. La Follette* of Wisconsin; for the National Conference of State Legislatures et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Beate Bloch*, and *Robert H. Freilich;* and for the Pennsylvania State Grange et al. by *K. W. James Rochow.*

> So the question depends upon the particular facts." *Ibid.*

In that case the "particular facts" led the Court to hold that the Pennsylvania Legislature had gone beyond its constitutional powers when it enacted a statute prohibiting the mining of anthracite coal in a manner that would cause the subsidence of land on which certain structures were located.

Now, 65 years later, we address a different set of "particular facts," involving the Pennsylvania Legislature's 1966 conclusion that the Commonwealth's existing mine subsidence legislation had failed to protect the public interest in safety, land conservation, preservation of affected municipalities' tax bases, and land development in the Commonwealth. Based on detailed findings, the legislature enacted the Bituminous Mine Subsidence and Land Conservation Act (Subsidence Act or Act), Pa. Stat. Ann., Tit. 52, § 1406.1 *et seq.* (Purdon Supp. 1986). Petitioners contend, relying heavily on our decision in *Pennsylvania Coal*, that §§ 4 and 6 of the Subsidence Act and certain implementing regulations violate the Takings Clause, and that § 6 of the Act violates the Contracts Clause of the Federal Constitution. The District Court and the Court of Appeals concluded that *Pennsylvania Coal* does not control for several reasons and that our subsequent cases make it clear that neither § 4 nor § 6 is unconstitutional on its face. We agree.

I

Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal. This lowering of the strata can have devastating effects.[1] It often causes substantial dam-

[1] See generally Department of the Interior, Lee & Abel, Subsidence from Underground Mining: Environmental Analysis and Planning Considerations, Geological Survey Circular 2–12, p. 876 (1983); P. Mavrolas & M. Schechtman, Coal Mine Subsidence 6–8 (1981); Blazey & Strain, Deep Mine Subsidence—State Law and the Federal Response, 1 Eastern Mineral Law Foundation § 1.01, pp. 1–5 (1980); Department of the Interior, Bureau of Mines, Moebs, Subsidence Over Four Room-and-Pillar Sections in South-

age to foundations, walls, other structural members, and the integrity of houses and buildings. Subsidence frequently causes sinkholes or troughs in land which make the land difficult or impossible to develop. Its effect on farming has been well documented—many subsided areas cannot be plowed or properly prepared. Subsidence can also cause the loss of groundwater and surface ponds.[2] In short, it presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades.[3]

Despite what their name may suggest, neither of the "full extraction" mining methods currently used in western Pennsylvania[4] enables miners to extract all subsurface coal; considerable amounts need to be left in the ground to provide access, support, and ventilation to the mines. Additionally, mining companies have long been required by various Pennsylvania laws and regulations, the legitimacy of which is not challenged here, to leave coal in certain areas for public safety reasons.[5] Since 1966, Pennsylvania has placed an additional set of restrictions on the amount of coal that may be

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western Pennsylvania, R18645 (1982); H. R. Rep. No. 95–218, p. 126 (1977).

[2] "Wherever [subsidence effects] extend, damage can occur to buildings, roads, pipelines, cables, streams, water impoundments, wells, and aquifers. Buildings can be cracked or tilted; roads can be lowered or cracked; streams, water impoundments, and aquifers can all be drained into the underground excavations. Oil and gas wells can be severed, causing their contents to migrate into underground mines, into aquifers, and even into residential basements. Sewage lines, gas lines, and water lines can all be severed, as can telephone and electric cables." Blazey & Strain, *supra*, § 1.01 [2].

[3] Indeed, in 1977, Congress passed the Federal Surface Mining Control and Reclamation Act, 91 Stat. 445, 30 U. S. C. § 1201 *et seq.*, which includes regulation of subsidence caused by underground coal mining. See 30 U. S. C. § 1266.

[4] The two "full extraction" coal mining methods in use in western Pennsylvania are the room and pillar method, and the longwall method. App. 90–91.

[5] For example, Pennsylvania law requires that coal beneath and adjacent to certain large surface bodies of water be left in place. Pa. Stat. Ann., Tit. 52, § 3101 *et seq.* (Purdon 1966).

extracted; these restrictions are designed to diminish subsidence and subsidence damage in the vicinity of certain structures and areas.

Pennsylvania's Subsidence Act authorizes the Pennsylvania Department of Environmental Resources (DER) to implement and enforce a comprehensive program to prevent or minimize subsidence and to regulate its consequences. Section 4 of the Subsidence Act, Pa. Stat. Ann., Tit. 52, § 1406.4 (Purdon Supp. 1986), prohibits mining that causes subsidence damage to three categories of structures that were in place on April 17, 1966: public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries.[6] Since 1966 the DER has ap-

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[6] Section 4 provides:

"Protection of surface structures against damage from cave-in, collapse, or subsidence

"In order to guard the health, safety and general welfare of the public, no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966, overlying or in the proximity of the mine:

"(1) Any public building or any noncommercial structure customarily used by the public, including but not being limited to churches, schools, hospitals, and municipal utilities or municipal public service operations.

"(2) Any dwelling used for human habitation; and

"(3) Any cemetery or public burial ground; unless the current owner of the structure consents and the resulting damage is fully repaired or compensated."

In response to the enactment in 1977 of the Federal Surface Mining Control and Reclamation Act, 91 Stat. 445, 30 U. S. C. § 1201 *et seq.*, and regulations promulgated by the Secretary of the Interior in 1979, 44 Fed. Reg. 14902, the Pennsylvania DER adopted new regulations extending the statutory protection to additional classes of buildings and surface features. Particularly:

"(a)(1) public buildings and non-commercial buildings customarily used by the public [after April 27, 1966], including churches, schools, hospitals, courthouses, and government offices;

. . . . . .

plied a formula that generally requires 50% of the coal beneath structures protected by § 4 to be kept in place as a means of providing surface support.[7] Section 6 of the Subsidence Act, Pa. Stat. Ann., Tit. 52, § 1406.6 (Purdon Supp. 1986), authorizes the DER to revoke a mining permit if the removal of coal causes damage to a structure or area protected by § 4 and the operator has not within six months either repaired the damage, satisfied any claim arising therefrom, or deposited a sum equal to the reasonable cost of repair with the DER as security.[8]

"(4) perennial streams and impoundments of water with the storage volume of 20 acre feet;

"(5) aquifers which serve as a significant source of water supply to any public water system; and

"(6) coal refuse disposa[l]" areas. 25 Pa. Code §§ 89.145(a) and 89.146 (b) (1983).

[7] The regulations define the zone for which the 50% rule applies:

"(2) The support area shall be rectangular in shape and determined by projecting a 15 degree angle of draw from the surface to the coal seam, beginning 15 feet from each side of the structure. For a structure on a surface slope of 5.0% or greater, the support area on the downslope side of the structure shall be extended an additional distance, determined by multiplying the depth of the overburden by the percentage of the surface slope." § 89.146(b)(2).

However, this 50% requirement is neither an absolute floor nor ceiling. It may be waived by the Department upon a showing that alternative measures will prevent subsidence damage. § 89.146(b)(5). Alternatively, more stringent measures may be imposed, or mining may be prohibited, if it appears that leaving 50% of the coal in place will not provide adequate support. § 89.146(b)(4).

[8] Although some subsidence eventually occurs over every underground mine, the extent and timing of the subsidence depends upon a number of factors, including the depth of the mining, the geology of the overlying strata, the topography of the surface, and the method of coal removal. The DER believes that the support provided by its 50% rule will last in almost all cases for the life of the structure being protected. Since 1966, petitioners have mined under approximately 14,000 structures or areas protected by § 4; there have been subsidence damage claims with respect to only 300. Stipulations of Counsel 41 and 42, App. 90.

II

In 1982, petitioners filed a civil rights action in the United States District Court for the Western District of Pennsylvania seeking to enjoin officials of the DER from enforcing the Subsidence Act and its implementing regulations. Petitioners are an association of coal mine operators, and four corporations that are engaged, either directly or through affiliates, in underground mining of bituminous coal in western Pennsylvania. The members of the association and the corporate petitioners own, lease, or otherwise control substantial coal reserves beneath the surface of property affected by the Subsidence Act. The defendants in the action, respondents here, are the Secretary of the DER, the Chief of the DER's Division of Mine Subsidence, and the Chief of the DER's Section on Mine Subsidence Regulation.

The complaint alleges that Pennsylvania recognizes three separate estates in land: The mineral estate; the surface estate; and the "support estate." Beginning well over 100 years ago, landowners began severing title to underground coal and the right of surface support while retaining or conveying away ownership of the surface estate. It is stipulated that approximately 90% of the coal that is or will be mined by petitioners in western Pennsylvania was severed from the surface in the period between 1890 and 1920. When acquiring or retaining the mineral estate, petitioners or their predecessors typically acquired or retained certain additional rights that would enable them to extract and remove the coal. Thus, they acquired the right to deposit wastes, to provide for drainage and ventilation, and to erect facilities such as tipples, roads, or railroads, on the surface. Additionally, they typically acquired a waiver of any claims for damages that might result from the removal of the coal.

In the portions of the complaint that are relevant to us, petitioners alleged that both § 4 of the Subsidence Act, as im-

plemented by the 50% rule, and § 6 of the Subsidence Act, constitute a taking of their private property without compensation in violation of the Fifth and Fourteenth Amendments. They also alleged that § 6 impairs their contractual agreements in violation of Article I, § 10, of the Constitution.[9] The parties entered into a stipulation of facts pertaining to petitioners' facial challenge, and filed cross-motions for summary judgment on the facial challenge. The District Court granted respondents' motion.

In rejecting petitioners' Takings Clause claim, the District Court first distinguished *Pennsylvania Coal*, primarily on the ground that the Subsidence Act served valid public purposes that the Court had found lacking in the earlier case. 581 F. Supp. 511, 516 (1984). The District Court found that the restriction on the use of petitioners' property was an exercise of the Commonwealth's police power, justified by Pennsylvania's interest in the health, safety, and general welfare of the public. In answer to petitioners' argument that the Subsidence Act effectuated a taking because a separate, recognized interest in realty—the support estate—had been entirely destroyed, the District Court concluded that under Pennsylvania law the support estate consists of a bundle of rights, including some that were not affected by the Act. That the right to cause damage to the surface may constitute the most valuable "strand" in the bundle of rights possessed by the owner of a support estate was not considered controlling under our decision in *Andrus* v. *Allard*, 444 U. S. 51 (1979).

In rejecting petitioners' Contracts Clause claim, the District Court noted that there was no contention that the Subsi-

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[9] Petitioners also challenged various other portions of the Subsidence Act below, see 771 F. 2d 707, 718–719 (1985); 581 F. Supp. 511, 513, 519–520 (1984), but have not pursued these claims in this Court.

dence Act or the DER regulations had impaired any contract to which the Commonwealth was a party. Since only private contractual obligations had been impaired, the court considered it appropriate to defer to the legislature's determinations concerning the public purposes served by the legislation. The court found that the adjustment of the rights of the contracting parties was tailored to those "significant and legitimate" public purposes. 581 F. Supp., at 514. At the parties' request, the District Court certified the facial challenge for appeal.

The Court of Appeals affirmed, agreeing that *Pennsylvania Coal* does not control because the Subsidence Act is a legitimate means of "protect[ing] the environment of the Commonwealth, its economic future, and its well-being." 771 F. 2d 707, 715 (1985). The Court of Appeals' analysis of the Subsidence Act's effect on petitioners' property differed somewhat from the District Court's, however. In rejecting the argument that the support estate had been entirely destroyed, the Court of Appeals did not rely on the fact that the support estate itself constitutes a bundle of many rights, but rather considered the support estate as just one segment of a larger bundle of rights that invariably includes either the surface estate or the mineral estate. As Judge Adams explained:

> "To focus upon the support estate separately when assessing the diminution of the value of plaintiffs' property caused by the Subsidence Act therefore would serve little purpose. The support estate is more properly viewed as only one 'strand' in the plaintiff's 'bundle' of property rights, which also includes the mineral estate. As the Court stated in *Andrus*, '[t]he destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.' 444 U. S. at 65. . . . The use to which the mine operators wish to put the support estate is forbidden. However, because the plaintiffs still possess valuable mineral rights that enable

them profitably to mine coal, subject only to the Subsidence Act's requirement that they prevent subsidence, their entire 'bundle' of property rights has not been destroyed." *Id.*, at 716.

With respect to the Contracts Clause claim, the Court of Appeals agreed with the District Court that a higher degree of deference should be afforded to legislative determinations respecting economic and social legislation affecting wholly private contracts than when the State impairs its own agreements. The court held that the impairment of private agreements effectuated by the Subsidence Act was justified by the legislative finding "that subsidence damage devastated many surface structures and thus endangered the health, safety, and economic welfare of the Commonwealth and its people." *Id.*, at 718. We granted certiorari, 475 U. S. 1080 (1986), and now affirm.

III

Petitioners assert that disposition of their takings claim[10] calls for no more than a straightforward application of the Court's decision in *Pennsylvania Coal Co.* v. *Mahon.* Although there are some obvious similarities between the cases, we agree with the Court of Appeals and the District Court that the similarities are far less significant than the differences, and that *Pennsylvania Coal* does not control this case.

In *Pennsylvania Coal*, the Pennsylvania Coal Company had served notice on Mr. and Mrs. Mahon that the company's mining operations beneath their premises would soon reach a point that would cause subsidence to the surface. The Mahons filed a bill in equity seeking to enjoin the coal company from removing any coal that would cause "the caving in, col-

[10] "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. This restriction is applied to the States through the Fourteenth Amendment. See *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

lapse or subsidence" of their dwelling. The bill acknowledged that the Mahons owned only "the surface or right of soil" in the lot, and that the coal company had reserved the right to remove the coal without any liability to the owner of the surface estate. Nonetheless, the Mahons asserted that Pennsylvania's then recently enacted Kohler Act of 1921, P. L. 1198, Pa. Stat. Ann., Tit. 52, § 661 *et seq.* (Purdon 1966), which prohibited mining that caused subsidence under certain structures, entitled them to an injunction.

After initially having entered a preliminary injunction pending a hearing on the merits, the Chancellor soon dissolved it, observing:

> "[T]he plaintiffs' bill contains no averment on which to base by implication or otherwise any finding of fact that any interest public or private is involved in the defendant's proposal to mine the coal except the private interest of the plaintiffs in the prevention of private injury." Tr. of Record in *Pennsylvania Coal* v. *Mahon*, O. T. 1922, No. 549, p. 23.

The Pennsylvania Supreme Court reversed, concluding that the Kohler Act was a proper exercise of the police power. 274 Pa. 489, 118 A. 491 (1922). One Justice dissented. He concluded that the Kohler Act was not actually intended to protect lives and safety, but rather was special legislation enacted for the sole benefit of the surface owners who had released their right to support. *Id.*, at 512–518, 118 A., at 499–501.

The company promptly appealed to this Court, asserting that the impact of the statute was so severe that "a serious shortage of domestic fuel is threatened." Motion to Advance for Argument in *Pennsylvania Coal* v. *Mahon*, O. T. 1922, No. 549, p. 3. The company explained that until the Court ruled, "no anthracite coal which is likely to cause surface subsidence can be mined," and that strikes were threatened

throughout the anthracite coal fields.[11] In its argument in this Court, the company contended that the Kohler Act was not a bona fide exercise of the police power, but in reality was nothing more than "'robbery under the forms of law'" because its purpose was "not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few." See 260 U. S., at 396–398, quoting *Loan Assn.* v. *Topeka*, 20 Wall. 655, 664 (1875).

Over Justice Brandeis' dissent, this Court accepted the company's argument. In his opinion for the Court, Justice Holmes first characteristically decided the specific case at hand in a single, terse paragraph:

> "This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout* v. *Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson* v. *Washburn Iron Co.*, 13 Allen, 95, 103. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an es-

[11] The urgency with which the case was treated is evidenced by the fact that the Court issued its decision less than a month after oral argument; a little over a year after the test case had been commenced.

> tate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." 260 U. S., at 413–414.

Then—uncharacteristically—Justice Holmes provided the parties with an advisory opinion discussing "the general validity of the Act."[12] In the advisory portion of the Court's opinion, Justice Holmes rested on two propositions, both critical to the Court's decision. First, because it served only private interests, not health or safety, the Kohler Act could not be "sustained as an exercise of the police power." *Id.*, at 414. Second, the statute made it "commercially impracticable" to mine "certain coal" in the areas affected by the Kohler Act.[13]

The holdings and assumptions of the Court in *Pennsylvania Coal* provide obvious and necessary reasons for distinguishing *Pennsylvania Coal* from the case before us today.

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[12] "But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain." 260 U. S., at 414.

[13] "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does." *Id.*, at 414–415.

This assumption was not unreasonable in view of the fact that the Kohler Act may be read to prohibit mining that causes any subsidence—not just subsidence that results in damage to surface structures. The record in this case indicates that subsidence will almost always occur eventually. See n. 8, *supra*.

The two factors that the Court considered relevant, have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980) (citations omitted); see also *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978). Application of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the Subsidence Act constitutes a taking. First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

The Public Purpose

Unlike the Kohler Act, which was passed upon in *Pennsylvania Coal*, the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas. Section 2 of the Subsidence Act provides:

> "This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or

> 'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania." Pa. Stat. Ann., Tit. 52, § 1406.2 (Purdon Supp. 1986).

The District Court and the Court of Appeals were both convinced that the legislative purposes[14] set forth in the statute were genuine, substantial, and legitimate, and we have no reason to conclude otherwise.[15]

None of the indicia of a statute enacted solely for the benefit of private parties identified in Justice Holmes' opinion are present here. First, Justice Holmes explained that the Kohler Act was a "private benefit" statute since it "ordinarily does not apply to land when the surface is owned by the owner of the coal." 260 U. S., at 414. The Subsidence Act, by contrast, has no such exception. The current surface owner may only waive the protection of the Act if the DER consents. See 25 Pa. Code § 89.145(b) (1983). Moreover, the Court was forced to reject the Commonwealth's safety justification for the Kohler Act because it found that the Commonwealth's interest in safety could as easily have been accomplished through a notice requirement to landowners. The Subsidence Act, by contrast, is designed to accomplish a number of widely varying interests, with reference to which petitioners have not suggested alternative methods through which the Commonwealth could proceed.

Petitioners argue that at least § 6, which requires coal companies to repair subsidence damage or pay damages to those

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[14] The legislature also set forth rather detailed findings about the dangers of subsidence and the need for legislation. See Pa. Stat. Ann., Tit. 52, § 1406.3 (Purdon Supp. 1986).

[15] "We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so contingent upon an analysis of state law." *Runyon* v. *McCrary*, 427 U. S. 160, 181 (1976).

who suffer subsidence damage, is unnecessary because the Commonwealth administers an insurance program that adequately reimburses surface owners for the cost of repairing their property. But this argument rests on the mistaken premise that the statute was motivated by a desire to protect private parties. In fact, however, the public purpose that motivated the enactment of the legislation is served by preventing the damage from occurring in the first place—in the words of the statute—"by providing for the conservation of surface land areas." Pa. Stat. Ann., Tit. 52, § 1406.2 (Purdon Supp. 1986). The requirement that the mine operator assume the financial responsibility for the repair of damaged structures deters the operator from causing the damage at all—the Commonwealth's main goal—whereas an insurance program would merely reimburse the surface owner after the damage occurs.[16]

Thus, the Subsidence Act differs from the Kohler Act in critical and dispositive respects. With regard to the Kohler Act, the Court believed that the Commonwealth had acted only to ensure against damage to some private landowners' homes. Justice Holmes stated that if the private individuals needed support for their structures, they should not have

[16] We do not suggest that courts have "a license to judge the effectiveness of legislation," *post*, at 511, n. 3, or that courts are to undertake "least restrictive alternative" analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388–389 (1926). But, on the other hand, *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. In *Pennsylvania Coal*, that inquiry led the Court to reject the Pennsylvania Legislature's stated purpose for the statute, because the "extent of the public interest is shown by the statute to be limited." 260 U. S., at 413–414. In this case, we, the Court of Appeals, and the District Court, have conducted the same type of inquiry the Court in *Pennsylvania Coal* conducted, and have determined that the details of the statute do not call the stated public purposes into question.

"take[n] the risk of acquiring only surface rights." 260 U. S., at 416. Here, by contrast, the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance. The Subsidence Act is a prime example that "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern." *Block* v. *Hirsh*, 256 U. S. 135, 155 (1921).

In *Pennsylvania Coal* the Court recognized that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required.[17] The Court distinguished the case before it from a case it had decided eight years earlier, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531 (1914). There, "it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property." *Pennsylvania Coal*, 260 U. S., at 415. Justice Holmes explained that unlike the Kohler Act, the statute challenged in *Plymouth Coal* dealt with "a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws." 260 U. S., at 415.

Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis.[18] In *Mugler* v. *Kansas*, 123 U. S. 623

[17] In his dissent, Justice Brandeis argued that the State has an absolute right to prohibit land use that amounts to a public nuisance. *Id.*, at 417. Justice Holmes' opinion for the Court did not contest that proposition, but instead took issue with Justice Brandeis' conclusion that the Kohler Act represented such a prohibition. *Id.*, at 413–414.

[18] Of course, the type of taking alleged is also an often critical factor. It is well settled that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e. g.*, *United States* v. *Causby*, 328 U. S. 256 (1946), than

(1887), for example, a Kansas distiller who had built a brewery while it was legal to do so challenged a Kansas constitutional amendment which prohibited the manufacture and sale of intoxicating liquors. Although the Court recognized that the "buildings and machinery constituting these breweries are of little value" because of the Amendment, *id.*, at 657, Justice Harlan explained that a

> "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property . . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." *Id.*, at 668–669.

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when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Tranportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978). While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435–438 (1982), the Court has repeatedly upheld regulations that destroy or adversely affect real property interests. See, *e. g.*, *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211 (1986); *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 125; *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 674, n. 8 (1976); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 592–593 (1962); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Gorieb* v. *Fox*, 274 U. S. 603, 608 (1927); *Welch* v. *Swasey*, 214 U. S. 91 (1909). This case, of course, involves land use regulation, not a physical appropriation of petitioners' property.

See also *Plymouth Coal Co., supra; Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915); *Reinman* v. *Little Rock*, 237 U. S. 171 (1915); *Powell* v. *Pennsylvania*, 127 U. S. 678 (1888).

We reject petitioners' implicit assertion that *Pennsylvania Coal* overruled these cases which focused so heavily on the nature of the State's interest in the regulation. Just five years after the *Pennsylvania Coal* decision, Justice Holmes joined the Court's unanimous decision in *Miller* v. *Schoene*, 276 U. S. 272 (1928), holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of the trees that the State had ordered destroyed. The trees needed to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource. In upholding the state action, the Court did not consider it necessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." *Id.*, at 280. Rather, it was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation. See also *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 509 (1923). Other subsequent cases reaffirm the important role that the nature of the state action plays in our takings analysis. See *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962); *Consolidated Rock Products Co.* v. *Los Angeles*, 57 Cal. 2d 515, 370 P. 2d 342, appeal dism'd, 371 U. S. 36 (1962). As the Court explained in *Goldblatt:* "Although a comparison of values before and after" a regulatory action "is relevant, . . . it is by no means conclusive . . . ." 369 U. S., at 594.[19]

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[19] See also *Agins* v. *Tiburon*, 447 U. S. 255, 261 (1980) (the question whether a taking has occurred "necessarily requires a weighing of private and public interests"); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 163 (1980) ("No police power justification is offered for the deprivation").

The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal.*[20] Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.[21] See *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 144–150 (REHNQUIST, J., dissenting); cf. *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306, 322 (1905). These restrictions are "properly treated as part of the burden of common citizenship." *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5 (1949). Long ago it was recognized that "all property in

[20] The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity. Cf. Sax, Takings, Private Property and Public Rights, 81 Yale L. J. 149, 155–161 (1971); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1235–1237 (1967).

However, as the current CHIEF JUSTICE has explained: "The nuisance exception to the taking guarantee is not coterminous with the police power itself." *Penn Central Transportation Co.*, 438 U. S., at 145 (REHNQUIST, J., dissenting). This is certainly the case in light of our recent decisions holding that the "scope of the 'public use' requirement of the Takings Clause is 'coterminous with the scope of a sovereign's police powers.'" See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1014 (1984) (quoting *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 240 (1984)). See generally R. Epstein, Takings 108–112 (1985).

[21] The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," *Mugler* v. *Kansas*, 123 U. S., at 665; see also *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32 (1878), and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.[22] See *Mugler*, 123 U. S., at 664.

In *Agins* v. *Tiburon*, we explained that the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and we recognized that this question "necessarily requires a weighing of private and public interests." 447 U. S., at 260–261. As the cases discussed above demonstrate, the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation. The Subsidence Act, unlike the Kohler Act, plainly seeks to further such an interest. Nonetheless, we need not rest our decision on this factor alone, because petitioners have also failed to make a

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[22] Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance. See *Nassr* v. *Commonwealth*, 394 Mass. 767, 477 N. E. 2d 987 (1985) (hazardous waste operation); *Kuban* v. *McGimsey*, 96 Nev. 105, 605 P. 2d 623 (1980) (brothel); *MacLeod* v. *Takoma Park*, 257 Md. 477, 263 A. 2d 581 (1970) (unsafe building); *Eno* v. *Burlington*, 125 Vt. 8, 209 A. 2d 499 (1965) (fire and health hazard); *Pompano Horse Club, Inc.* v. *State ex rel. Bryan*, 93 Fla. 415, 111 So. 801 (1927) (gambling facility); *People ex rel. Thrasher* v. *Smith*, 275 Ill. 256, 114 N. E. 31 (1916) ("bawdyhouse"). It is hard to imagine a different rule that would be consistent with the maxim "*sic utere tuo ut alienum non laedas*" (use your own property in such manner as not to injure that of another). See generally *Empire State Insurance Co.* v. *Chafetz*, 278 F. 2d 41 (CA5 1960). As Professor Epstein has recently commented: "The issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant." Epstein, *supra*, at 199.

showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases.

Diminution of Value and Investment-Backed Expectations

The second factor that distinguishes this case from *Pennsylvania Coal* is the finding in that case that the Kohler Act made mining of "certain coal" commercially impracticable. In this case, by contrast, petitioners have not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking. For this reason, their takings claim must fail.

In addressing petitioners' claim we must not disregard the posture in which this case comes before us. The District Court granted summary judgment to respondents only on the facial challenge to the Subsidence Act. The court explained that "[b]ecause plaintiffs have not alleged any injury due to the enforcement of the statute, there is as yet no concrete controversy regarding the application of the specific provisions and regulations. Thus, *the only question before this court is whether the mere enactment of the statutes and regulations constitutes a taking.*" 581 F. Supp., at 513 (emphasis added). The next phase of the case was to be petitioners' presentation of evidence about the actual effects the Subsidence Act had and would have on them. Instead of proceeding in this manner, however, the parties filed a joint motion asking the court to certify the facial challenge for appeal. The parties explained that an assessment of the actual impact that the Act has on petitioners' operations "will involve complex and voluminous proofs," which neither party was currently in a position to present, App. 15–17, and stressed that if an appellate court were to reverse the District Court on the facial challenge, then all of their expenditures in adjudicating the as-applied challenge would be wasted. Based

on these considerations, the District Court certified three questions relating to the facial challenge.[23]

The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation. This point is illustrated by our decision in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), in which we rejected a preenforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977. We concluded that the District Court had been mistaken in its reliance on *Pennsylvania Coal* as support for a holding that two statutory provisions were unconstitutional because they deprived coal mine operators of the use of their land. The Court explained:

> "[T]he court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. See *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575, 584 (1947); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. Just last Term, we reaffirmed:

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[23] The certified questions asked whether §§ 4, 5, or 6 of the Subsidence Act, and various regulations:

"1. Violate the Rule of the *Mahon* Decision[,]

"2. Constitute *Per Se* Takings,

"3. Violate Article I, § 10 of the Constitution of the United States." App. 12.

The Court of Appeals recognized the limited nature of its inquiry, pointing out that it was passing only on the facial challenge, and that the "as-applied challenge remains for disposition in the district court." 771 F. 2d, at 710, n. 3.

> "'[T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.' *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979) (citations omitted).
>
> "These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.
>
> "Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking. See *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980). The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' *Agins* v. *Tiburon*, *supra*, at 260; see also *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978)." 452 U. S., at 295–296.

Petitioners thus face an uphill battle in making a facial attack on the Act as a taking.

The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially

impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. Indeed, petitioners have not even pointed to a single mine that can no longer be mined for profit. The only evidence available on the effect that the Subsidence Act has had on petitioners' mining operations comes from petitioners' answers to respondents' interrogatories. Petitioners described the effect that the Subsidence Act had from 1966–1982 on 13 mines that the various companies operate, and claimed that they have been required to leave a bit less than 27 million tons of coal in place to support § 4 areas. The total coal in those 13 mines amounts to over 1.46 billion tons. See App. 284. Thus § 4 requires them to leave less than 2% of their coal in place.[24] But, as we have indicated, nowhere near all of the underground coal is extractable even aside from the Subsidence Act. The categories of coal that must be left for § 4 purposes and other purposes are not necessarily distinct sets, and there is no information in the record as to how much coal is actually left in the ground *solely* because of § 4. We do know, however, that petitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed. Nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable.

Instead, petitioners have sought to narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use. They advance two alternative ways of carving their property in order to reach this conclusion. First, they focus on the specific tons of coal that they must leave in the ground under

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[24] The percentage of the total that must be left in place under § 4 is not the same for every mine because of the wide variation in the extent of surface development in different areas. For 7 of the 13 mines identified in the record, 1% or less of the coal must remain in place; for 3 others, less than 3% must be left in place; for the other 3, the percentages are 4%, 7.8%, and 9.4%. See App. 284.

the Subsidence Act, and argue that the Commonwealth has effectively appropriated this coal since it has no other useful purpose if not mined. Second, they contend that the Commonwealth has taken their separate legal interest in property—the "support estate."

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967).[25] In *Penn Central* the Court explained:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole*—here the city tax block designated as the 'landmark site.'" 438 U. S., at 130–131.

Similarly, in *Andrus* v. *Allard*, 444 U. S. 51 (1979), we held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.*, at 65–66. Although these verbal formulizations do not solve all of the definitional issues that may arise in defining the relevant mass of property, they do provide sufficient guidance to compel us to reject petitioners' arguments.

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[25] See also Sax, Takings and the Police Power, 74 Yale L. J. 36, 60 (1964); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 566–567 (1984).

The Coal in Place

The parties have stipulated that enforcement of the DER's 50% rule will require petitioners to leave approximately 27 million tons of coal in place. Because they own that coal but cannot mine it, they contend that Pennsylvania has appropriated it for the public purposes described in the Subsidence Act.

This argument fails for the reason explained in *Penn Central* and *Andrus*. The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. Cf. *Gorieb* v. *Fox*, 274 U. S. 603 (1927) (upholding validity of setback ordinance) (Sutherland, J.). There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

We do not consider Justice Holmes' statement that the Kohler Act made mining of "certain coal" commercially impracticable as requiring us to focus on the individual pillars of coal that must be left in place. That statement is best understood as referring to the Pennsylvania Coal Company's assertion that it could not undertake profitable anthracite coal mining in light of the Kohler Act. There were strong assertions in the record to support that conclusion. For example, the coal company claimed that one company was "unable to operate six large collieries in the city of Scranton, employing more than five thousand men." Motion to Advance for Ar-

gument in *Pennsylvania Coal Co.* v. *Mahon*, O. T. 1922, No. 549, p. 2.[26] As Judge Adams explained:

> "At first blush, this language seems to suggest that the Court would have found a taking no matter how little of the defendants' coal was rendered unmineable—that because 'certain' coal was no longer accessible, there had been a taking of that coal. However, when one reads the sentence in context, it becomes clear that the Court's concern was with whether the defendants' 'right to mine coal . . . [could] be exercised *with profit*.' 260 U. S. at 414 (emphasis added). . . . Thus, the Court's holding in *Mahon* must be assumed to have been based on its understanding that the Kohler Act rendered the business of mining coal unprofitable." 771 F. 2d, at 716, n. 6.

When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners' underground coal can be profitably mined in any event, and there is no showing that petitioners' reasonable "investment-backed expectations" have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by § 4.[27]

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[26] Of course, the company also argued that the Subsidence Act made it commercially impracticable to mine the very coal that had to be left in place. Although they could have constructed pillars for support in place of the coal, the cost of the artificial pillars would have far exceeded the value of the coal. See Brief for Plaintiff in Error in *Pennsylvania Coal* v. *Mahon*, O. T. 1922, No. 549, pp. 7–9.

[27] We do not suggest that the State may physically appropriate relatively small amounts of private property for its own use without paying just compensation. The question here is whether there has been any taking at all when no coal has been physically appropriated, and the regulatory pro-

The Support Estate

Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate.[28] Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights. For example, in *Penn Central*, the Court rejected the argument that the "air rights" above the terminal constituted a separate segment of property for Takings Clause purposes. 438 U. S., at 130. Likewise, in *Andrus* v. *Allard*, we viewed the right to sell property as just one element of the owner's property interest. 444 U. S., at 65–66. In neither case did the result turn on whether state law allowed the separate sale of the segment of property.

The Court of Appeals, which is more familiar with Pennsylvania law than we are, concluded that as a practical matter the support estate is always owned by either the owner of the surface or the owner of the minerals. It stated:

> "The support estate consists of the right to remove the strata of coal and earth that undergird the surface or to leave those layers intact to support the surface and prevent subsidence. These two uses cannot co-exist and, depending upon the purposes of the owner of the support

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gram places a burden on the use of only a small fraction of the property that is subjected to regulation. See generally n. 18, *supra*.

[28] See *Charnetski* v. *Miners Mills Coal Mining Co.*, 270 Pa. 459, 113 A. 683 (1921); *Penman* v. *Jones*, 256 Pa. 416 (1917); *Captline* v. *County of Allegheny*, 74 Pa. Commw. 85, 459 A. 2d 1298 (1983), cert. denied, 466 U. S. 904 (1984); see generally Montgomery, The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania, 25 Temple L. Q. 1 (1951).

> estate, one use or the other must be chosen. If the owner is a mine operator, the support estate is used to exploit the mineral estate. When the right of support is held by the surface owner, its use is to support that surface and prevent subsidence. Thus, although Pennsylvania law does recognize the support estate as a 'separate' property interest, *id.*, it cannot be used profitably by one who does not also possess either the mineral estate or the surface estate. *See* Montgomery, *The Development of the Right of Subjacent Support and the 'Third Estate in Pennsylvania,'* 25 Temple L. Q. 1, 21 (1951)." 771 F. 2d, at 715–716.

Thus, in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.

But even if we were to accept petitioners' invitation to view the support estate as a distinct segment of property for "takings" purposes, they have not satisfied their heavy burden of sustaining a facial challenge to the Act. Petitioners have acquired or retained the support estate for a great deal of land, only part of which is protected under the Subsidence Act, which, of course, deals with subsidence in the immediate vicinity of certain structures, bodies of water, and cemeteries. See n. 6, *supra*. The record is devoid of any evidence on what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act. Under these circumstances, peti-

tioners' facial attack under the Takings Clause must surely fail.[29]

IV

In addition to their challenge under the Takings Clause, petitioners assert that § 6 of the Subsidence Act violates the Contracts Clause by not allowing them to hold the surface owners to their contractual waiver of liability for surface damage. Here too, we agree with the Court of Appeals and the District Court that the Commonwealth's strong public interests in the legislation are more than adequate to justify the impact of the statute on petitioners' contractual agreements.

Prior to the ratification of the Fourteenth Amendment, it was Article I, § 10, that provided the primary constitutional check on state legislative power. The first sentence of that section provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold or silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U. S. Const., Art. I, § 10.

Unlike other provisions in the section, it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally. *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 433 (1934). The context in which the Contracts Clause is found, the historical setting in which it was

[29] Another unanswered question about the level of diminution involves the District Court's observation that the support estate carries with it far more than the right to cause subsidence damage without liability. See 581 F. Supp., at 519. There is no record as to what value these other rights have and it is thus impossible to say whether the regulation of subsidence damage under certain structures, and the imposition of liability for damage to certain structures, denies petitioners the economically viable use of the support estate, even if viewed as a distinct segment of property.

adopted,[30] and our cases construing the Clause, indicate that its primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy. See *e. g.*, *ibid.*; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934). Even in such cases, the Court has refused to give the Clause a literal reading. Thus, in the landmark case of *Home Building & Loan Assn.* v. *Blaisdell*, the Court upheld Minnesota's statutory moratorium against home foreclosures, in part, because the legislation was addressed to the "legitimate end" of protecting "a basic interest of society," and not just for the advantage of some favored group. *Id.*, at 445.

As Justice Stewart explained:

> "[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.' *Manigault* v. *Springs*, 199 U. S. 473, 480. As Mr. Justice

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[30] "It was made part of the Constitution to remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them,' *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 439 (1934)." *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 256 (1978) (BRENNAN, J., dissenting).

> Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.'" *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 241–242 (1978).

In assessing the validity of petitioners' Contracts Clause claim in this case, we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment. Petitioners claim that they obtained damages waivers for a large percentage of the land surface protected by the Subsidence Act, but that the Act removes the surface owners' contractual obligations to waive damages. We agree that the statute operates as "a substantial impairment of a contractual relationship," *id.*, at 244, and therefore proceed to the asserted justifications for the impairment.[31]

The record indicates that since 1966 petitioners have conducted mining operations under approximately 14,000 structures protected by the Subsidence Act. It is not clear whether that number includes the cemeteries and water courses under which mining has been conducted. In any event, it is petitioners' position that, because they contracted

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[31] As we have mentioned above, we do not know what percentage of petitioners' acquired support estate is in fact restricted under the Subsidence Act. See *supra*, at 501–502. Moreover, we have no basis on which to conclude just how substantial a part of the support estate the waiver of liability is. See *id.*, at n. 29. These inquiries are both essential to determine the "severity of the impairment," which in turn affects "the level of scrutiny to which the legislation will be affected." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 411 (1983). While these dearths in the record might be critical in some cases, they are not essential to our discussion here because the Subsidence Act withstands scrutiny even if it is assumed that it constitutes a total impairment.

with some previous owners of property generations ago,[32] they have a constitutionally protected legal right to conduct their mining operations in a way that would make a shambles of all those buildings and cemeteries. As we have discussed, the Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties.

Of course, the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations. A court must also satisfy itself that the legislature's "adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 412 (1983) (quoting *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 22 (1977)). But, we have repeatedly held that unless the State is itself a contracting party, courts should "'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Energy Reserves Group, Inc.*, 459 U. S., at 413 (quoting *United States Trust Co.*, 431 U. S., at 23).

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[32] Most of these waivers were obtained over 70 years ago as part of the support estate which was itself obtained or retained as an incident to the acquisition or retention of the right to mine large quantities of underground coal. No question of enforcement of such a waiver against the original covenantor is presented; rather, petitioners claim a right to enforce the waivers against subsequent owners of the surface. This claim is apparently supported by Pennsylvania precedent holding that these waivers run with the land. See *Kormuth* v. *United States Steel Co.*, 379 Pa. 365, 108 A. 2d 907 (1954); *Scranton* v. *Phillips*, 94 Pa. 15, 22 (1880). That the Pennsylvania courts might have had, or may in the future have, a valid basis for refusing to enforce these perpetual covenants against subsequent owners of the surface rights is not necessarily a sufficient reason for concluding that the legislative impairment of the contracts is permissible. See *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1924); *Central Land Co.* v. *Laidley*, 159 U. S. 103 (1895) (distinguishing legislative and judicial action).

As we explained more fully above, the Subsidence Act plainly survives scrutiny under our standards for evaluating impairments of private contracts.[33] The Commonwealth has determined that in order to deter mining practices that could have severe effects on the surface, it is not enough to set out guidelines and impose restrictions, but that imposition of liability is necessary. By requiring the coal companies either to repair the damage or to give the surface owner funds to repair the damage, the Commonwealth accomplishes both deterrence and restoration of the environment to its previous condition. We refuse to second-guess the Commonwealth's determinations that these are the most appropriate ways of dealing with the problem. We conclude, therefore, that the impairment of petitioners' right to enforce the damages waivers is amply justified by the public purposes served by the Subsidence Act.

The judgment of the Court of Appeals is

Affirmed.

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

More than 50 years ago, this Court determined the constitutionality of Pennsylvania's Kohler Act as it affected the property interests of coal mine operators. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922). The Bituminous Mine Subsidence and Land Conservation Act approved today effects an interference with such interests in a strikingly similar manner. The Court finds at least two reasons why this case is different. First, we are told, "the character of the governmental action involved here leans heavily against finding a taking." *Ante*, at 485. Second, the Court concludes that the Subsidence Act neither "makes it impossible for peti-

[33] Because petitioners did not raise the issue before the District Court, the Court of Appeals rejected their attempt to argue on appeal that the Subsidence Act also affects contracts to which the Commonwealth is a party. See 771 F. 2d, at 718, n. 8.

tioners to profitably engage in their business," nor involves "undue interference with [petitioners'] investment-backed expectations." *Ibid.* Neither of these conclusions persuades me that this case is different, and I believe that the Subsidence Act works a taking of petitioners' property interests. I therefore dissent.

I

In apparent recognition of the obstacles presented by *Pennsylvania Coal* to the decision it reaches, the Court attempts to undermine the authority of Justice Holmes' opinion as to the validity of the Kohler Act, labeling it "uncharacteristically . . . advisory." *Ante*, at 484. I would not so readily dismiss the precedential value of this opinion. There is, to be sure, some language in the case suggesting that it could have been decided simply by addressing the particular application of the Kohler Act at issue in the case. See, *e. g.*, *Pennsylvania Coal*, *supra*, at 414 ("If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights"). The Court, however, found that the validity of the Act itself was properly drawn into question: "[T]he case has been treated as one in which the general validity of the [Kohler] act should be discussed." *Ibid.*[1] The coal company clearly had an interest in obtaining a determination that the Kohler Act was unenforceable if it worked a taking without providing for compensation. For

[1] The Pennsylvania Supreme Court, in the decision under review, had also determined that the case called for "consideration . . . of the constitutionality of the act itself." *Mahon* v. *Pennsylvania Coal Co.*, 274 Pa. 489, 494, 118 A. 491, 492 (1922). Before this Court, the coal company persisted in its claim that the Pennsylvania statute took its property without just compensation. See Brief for Plaintiff in Error in *Pennsylvania Coal Co.* v. *Mahon*, O. T. 1922, No. 549, pp. 7–8, 16, 19–21, 28–33; Brief for Defendants in Error in *Pennsylvania Coal Co.* v. *Mahon*, O. T. 1922, No. 549, p. 73.

these reasons, I would not find the opinion of the Court in *Pennsylvania Coal* advisory in any respect.

The Court's implication to the contrary is particularly disturbing in this context, because the holding in *Pennsylvania Coal* today discounted by the Court has for 65 years been the foundation of our "regulatory takings" jurisprudence. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127 (1978); D. Hagman & J. Juergensmeyer, Urban Planning and Land Development Control Law 319 (2d ed. 1986) ("Pennsylvania Coal was a monumental decision which remains a vital element in contemporary taking law"). We have, for example, frequently relied on the admonition that "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, *supra*, at 415. See, *e. g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348 (1986); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1003 (1984); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962); *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958). Thus, even were I willing to assume that the opinion in *Pennsylvania Coal* standing alone is reasonably subject to an interpretation that renders more than half the discussion "advisory," I would have no doubt that our repeated reliance on that opinion establishes it as a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause.

I accordingly approach this case with greater deference to the language as well as the holding of *Pennsylvania Coal* than does the Court. Admittedly, questions arising under the Just Compensation Clause rest on ad hoc factual inquiries, and must be decided on the facts and circumstances in each case. See *Penn Central Transportation Co.* v. *New York City*, *supra*, at 124; *United States* v. *Central Eureka Mining Co.*, *supra*, at 168. Examination of the relevant factors presented here convinces me that the differences be-

tween them and those in *Pennsylvania Coal* verge on the trivial.

II

The Court first determines that this case is different from *Pennsylvania Coal* because "the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare." *Ante*, at 485. In my view, reliance on this factor represents both a misreading of *Pennsylvania Coal* and a misunderstanding of our precedents.

A

The Court opines that the decision in *Pennsylvania Coal* rested on the fact that the Kohler Act was "enacted solely for the benefit of private parties," *ante*, at 486, and "served only private interests." *Ante*, at 484. A review of the Kohler Act shows that these statements are incorrect. The Pennsylvania Legislature passed the statute "as remedial legislation, designed to cure existing evils and abuses." *Mahon* v. *Pennsylvania Coal Co.*, 274 Pa. 489, 495, 118 A. 491, 492 (1922) (quoting the Act). These were *public* "evils and abuses," identified in the preamble as "wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life . . . ." *Id.*, at 496, 118 A., at 493.[2] The Pennsylvania Supreme Court recognized that these concerns were "such as to create an emergency, properly warranting the exercise of the police power . . . ." *Id.*, at 497, 118 A., at 493. There can be

[2] That these were public "evils and abuses" is further illustrated by the coverage of the Kohler Act, which regulated mining under "any public building or any structure customarily used by the public," including churches, schools, hospitals, theaters, hotels, and railroad stations. *Mahon* v. *Pennsylvania Coal*, *supra*, at 495, 118 A., at 492. Protected areas also included streets, roads, bridges, or "any other public passageway, dedicated to public use or habitually used by the public," as well as public utility structures, private homes, workplaces, and cemeteries. *Ibid.*

no doubt that the Kohler Act was intended to serve public interests.

Though several aspects of the Kohler Act limited its protection of these interests, see *Pennsylvania Coal*, 260 U. S., at 414, this Court did not ignore the public interests served by the Act. When considering the protection of the "single private house" owned by the Mahons, the Court noted that "[n]o doubt there is a *public* interest even in this." *Id.*, at 413 (emphasis added). It recognized that the Act "affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." *Id.*, at 414. See also *id.*, at 416 ("We assume . . . that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain"). The strong public interest in the stability of streets and cities, however, was insufficient "to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Ibid.* Thus, the Court made clear that the mere existence of a public purpose was insufficient to release the government from the compensation requirement: "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." *Id.*, at 415.

The Subsidence Act rests on similar public purposes. These purposes were clearly stated by the legislature: "[T]o aid in the protection of the safety of the public, to enhance the value of [surface area] lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands . . . ." Pa. Stat. Ann., Title 52, § 1406.2 (Purdon Supp. 1986). The Act's declaration of policy states that mine subsidence "has seriously impeded land development . . . has caused a very clear and present danger to the health, safety and welfare of the people of Pennsylvania [and] erodes the

tax base of the affected municipalities." §§ 1406.3(2), (3), (4). The legislature determined that the prevention of subsidence would protect surface structures, advance the economic future and well-being of Pennsylvania, and ensure the safety and welfare of the Commonwealth's residents. *Ibid.* Thus, it is clear that the Court has severely understated the similarity of purpose between the Subsidence Act and the Kohler Act. The public purposes in this case are not sufficient to distinguish it from *Pennsylvania Coal.*[3]

B

The similarity of the public purpose of the present Act to that in *Pennsylvania Coal* does not resolve the question whether a taking has occurred; the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power. See *Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 239–243, 245 (1984); *Berman* v. *Parker,* 348 U. S. 26, 32–33 (1954). The *nature* of these purposes may be relevant, for we have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use. See *Goldblatt* v. *Hemp-*

[3] The Court notes that the particulars of the Subsidence Act better serve these public purposes than did the Kohler Act. *Ante,* at 486. This may well be true, but our inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.'" *Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 242 (1984), quoting *Western & Southern Life Insurance Co.* v. *State Bd. of Equalization,* 451 U. S. 648, 671–672 (1981). Conversely, our cases have never found it sufficient that legislation efficiently achieves its desired objectives to hold that the compensation required by the Fifth Amendment is unavailable.

stead, 369 U. S. 590 (1962); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915); *Mugler* v. *Kansas*, 123 U. S. 623 (1887). See generally *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 144–146 (REHNQUIST, J., dissenting). The Court today indicates that this "nuisance exception" alone might support its conclusion that no taking has occurred. Despite the Court's implication to the contrary, see *ante*, at 485–486, and n. 15, the legitimacy of this purpose is a question of federal, rather than state, law, subject to independent scrutiny by this Court. This statute is not the type of regulation that our precedents have held to be within the "nuisance exception" to takings analysis.

The ease with which the Court moves from the recognition of public interests to the assertion that the activity here regulated is "akin to a public nuisance" suggests an exception far wider than recognized in our previous cases. "The nuisance exception to the taking guarantee," however, "is not coterminous with the police power itself," *Penn Central Transportation*, *supra*, at 145 (REHNQUIST, J., dissenting), but is a narrow exception allowing the government to prevent "a misuse or illegal use." *Curtin* v. *Benson*, 222 U. S. 78, 86 (1911). It is not intended to allow "the prevention of a legal and essential use, an attribute of its ownership." *Ibid.*

The narrow nature of this exception is compelled by the concerns underlying the Fifth Amendment. Though, as the Court recognizes, *ante*, at 491–492, the Fifth Amendment does not prevent actions that secure a "reciprocity of advantage," *Pennsylvania Coal*, *supra*, at 415, it is designed to prevent "the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325 (1893). See also *Penn Central Transportation Co.* v. *New York City*, *supra*, at 123–125; *Armstrong* v.

United States, 364 U. S. 40, 49 (1960). A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety, and welfare."

Thus, our cases applying the "nuisance" rationale have involved at least two narrowing principles. First, nuisance regulations exempted from the Fifth Amendment have rested on discrete and narrow purposes. See *Goldblatt* v. *Hempstead*, *supra*; *Hadacheck* v. *Sebastian*, *supra*; *Mugler* v. *Kansas*, *supra*. The Subsidence Act, however, is much more than a nuisance statute. The central purposes of the Act, though including public safety, reflect a concern for preservation of buildings, economic development, and maintenance of property values to sustain the Commonwealth's tax base. We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation.

Second, and more significantly, our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation. Thus, in *Mugler* v. *Kansas*, *supra*, the prohibition on manufacture and sale of intoxicating liquors made the distiller's brewery "of little value" but did not completely extinguish the value of the building. Similarly, in *Miller* v. *Schoene*, 276 U. S. 272 (1928), the individual forced to cut down his cedar trees nevertheless was able "to use the felled trees." *Penn Central Transportation Co.* v. *New York City*, *supra*, at 126. The

restriction on surface mining upheld in *Goldblatt* v. *Hempstead*, *supra*, may have prohibited "a beneficial use" of the property, but did not reduce the value of the lot in question. 369 U. S., at 593, 594. In none of these cases did the regulation "destroy essential uses of private property." *Curtin* v. *Benson*, *supra*, at 86.

Here, petitioners' interests in particular coal deposits have been completely destroyed. By requiring that defined seams of coal remain in the ground, see *ante*, at 476–477, and n. 7, § 4 of the Subsidence Act has extinguished any interest one might want to acquire in this property, for "'the right to coal consists in the right to mine it.'" *Pennsylvania Coal*, 260 U. S., at 414, quoting *Commonwealth ex rel. Keator* v. *Clearview Coal Co.*, 256 Pa. 328, 331, 100 A. 820 (1917). Application of the nuisance exception in these circumstances would allow the State not merely to forbid one "particular use" of property with many uses but to extinguish *all* beneficial use of petitioners' property.[4]

Though suggesting that the purposes alone are sufficient to uphold the Act, the Court avoids reliance on the nuisance exception by finding that the Subsidence Act does not impair petitioners' investment-backed expectations or ability to profitably operate their businesses. This conclusion follows mainly from the Court's broad definition of the "relevant mass of property," *ante*, at 497, which allows it to ascribe to the Subsidence Act a less pernicious effect on the interests of the property owner. The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant

[4] *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531 (1914), did not go this far. Though the Court in that case upheld a statute requiring mine operators to leave certain amounts of coal in their mines, examination of the opinion in *Plymouth Coal* reveals that the statute was not challenged as a taking for which compensation was due. Instead, the coal company complained that the statutory provisions for defining the width of required pillars of coal were constitutionally deficient as a matter of procedural due process.

parcel. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 149, n. 13 (REHNQUIST, J., dissenting). For the reasons explained below, I do not believe that the Court's opinion adequately performs this task.

III

The *Pennsylvania Coal* Court found it sufficient that the Kohler Act rendered it "commercially impracticable to mine certain coal." 260 U. S., at 414. The Court, *ante*, at 498, observes that this language is best understood as a conclusion that certain coal mines could not be operated at a profit. Petitioners have not at this stage of the litigation rested their claim on similar proof; they have not "claimed that their mining operations, or even any specific mines, have been unprofitable since the Subsidence Act was passed." *Ante*, at 496. The parties have, however, stipulated for purposes of this facial challenge that the Subsidence Act requires petitioners to leave in the ground 27 million tons of coal, without compensation therefor. Petitioners also claim that the Act extinguishes their purchased interests in support estates which allow them to mine the coal without liability for subsidence. We are thus asked to consider whether these restrictions are such as to constitute a taking.

A

The Court's conclusion that the restriction on particular coal does not work a taking is primarily the result of its view that the 27 million tons of coal in the ground "do not constitute a separate segment of property for takings law purposes." *Ante*, at 498. This conclusion cannot be based on the view that the interests are too insignificant to warrant protection by the Fifth Amendment, for it is beyond cavil that government appropriation of "relatively small amounts of private property for its own use" requires just compensation. *Ante*, at 499, n. 27. Instead, the Court's refusal to recognize the coal in the ground as a separate segment of property for takings purposes is based on the fact that the

alleged taking is "regulatory," rather than a physical intrusion. See *ante*, at 488–489, n. 18. On the facts of this case, I cannot see how the label placed on the government's action is relevant to consideration of its impact on property rights.

Our decisions establish that governmental action short of physical invasion may constitute a taking because such regulatory action might result in "as complete [a loss] as if the [government] had entered upon the surface of the land and taken exclusive possession of it." *United States* v. *Causby*, 328 U. S. 256, 261 (1946). Though the government's direct benefit may vary depending upon the nature of its action, the question is evaluated from the perspective of the property holder's loss rather than the government's gain. See *ibid.*; *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945); *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910). Our observation that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government," *Penn Central Transportation Co.* v. *New York City*, *supra*, at 124, was not intended to alter this perspective merely because the claimed taking is by regulation. Instead, we have recognized that regulations—unlike physical invasions—do not typically extinguish the "full bundle" of rights in a particular piece of property. In *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979), for example, we found it crucial that a prohibition on the sale of avian artifacts destroyed only "one 'strand' of the bundle" of property rights, "because the aggregate must be viewed in its entirety." This characteristic of regulations frequently makes unclear the breadth of their impact on identifiable segments of property, and has required that we evaluate the effects in light of the "several factors" enumerated in *Penn Central Transportation Co.*: "The economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with investment-backed expectations, [and] the character of the governmental action." 438 U. S., at 124.

No one, however, would find any need to employ these analytical tools where the government has physically taken an identifiable segment of property. Physical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land. Similarly, there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking.[5] Thus, it is clear our decision in *Andrus* v. *Allard*, *supra*, would have been different if the Government had confiscated the avian artifacts. In my view, a different result would also follow if the Government simply prohibited every use of that property, for the owner would still have been "deprive[d] of all or most of his interest in the subject matter." *United States* v. *General Motors Corp. supra*, at 378.

In this case, enforcement of the Subsidence Act and its regulations will require petitioners to leave approximately 27 million tons of coal in place. There is no question that this coal is an identifiable and separable property interest. Unlike many property interests, the "bundle" of rights in this coal is sparse. "'For practical purposes, the right to coal consists in the right to mine it.'" *Pennsylvania Coal*, 260

[5] There is admittedly some language in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 130–131 (1978), that suggests a contrary analysis: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." The Court gave no guidance on how one is to distinguish a "discrete segment" from a "single parcel." It was not clear, moreover, that the air rights at issue in *Penn Central* were entirely eliminated by the operation of New York City's Landmark Preservation Law, for, as the Court noted, "it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal." *Id.*, at 136.

U. S., at 414, quoting *Commonwealth ex rel. Keater* v. *Clearview Coal Co.*, 256 Pa. at 331, 100 A. at 820. From the relevant perspective—that of the property owners—this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use. The regulation, then, does not merely inhibit one strand in the bundle, cf. *Andrus* v. *Allard*, *supra*, but instead destroys completely any interest in a segment of property. In these circumstances, I think it unnecessary to consider whether petitioners may operate individual mines or their overall mining operations profitably, for they have been denied all use of 27 million tons of coal. I would hold that § 4 of the Subsidence Act works a taking of these property interests.

B

Petitioners also claim that the Subsidence Act effects a taking of their support estate. Under Pennsylvania law, the support estate, the surface estate, and the mineral estate are "three distinct estates in land which can be held in fee simple separate and distinct from each other . . . ." *Captline* v. *County of Allegheny*, 74 Pa. Commw. 85, 91, 459 A. 2d 1298, 1301(1983), cert. denied, 466 U. S. 904 (1984). In refusing to consider the effect of the Subsidence Act on this property interest alone, the Court dismisses this feature of Pennsylvania property law as simply a "legalistic distinctio[n] within a bundle of property rights." *Ante*, at 500. "Its value," the Court informs us, "is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface." *Ante*, at 501. See also 771 F. 2d 707, 716 (1985) ("To focus upon the support estate separately . . . would serve little purpose"). This view of the support estate allows the Court to conclude that its destruction is merely the destruction of one "strand" in petitioners' bundle of property rights, not significant enough in the overall bundle to work a taking.

Contrary to the Court's approach today, we have evaluated takings claims by reference to the units of property defined

by state law. In *Ruckleshaus* v. *Monsanto Co.*, for example, we determined that certain "health, safety, and environmental data" was "cognizable as a trade-secret property right under Missouri law," 467 U. S., at 1003, and proceeded to evaluate the effects of governmental action on this state-defined property right.[6] Reliance on state law is necessitated by the fact that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 161 (1980), quoting *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). In reality, the Court's decision today cannot reject this necessary reliance on state law. Rather, it simply rejects the support estate as the relevant segment of property and evaluates the impact of the Subsidence Act by reference to some broader, yet undefined, segment of property presumably recognized by state law.

I see no reason for refusing to evaluate the impact of the Subsidence Act on the support estate alone, for Pennsylvania has clearly defined it as a separate estate in property. The Court suggests that the practical significance of this estate is limited, because its value "is merely part of the bundle of rights possessed by the owner of either the coal or the surface." *Ante*, at 501. Though this may accurately describe the usual state of affairs, I do not understand the Court to mean that one holding the support estate alone would find it worthless, for surely the owners of the mineral or surface es-

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[6] Indeed, we rejected the claim that the Supremacy Clause allowed Congress to dictate that the effect of its regulation "not vary depending on the property law of the State in which the submitter [of trade-secret information] is located. . . . If Congress can 'pre-empt' state property law in the manner advocated . . . , then the Taking Clause has lost all vitality." *Ruckleshaus* v. *Monsanto Co.*, 467 U. S., at 1012.

tates would be willing buyers of this interest.[7] Nor does the Court suggest that the owner of both the mineral and support estates finds his separate interest in support to be without value. In these circumstances, where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest.

When held by owners of the mineral estate, the support estate "consists of the right to remove the strata of coal and earth that undergird the surface . . . ." 771 F. 2d, at 715. Purchase of this right, therefore, shifts the risk of subsidence to the surface owner. Section 6 of the Subsidence Act, by making the coal mine operator strictly liable for any damage to surface structures caused by subsidence, purports to place this risk on the holder of the mineral estate regardless of whether the holder also owns the support estate. Operation of this provision extinguishes petitioners' interests in their support estates, making worthless what they purchased as a separate right under Pennsylvania law. Like the restriction on mining particular coal, this complete interference with a property right extinguishes its value, and must be accompanied by just compensation.[8]

IV

In sum, I would hold that Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act effects a taking of petitioners' property without providing just compensation. Specifically, the Act works to extinguish petitioners' interest

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[7] It is clear that under Pennsylvania law, "one person may own the coal, another the surface, and the third the right of support." *Smith* v. *Glen Alden Coal Co.*, 347 Pa. 290, 304, 32 A. 2d 227, 234–235 (1943).

[8] It is therefore irrelevant that petitioners have not presented evidence of "what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act." *Ante*, at 501. There is no doubt that the Act extinguishes support estates. Because it fails to provide compensation for this taking, the Act violates the dictates of the Fifth Amendment.

in at least 27 million tons of coal by requiring that coal to be left in the ground, and destroys their purchased support estates by returning to them financial liability for subsidence. I respectfully dissent from the Court's decision to the contrary.[9]

[9] Because I would find § 6 of the Subsidence Act unconstitutional under the Fifth Amendment, I would not reach the Contracts Clause issue addressed by the Court, *ante*, at 502–506.

RODRIGUEZ *v.* UNITED STATES

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

No. 86–5504. Decided March 23, 1987

While released on a personal recognizance bond following her arrest for selling cocaine, petitioner was arrested again for selling heroin. She pleaded guilty to both charges. Although recognizing that 18 U. S. C. § 3147 (1982 ed., Supp. III) required that petitioner, as a person who committed a felony while on release pending judicial proceedings, had to be *sentenced* to at least a 2-year term of imprisonment in addition to the sentences for the two drug offenses, the sentencing judge, relying on 18 U. S. C. § 3651, suspended *execution* of the § 3147 sentence and instead imposed a 2-year probation term as more appropriate under the circumstances. The Court of Appeals reversed, holding that § 3147 "supersede[d]" § 3651, leaving federal judges without authority to suspend execution of sentences imposed under § 3147.

Held: Section 3147 does not divest sentencing judges of their § 3651 authority. Nothing in the language of the two provisions suggests the existence of an "irreconcilable conflict" from which an intent to work an implicit partial repeal of § 3651 may be inferred; to the contrary, the provisions fit together quite sensibly. Moreover, the totality of the legislative history of the Act of which § 3147 is a part demonstrates with unusual clarity that no repeal was intended. The Court of Appeals impermissibly relied on its understanding of the broad purposes of that Act, since § 3147 is sufficiently clear in its context and not at odds with the legislative history.

Certiorari granted; 794 F. 2d 24, reversed.

PER CURIAM.

In the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. 98–473, 98 Stat. 1976, Congress provided that anyone who commits a felony while on release pending judicial proceedings must be sentenced to at least two years' imprisonment in addition to the sentence imposed for the underlying felony. 18 U. S. C. § 3147 (1982 ed., Supp. III). Under the Probation Act, 18 U. S. C. § 3651, federal judges have long had authority to suspend the execution of certain sen-

tences and to impose probation instead. The United States Court of Appeals for the Second Circuit held that § 3147 "supersede[d]" § 3651, leaving federal judges without authority to suspend execution of sentences imposed under § 3147. 794 F. 2d 24, 26 (1986). We reverse.

Petitioner, Gloria Rodriguez, was arrested for selling cocaine. While released on a personal recognizance bond she was arrested again, for selling heroin. She pleaded guilty to both charges. The sentencing judge recognized that § 3147[1] required that petitioner be *sentenced* to at least a 2-year term of imprisonment in addition to the sentences for the two drug offenses. Nevertheless, relying on § 3651,[2] he suspended *execution* of that sentence, finding that under the circumstances a 2-year probation term was more appropriate. The United States appealed, arguing that § 3147 had superseded § 3651, and that the sentencing judge had no authority to suspend execution of the sentence imposed under § 3147. The Court of Appeals agreed with the United States and reversed. 794 F. 2d 24 (CA2 1986). Rodriguez then filed this petition for certiorari.

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[1] Section 3147 provides in relevant part:

"A person convicted of an offense committed while released [pending judicial proceedings] shall be sentenced, in addition to the sentence prescribed for the offense[,] to—

"(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony . . . .

"A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment."

[2] Section 3651 provides in relevant part:

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States[,] when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

Since § 3147 does not explicitly divest sentencing judges of their authority under § 3651, the Court of Appeals' judgment amounts to the conclusion that § 3147 is an implicit partial repeal of § 3651. It is well settled, however, that repeals by implication are not favored, see, *e. g.*, *TVA* v. *Hill*, 437 U. S. 153, 189 (1978), and will not be found unless an intent to repeal is "'clear and manifest.'" *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939) (quoting *Red Rock* v. *Henry*, 106 U. S. 596, 602 (1883)). Nothing in the language of these two provisions suggests the existence of the "'"irreconcilable conflict,"'" *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 468 (1982) (citations omitted), from which an intent to repeal may be inferred. To the contrary, the provisions fit together quite sensibly. Section 3147 requires that those who commit felonies while on release be *sentenced* to a term of at least two years; § 3651 authorizes sentencing judges to suspend *execution* of those sentences if probation would be more appropriate. Section 3147 is no different from many other federal statutes requiring minimum sentences, which have uniformly been held to be subject to the suspension authority of § 3651. See, *e. g.*, *Andrews* v. *United States*, 373 U. S. 334, 340 (1963) (dictum); *United States* v. *Davis*, 560 F. 2d 144, 148, n. 6 (CA3), cert. denied *sub nom. Hazzard* v. *United States*, 434 U. S. 839 (1977); *United States* v. *Wilson*, 506 F. 2d 521, 522 (CA9 1974) *(per curiam); Jones* v. *United States*, 419 F. 2d 593, 597–598 (CA8 1969); *United States* v. *Cameron*, 351 F. 2d 448, 449 (CA7 1965); *United States* v. *Hardaway*, 350 F. 2d 1021, 1022 (CA6 1965); *Smith* v. *United States*, 284 F. 2d 789, 791, n. 2 (CA5 1960); *United States* v. *Donovan*, 242 F. 2d 61, 64 (CA2 1957).

The Court of Appeals rested its conclusion in part on the legislative history of the CCCA, noting that various Senate and House Reports referred to § 3147 as establishing a "mandatory" sentence, as prescribing a "term of imprisonment of at least two years and not more than ten," and as "requir[ing] that the individual be imprisoned for an additional period of

time." See 794 F. 2d, at 26–29. Even if unrebutted, these passing references would not constitute the "clear and manifest" evidence of congressional intent necessary to establish repeal by implication. In fact, however, the totality of the legislative history of the Act demonstrates with unusual clarity that no repeal was intended. A Senate Report on an early version of the Act pointed out that statutes specifying minimum sentences did not create mandatory minimum terms of confinement, since such sentences could be suspended in favor of probation or parole. S. Rep. No. 98–225, p. 66, n. 129 (1983). The same Report also noted that the reported version of the provision eventually codified at 18 U. S. C. § 924(c) would permit such suspension, and recommended that it be amended to eliminate that possibility. S. Rep., at 312–313. Congress subsequently did amend § 924(c), as well as certain other provisions of the CCCA, to make § 3651 unambiguously inapplicable. See 18 U. S. C. §§ 924(c), 929(a) (1982 ed., Supp. III); 18 U. S. C. App. § 1202 (a); 21 U. S. C. § 845a(c) (1982 ed., Supp. III). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972)). It is, in short, overwhelmingly clear that, in passing the CCCA, Congress acted—as it is presumed to act, see, *e. g.*, *Lorillard* v. *Pons*, 434 U. S. 575, 581–582 (1978)—with full awareness of the well-established judicial interpretation that § 3651 permits the suspension of sentences "unless [it is] explicitly made inapplicable." *United States* v. *Donovan*, *supra*, at 64.

Additionally, and most impermissibly, the Court of Appeals relied on its understanding of the broad purposes of the CCCA, which included decreasing the frequency with which persons on pretrial release commit crimes and diminishing the sentencing discretion of judges. But no legislation pur-

sues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'" *Aaron* v. *SEC*, 446 U. S. 680, 695 (1980) (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 214, n. 33 (1976)).

Neither the language nor the legislative history of § 3147 provides any basis for concluding that it was intended to effect a partial repeal of § 3651. It is true that the practical effect of the Court of Appeals' contrary judgment is reduced by the fact that, as subsequently amended, the CCCA provides that § 3147 will be substantially altered and § 3651 will be repealed effective November 1, 1987, see 18 U. S. C. § 3147, 18 U. S. C. § 3651 (1982 ed., Supp. III). Nevertheless, because that judgment is plainly inconsistent with important doctrines of statutory construction, we grant the motion for leave to proceed *in forma pauperis* and the petition for certiorari and reverse.

It is so ordered.

JUSTICE BLACKMUN also would grant certiorari and reverse the judgment of the Court of Appeals.

JUSTICE MARSHALL would grant the petition and afford the parties an opportunity to brief the merits of the case. See, *e. g.*, *Newport* v. *Iacobucci*, 479 U. S. 92, 97 (1986) (MARSHALL, J., dissenting from summary disposition).

TRUESDALE *v.* AIKEN, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 86-5530. Decided March 23, 1987

Certiorari granted. Reversed.

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of South Carolina is reversed. *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). See also *United States* v. *Johnson*, 457 U. S. 537, 549 (1982).

It is so ordered.

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

Today the Court grants certiorari and summarily reverses a decision of the South Carolina Supreme Court that had refused to apply *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), retroactively to cases that were final at the time *Skipper* was decided. I continue to believe that the appropriate test for applying this Court's criminal law decisions retroactively to federal habeas corpus petitions is the analysis set forth by Justice Harlan in *Mackey* v. *United States*, 401 U. S. 667, 681–695 (1971) (opinion concurring in judgment in *Mackey* and dissenting from judgment in *Williams* v. *United States*, 401 U. S. 646 (1971)). See *Griffith* v. *Kentucky*, 479 U. S. 314, 328–329 (1987) (POWELL, J., concurring). In *Mackey*, Justice Harlan argued that "it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of

all these cases on the basis of intervening changes in constitutional interpretation." 401 U. S., at 689.[1]

Application of these principles to this case is not simple. *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), were decided before petitioner's conviction became final. Accordingly, under the retroactivity principles adopted in our recent decision in *Griffith* v. *Kentucky*, *supra*, petitioner is entitled to the benefit of those decisions. The Court appears to think that *Skipper*, *supra*, merely applied the settled principles of *Lockett* and *Eddings* to a new fact situation, and thus that petitioner also is entitled to the benefit of the Court's decision in *Skipper*.[2]

I do not agree that petitioner is entitled to the benefit of our decision in *Skipper*. I continue to think that the result in *Skipper* was "not required by our decisions in *Lockett* and *Eddings*," *Skipper*, *supra*, at 9 (POWELL, J., concurring in judgment) (citations omitted). In *Lockett* and *Eddings*, the Court held that the Eighth Amendment prohibits States from excluding, at a capital-sentencing proceeding, relevant evidence that tends to lessen the defendant's culpability. *Lockett* v. *Ohio*, *supra*, at 604; *Eddings* v. *Oklahoma*, *supra*, at 114. In *Skipper*, this rule was extended to require admission of evidence that was unrelated to culpability. Rather, the State was required to admit evidence relevant to the de-

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[1] Justice Harlan identified two exceptions to this rule: cases that "place . . . certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority," 401 U. S., at 692, and where there are "claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty,'" *id.*, at 693 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)). Neither of these exceptions is applicable to this case.

[2] The Court supports this conclusion by reference to the statement in *United States* v. *Johnson*, 457 U. S. 537 (1982), that "when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively, . . . because the later decision has not in fact altered that rule in any material way." *Id.*, at 549.

fendant's probable future conduct as a prisoner.[3] Neither the author of the plurality opinion in *Lockett* nor the author of the Court's opinion in *Eddings* agreed with the Court's decision in *Skipper*. Although I am of course bound by the Court's decision on the merits in *Skipper*, this is not incompatible with my view that *Skipper* broke new ground. Therefore, I do not believe this petitioner's conviction was incorrect under the law existing when the conviction became final. The South Carolina court decided this case in accord with the precedents existing at the time of petitioner's conviction.

I acknowledge that we cannot determine with certainty how the Court would have decided this case at the time petitioner was convicted.[4] Because of the inherent subjectivity of this determination, I do not find summary disposition of this case appropriate. Moreover, there are several questions related to this case that have not been decided by this Court's decisions. At least in the context of habeas petitions, we have not addressed the standards by which a court should determine the retroactive effect of cases like *Skipper* that arguably follow from pre-existing precedents. Nor has the Court decided whether the same retroactivity rules should apply to state postconviction proceedings that apply to

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[3] The Court in *Skipper* explained: "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.'" *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986) (quoting *Jurek* v. *Texas*, 428 U. S. 262, 275 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.)). The "past conduct" to which the *Skipper* Court referred was Skipper's good behavior *after* his conviction and death sentence.

[4] I am not the first to note the difficulty of making these determinations. See *Desist* v. *United States*, 394 U. S. 244, 263–269 (1969) (Harlan, J., dissenting); *Mackey* v. *United States*, 401 U. S. 667, 695 (1971) (opinion of Harlan, J., concurring in judgment in *Mackey* and dissenting from judgment in *Williams* v. *United States*, 401 U. S. 646 (1971)).

federal habeas proceedings. A substantial argument could be made that this is a question of state procedural law and that—whatever the federal rule eventually may become—state courts considering such petitions need not consider developments in constitutional law that occur after the conviction became final. Of course, we should not resolve these questions without full briefing and consideration.

If these questions were properly presented, I would vote to grant the petition for a writ of certiorari. As the more important questions are not directly raised, my vote is to deny the petition. It seems to me that summary reversal is wholly inappropriate, and accordingly I dissent.

Syllabus

AMOCO PRODUCTION CO. ET AL. *v.* VILLAGE OF GAMBELL ET AL.

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

No. 85–1239. Argued January 12, 1987—Decided March 24, 1987*

Section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA) provides, *inter alia*, that, before allowing the use, occupancy, or disposition of public lands that would significantly restrict Alaskan Natives' use of those lands for subsistence, the head of the federal agency having primary jurisdiction over the lands must give notice, conduct a hearing, and determine that the restriction of subsistence uses is necessary and that reasonable steps will be taken to minimize adverse impacts. Petitioner Secretary of the Interior (Secretary) granted oil and gas leases to petitioner oil companies off the Alaska coast under the Outer Continental Shelf Lands Act (OCSLA). Claiming that the Secretary had failed to comply with § 810(a), respondents, two Alaska Native villages and a Native organization, sought injunctions to, *inter alia*, prohibit exploratory drilling under the leases. The District Court held that ANILCA applies to the OCS. It denied respondents' motions for preliminary injunctions, ruling that, although respondents had established a strong likelihood of success on the merits, injunctive relief was inappropriate because the balance of irreparable harm did not favor them, and the public interest favored continued oil exploration, which would not cause the type of harm—a restriction in subsistence uses or resources—that ANILCA was designed to prevent. The Court of Appeals affirmed the holding that ANILCA applies to the OCS but reversed the District Court's denial of a preliminary injunction. The court held, *inter alia*, that irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action, and that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances.

Held:

1. The Court of Appeals' direction of a preliminary injunction conflicted with *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, and was in

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*Together with No. 85–1406, *Hodel, Secretary of the Interior, et al.* v. *Village of Gambell et al.*, also on certiorari to the same court.

error. Section 810(a)'s purpose is to protect subsistence resources from unnecessary destruction, not to prohibit all federal land uses that would adversely affect such resources, and there is no clear indication in ANILCA that Congress intended to limit district courts' traditional equitable discretion by requiring them to issue injunctions in all cases. The Court of Appeals erroneously focused on § 810's procedure rather than on its underlying substantive policy of preservation of subsistence resources. The District Court's decision does not undermine that policy, since it was based on findings that exploration activities would not significantly restrict subsistence uses, and that the Secretary can control the offshore-leasing process even after exploration is completed, which findings the Court of Appeals did not dispute. Instead, that court stated and relied on a presumption of irreparable harm which is contrary to traditional equitable principles, has no basis in ANILCA, and is unnecessary to fully protect the environment. Furthermore, the balance of harms favors the District Court's ruling since the oil company petitioners had committed approximately $70 million to exploration which would have been lost had the preliminary injunction been issued. Moreover, the Court of Appeals' conclusion that the public interest favored injunctive relief because the interests served by ANILCA supersede all others is not supported by the statutory language, which merely declares that preservation of subsistence resources is *a* public interest that should be reconciled with competing interests where possible. Pp. 541–546.

2. Section 810(a) does not apply to the OCS. Pp. 546–555.

(a) By ANILCA's plain language, § 810(a) applies only to federal lands within the State of Alaska's boundaries, since the Act defines "public lands" to mean federal lands situated "in Alaska," which phrase has a precise geographic/political meaning that can be delineated with exactitude to include coastal waters to a point three miles from the coastline, where the OCS commences. Pp. 546–548.

(b) Nothing in the language or structure of ANILCA compels this Court to deviate from the plain meaning of "Alaska." Title VIII's subsistence-protection provisions constitute just 1 of ANILCA's 15 Titles, none of the rest of which has any express or implied applicability to the OCS, and all but 2 of which utilize the same definition of "public lands" as Title VIII. Moreover, § 1001(a) of the Act contains the lone express reference to the OCS which is intended to establish that section's inapplicability to the OCS. Furthermore, § 810(a) itself suggests that it does not apply to the OCS when it refers to "the Federal agency having primary jurisdiction," since no federal agency has "primary jurisdiction" over the OCS. Pp. 548–552.

(c) The similarity between ANILCA's language and that of its two statutory predecessors, the Alaska Statehood Act and the Alaska Native Claims Settlement Act, also refutes the contention that Congress intended "Alaska" to include the OCS. Those statutes allowed the new State of Alaska and Native Alaskans to select public lands "in Alaska" as their own. It is inconceivable that Congress could have intended that either the State or the Natives could select so vital a national resource as the OCS. P. 555.

(d) ANILCA's legislative history indicates that OCSLA rather than ANILCA governs offshore oil development. Pp. 552–554.

(e) The statutory construction rule that doubtful expressions must be resolved in favor of Indians does not apply here, since there is no ambiguity in the Act that requires interpretation. P. 555.

774 F. 2d 1414, reversed in part, vacated in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Parts I and III of which STEVENS and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined, *post*, p. 555.

Assistant Attorney General Habicht argued the cause for petitioners in No. 85–1406. With him on the briefs were *Solicitor General Fried*, *Deputy Solicitor General Wallace*, *Richard J. Lazarus*, *Anne S. Almy*, *Jacques B. Gelin*, *David C. Shilton*, and *Ralph W. Tarr*. *E. Edward Bruce* argued the cause for petitioners in No. 85–1239. With him on the briefs were *Brice M. Clagett*, *Bobby R. Burchfield*, and *Carl J. D. Bauman*.

Donald S. Cooper argued the cause for respondents. With him on the brief was *Carol H. Daniel*.†

†*Alvin J. Ziontz* filed a brief for North Slope Borough et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska by *Harold M. Brown*, Attorney General, and *Deborah Vogt*, Assistant Attorney General; for the State of California *ex rel.* Van de Kamp et al. by *John K. Van de Kamp*, Attorney General of California, *Theodora Berger*, Assistant Attorney General, *Ken Alex*, Deputy Attorney General, *Fred Silverman*, Solicitor of Delaware, *Jim Smith*, Attorney General of Florida, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Robert T.*

JUSTICE WHITE delivered the opinion of the Court.

Petitioner Secretary of the Interior granted oil and gas leases to petitioner oil companies in the Norton Sound (Lease Sale 57) and Navarin Basin (Lease Sale 83) areas of the Bering Sea under the Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.* (1982 ed. and Supp. III). The Court of Appeals for the Ninth Circuit directed the entry of a preliminary injunction against all activity in connection with the leases because it concluded that it was likely that the Secretary had failed to comply with § 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, 16 U. S. C. § 3120, prior to issuing the leases. We granted certiorari, 476 U. S. 1157, and we now reverse.[1]

Stephan, Attorney General of Kansas, *Paul Bardacke*, Attorney General of New Mexico, *Michael C. Turpen*, Attorney General of Oklahoma, *T. Travis Medlock*, Attorney General of South Carolina, *Jim Mattox*, Attorney General of Texas, *Mary Sue Terry*, Attorney General of Virginia, and *Bronson C. La Follette*, Attorney General of Wisconsin; and for the Natural Resources Defense Council et al. by *Larry Silver* and *Michael Axline*.

Ronald A. Zumbrun and *Robin L. Rivett* filed a brief for the Resource Development Council for Alaska, Inc., et al. as *amici curiae*.

[1] The oil company lessees and the Secretary of the Interior separately petitioned for certiorari, Nos. 85–1239 and 85–1406 respectively, presenting the same four questions: (1) whether the Ninth Circuit's rule that a district court must enter a preliminary injunction whenever it finds a likely violation of an environmental statute, absent extraordinary circumstances, conflicts with *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305 (1982); (2) whether ANILCA § 810 applies to the Outer Continental Shelf; (3) whether the Ninth Circuit's ruling that the Secretary of the Interior must fully comply with § 810's requirements prior to leasing and exploration, when a significant restriction of subsistence uses is not expected until the development and production stage, conflicts with *Secretary of Interior* v. *California*, 464 U. S. 312 (1984); and (4) whether the Ninth Circuit's decision applying ANILCA to the OCS should be given retroactive effect. Our answer to the second question disposes of the third and fourth questions. Respondent Alaska Natives cross-petitioned, No. 85–1608, from the Court of Appeals' ruling that the Alaska Native Claims Settlement Act, 43

I

When the Secretary of the Interior proposed Outer Continental Shelf (OCS) Lease Sale 57, the Alaska Native villages of Gambell and Stebbins sought to enjoin him from proceeding with the sale, claiming that it would adversely affect their aboriginal rights to hunt and fish on the OCS and that the Secretary had failed to comply with ANILCA § 810(a), 16 U. S. C. § 3120(a), which provides protection for natural resources used for subsistence in Alaska.[2] The District Court denied their motion for a preliminary injunction and thereafter granted summary judgment in favor of the Secretary and oil company intervenors, holding that the villagers had

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U. S. C. § 1601 *et seq.* (1982 ed. and Supp. III), extinguished their aboriginal rights on the OCS. The cross-petition has been held pending our disposition in Nos. 85–1239 and 85–1406.

[2] Section 810(a), 16 U. S. C. § 3120(a), provides:

"In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

"(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title;

"(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

"(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions."

no aboriginal rights on the OCS and that ANILCA did not apply to the OCS.[3]

The Court of Appeals for the Ninth Circuit affirmed the District Court's ruling on aboriginal rights, although on different grounds, and reversed the ruling on the scope of ANILCA § 810. *People of Gambell* v. *Clark*, 746 F. 2d 572 (1984) *(Gambell I)*. With respect to the claim of aboriginal rights, the court assumed without deciding that the villagers once had aboriginal rights to hunt and fish in the Norton Sound,[4] but concluded that these rights had been extinguished by § 4(b) of the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 690, 43 U. S. C. § 1603(b). That section provides:

> "All aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished." (Emphasis added.)

The Court of Appeals construed the phrase "in Alaska" to mean "the geographic region, including the contiguous continental shelf and the waters above it, and not merely the area within the strict legal boundaries of the State of Alaska."

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[3] The villages appealed and moved to enjoin the issuance of the leases pending appeal. The Ninth Circuit denied the motion and on May 10, 1983, 59 tracts were leased for bonus payments totaling over $300 million. While the appeal was pending, the Secretary approved exploration plans submitted by the lessees under 43 U. S. C. § 1340 (1982 ed. and Supp. III) and they proceeded with exploration during the summer of 1984. The Secretary also proceeded with Lease Sale 83 on April 17, 1984, which resulted in the leasing of 163 tracts for total bonus payments of over $500 million.

[4] As explained by the Ninth Circuit, "[a]boriginal title or right is a right of exclusive use and occupancy held by Natives in lands and waters used by them and their ancestors prior to the assertion of sovereignty over such areas by the United States." 746 F. 2d, at 574. See *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 667–669 (1974); see also F. Cohen, Handbook of Federal Indian Law 486–493 (1982).

746 F. 2d, at 575. Finding the phrase ambiguous, the court examined the legislative history and concluded that Congress wrote the extinguishment provision broadly "to accomplish a complete and final settlement of aboriginal claims and avoid further litigation of such claims." *Ibid.* The court then concluded that ANILCA § 810 had the same geographical scope as ANCSA § 4(b):

> "[The villages] make a compelling argument that the provisions of Title VIII of [ANILCA] protecting subsistence uses were intended to have the same territorial scope as provisions of the earlier Claims Settlement Act extinguishing Native hunting and fishing rights. The two statutory provisions are clearly related. When Congress adopted the Claims Settlement Act it was aware that extinguishing Native rights might threaten subsistence hunting and fishing by Alaska Natives. . . . It is a reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of [ANILCA] to be coextensive with the extinguishment of aboriginal rights that made those measures necessary." 746 F. 2d, at 579–580.

The court found support for this view in ANILCA's legislative history. But, according to the Court of Appeals, "[t]he most compelling reason for resolving the ambiguous language of Title VIII in favor of coverage of outer continental shelf lands and waters is that Title VIII was adopted to benefit the Natives." *Id.*, at 581. The court acknowledged the familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians. See *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918). It then remanded to the District Court the questions whether the Secretary had substantially complied with ANILCA § 810 in the

course of complying with other environmental statutes,[5] and if not, whether the leases should be voided.

In compliance with the Court of Appeals' decision, the Secretary prepared a postsale evaluation of possible impacts on subsistence uses from Lease Sale 57.[6] The Secretary found

[5] The Coastal Zone Management Act, 16 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), Marine Protection, Research, and Sanctuaries Act, 16 U. S. C. § 1431 *et seq.* (1982 ed. and Supp. III), Marine Mammal Protection Act, 16 U. S. C. § 1361 *et seq.* (1982 ed. and Supp. III), Fishery Conservation and Management Act, 16 U. S. C. § 1801 *et seq.* (1982 ed. and Supp. III), Endangered Species Act, 16 U. S. C. § 1531 *et seq.* (1982 ed. and Supp. III), and National Environmental Policy Act, 42 U. S. C. § 4331 *et seq.* (1982 ed. and Supp. III), all apply to activities on the OCS. Pursuant to the National Environmental Policy Act (NEPA), the Department of the Interior drafted in 1982 a 332-page Final Environmental Impact Statement (EIS) on proposed Lease Sale 57. Interior analyzed in the EIS the effects that the lease sale, and subsequent exploration, development, and production, could conceivably have on "subsistence uses," as defined by ANILCA § 803, 16 U. S. C. § 3113. The EIS documented the fish and shellfish, sea mammal, bird, and land animal resources utilized by the villages in the region, including Gambell and Stebbins, and analyzed the sensitivity of these resources to oilspills, other exploration and development impacts, and harvest pressure. EIS 47–53, 136–148. The EIS also considered the sociocultural impact of changes in the availability of subsistence resources. Interior concluded as follows:

"While some changes in local subsistence use and take may occur with this proposal, the probability of significant disturbance, in the form of long-term reduction of subsistence take, large-scale disruption of subsistence harvesting activities, or significant reductions in primary resources utilized for subsistence is unlikely for the region as a whole. For Savoonga, and to a lesser extent other 'big sea mammal hunting' villages (Diomede, Gambell, King Island, Wales) due to a relatively greater vulnerability to oilspill events, the short-term disturbance is more likely, particularly during the peak development period." EIS 142.

A comparable EIS was drafted in 1983 for Lease Sale 83. The Secretary had also previously prepared an EIS in conjunction with his Five Year Leasing Plan.

[6] As we explained in *Secretary of Interior* v. *California*, 464 U. S., at 337, there are four distinct statutory stages to developing an oil well on the OCS: "(1) formulation of a 5-year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and

that the execution of the leases, which permitted lessees to conduct only limited preliminary activities on the OCS, had not and would not significantly restrict subsistence uses. He further found that the exploration stage activities, including seismic activities and exploratory drilling, that had occurred in Norton Sound had not significantly restricted subsistence uses and were not likely to do so in the future. Finally, he found that, if development and production activities were ever conducted, which was not likely, they might, in the event of a major oilspill, significantly restrict subsistence uses for limited periods in limited areas.[7]

In April 1985, the villages sought a preliminary injunction in the District Court against exploratory activities in Norton Sound. At the same time, the village of Gambell, joined by Nunam Kitlutsisti, an organization of Yukon Delta Natives, filed a complaint seeking to void Lease Sale 83 and to enjoin imminent exploratory drilling in the Navarin Basin. The District Court consolidated the motions for preliminary injunctions and denied them. It found that respondents had established a strong likelihood of success on the merits. Although the Secretary, in the EIS's for the Five Year Leasing Plan and for the Norton Sound and Navarin Basin Lease Sales, had evaluated in some detail the effect of OCS oil and

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production. Each stage involves separate regulatory review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS." The Secretary examined the effects on subsistence uses of Lease Sale 57 itself, present and future exploratory activities, and development and production activities, which the Secretary estimated had a 13% probability of being undertaken. App. to Pet. for Cert. in No. 85–1406, pp. 81a–106a. The Secretary stressed that a definite evaluation with respect to the latter stage could only be made if and when plans for development and production were submitted and that a separate § 810 evaluation would be prepared at that time. The Secretary relied to a considerable degree on the 1982 Final EIS.

[7] The Secretary approved exploration plans for the Navarin Basin after the decision in *Gambell I* and accordingly made explicit ANILCA evaluations. See App. to Pet. for Cert. in No. 85–1406, pp. 107a–115a. The lessees planned exploration activities for the summer of 1985.

gas development on subsistence resources and had considered alternatives which would reduce or eliminate the impact on these resources, the Secretary failed to comply with ANILCA because "he did not have the policy precepts of ANILCA in mind at the time of evaluation." App. to Pet. for Cert. in No. 85–1239, pp. 57a–58a. And with respect to the postsale evaluation for Lease Sale 57, the District Court concluded that because development and production activities, if they ever occurred, could significantly restrict subsistence uses in certain areas, the Secretary was required to conduct the hearing and make the findings required by §§ 810(a)(1)–(3) prior to conducting the lease sale. Nevertheless, the court concluded that injunctive relief was not appropriate based on the following findings:

> "(1) That delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence. Expedited exploration as a policy is stated in OCSLA. See 43 U. S. C. § 1332(3);
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> "(2) That exploration will not significantly restrict subsistence resources; and
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> "(3) That the Secretary continues to possess power to control and shape the off-shore leasing process. Therefore, if the ANILCA subsistence studies require alteration of the leasing conditions or configuration the Secretary will be able to remedy any harm caused by the violation." *Id.*, at 62a–63a.

Accordingly, applying the traditional test for a preliminary injunction, the court concluded that the balance of irreparable harm did not favor the movants; in addition, the public interest favored continued oil exploration and such exploration in this case would not cause the type of harm that ANILCA was designed to prevent.

Respondents appealed from the District Court's denial of a preliminary injunction. The Ninth Circuit reversed. *People of Gambell* v. *Hodel*, 774 F. 2d 1414 (1985)

(Gambell II). The court, agreeing that the villages had established a strong likelihood of success on the merits, concluded that the District Court had not properly balanced irreparable harm and had not properly evaluated the public interest. Relying on its earlier decision in *Save Our Ecosystems* v. *Clark*, 747 F. 2d 1240, 1250 (1984), the court stated: "'Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.'" 774 F. 2d, at 1423. It ruled that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances." *Ibid.* "Unusual circumstances" are those in which an injunction would interfere with a long-term contractual relationship, *Forelaws on Board* v. *Johnson*, 743 F. 2d 677 (CA9 1984), or would result in irreparable harm *to the environment*, *American Motorcyclist Assn.* v. *Watt*, 714 F. 2d 962, 966 (CA9 1983). 774 F. 2d, at 1423–1425. The court found no such circumstances in the instant case. The Ninth Circuit also concluded that the policy declared in OCSLA to expedite exploration of the OCS had been superseded by ANILCA's policy to preserve the subsistence culture of Alaska Natives. Finally, the court rejected arguments that it was improper to apply *Gambell I* retroactively to Lease Sale 83.

II

Petitioners assert that the Ninth Circuit erred in directing the grant of a preliminary injunction. We addressed a similar contention in *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305 (1982). The District Court in that case found that the Navy had violated the Federal Water Pollution Control Act (FWPCA), 33 U. S. C. § 1251 *et seq.* (1982 ed. and Supp. III), by discharging ordnance into the sea without a permit. 456 U. S., at 307–308. The court ordered the Navy to apply for a permit but refused to enjoin weapons-training operations during the application process because the Navy's "technical violations" were not causing any "appreciable harm" to the

quality of the water and an injunction would cause grievous harm to the Navy's military preparedness and therefore to the Nation. *Id.*, at 309–310. The First Circuit reversed and directed the District Court to enjoin all Navy activities until it obtained a permit, concluding that the traditional equitable balancing of competing interests was inappropriate where there was an absolute statutory duty to obtain a permit. *Id.*, at 310–311. We reversed, acknowledging at the outset the fundamental principle that an injunction is an equitable remedy that does not issue as of course. *Id.*, at 311. We reviewed the well-established principles governing the award of equitable relief in federal courts. *Id.*, at 311–313. In brief, the bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Although particular regard should be given to the public interest, "[t]he 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." *Id.*, at 313. Finally, we stated:

> "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. . . . '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.'" *Ibid.* (quoting *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946)).

Applying these principles, we concluded that the purpose of the FWPCA—to restore and maintain the integrity of the Nation's waters—would not be undermined by allowing the statutory violation to continue during the permit application

process because the ordnance was not polluting the water. 456 U. S., at 314–315. The First Circuit had erroneously focused on the integrity of the *permit process* rather than on the integrity of the Nation's waters. Moreover, the permit process was not completely circumvented since the District Court ordered the Navy to apply for a permit. An injunction against all discharges was not the only means of ensuring compliance with the Act[8] and we found nothing in the Act's language and structure or legislative history which suggested that Congress intended to deny courts their traditional equitable discretion.[9]

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[8] We noted that, in addition to a court order to apply for a permit, the FWPCA could be enforced through fines and criminal penalties, 33 U. S. C. §§ 1319(c) and (d). 456 U. S., at 314. The Ninth Circuit believed that the absence of such enforcement provisions in ANILCA distinguished the FWPCA and *Romero-Barcelo*. 774 F. 2d, at 1426, n. 2. It stated that the injunctive relief it granted was the only means of insuring compliance under § 810. The Court of Appeals was incorrect. Here, as in *Romero-Barcelo*, compliance could be obtained through the simple means of an order to the responsible federal official to comply. The Secretary had not complied with § 810 only because he interpreted ANILCA not to apply to the OCS.

[9] We distinguished *TVA* v. *Hill*, 437 U. S. 153 (1978), in which we had held that Congress, in the Endangered Species Act of 1973, 87 Stat. 884, as amended, 16 U. S. C. § 1531 *et seq.* (1982 ed. and Supp. III), had foreclosed the traditional discretion possessed by an equity court and had required the District Court to enjoin completion of the Tellico Dam in order to preserve the snail darter, an endangered species. That statute contains a flat ban on destruction of critical habitats of endangered species and it was conceded that completion of the dam would destroy the critical habitat of the snail darter. We stated:

"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 [not the bare fact of a statutory violation] limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act." 456 U. S., at 314.

The Ninth Circuit erroneously relied on *TVA* v. *Hill*. 774 F. 2d, at 1426, n. 2. It is clear that this case is similarly distinguishable from *Hill*.

We see nothing which distinguishes *Romero-Barcelo* from the instant case. The purpose of ANILCA § 810 is to protect Alaskan subsistence resources from unnecessary destruction. Section 810 does not prohibit all federal land use actions which would adversely affect subsistence resources but sets forth a procedure through which such effects must be considered and provides that actions which would significantly restrict subsistence uses can only be undertaken if they are necessary and if the adverse effects are minimized. There is no clear indication in § 810 that Congress intended to deny federal district courts their traditional equitable discretion in enforcing the provision, nor are we compelled to infer such a limitation. Like the First Circuit in *Romero-Barcelo*, the Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect—preservation of subsistence resources. The District Court's refusal to issue a preliminary injunction against all exploration activities did not undermine this policy. The District Court, after reviewing the EIS's for the Secretary's Five Year Leasing Plan and for Lease Sales 57 and 83, as well as the § 810 study prepared after *Gambell I*, expressly found that exploration activities would not significantly restrict subsistence uses.[10] The Court of Appeals did not conclude that this factual finding was clearly erroneous. The District Court also found that "the Secretary continues to possess power to control and shape the off-shore leasing process," App. to Pet. for Cert. in No. 85–1239, p. 63a, referring to the four distinct stages under OCSLA, particularly the requirement for secretarial approval of a development and production plan, 43 U. S. C. § 1351. See n. 6, *supra*. The Court of Appeals did not dispute that the Secretary could meaningfully comply with ANILCA § 810 in conjunction with his review of production and development plans. Instead, the court stated that "[i]rreparable damage

[10] Implicit in this finding was the finding that the lease-sale stage had not significantly restricted subsistence uses.

is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action." 774 F. 2d, at 1423 (emphasis added). This presumption is contrary to traditional equitable principles and has no basis in ANILCA. Moreover, the environment can be fully protected without this presumption. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i. e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment. Here, however, injury to subsistence resources from exploration was not at all probable. And on the other side of the balance of harms was the fact that the oil company petitioners had committed approximately $70 million to exploration to be conducted during the summer of 1985 which they would have lost without chance of recovery had exploration been enjoined. *Id.*, at 1430.

We acknowledged in *Romero-Barcelo* the important role of the "public interest" in the exercise of equitable discretion. The District Court concluded that the public interest in this case favored continued oil exploration, given OCSLA's stated policy[11] and the fact that "such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent." App. to Pet. for Cert. in No. 85–1239, p. 63a. The Court of Appeals concluded, however, that the public interest favored injunctive relief because the interests served by federal environmental statutes, such as ANILCA, supersede all other interests that might be at stake. We do not read ANILCA to have repealed OCSLA. Congress clearly did not state in ANILCA

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[11] OCSLA declares it to be the policy of the United States that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U. S. C. § 1332(3).

that subsistence uses are always more important than development of energy resources, or other uses of federal lands; rather, it expressly declared that preservation of subsistence resources is *a* public interest and established a framework for reconciliation, where possible, of competing public interests.[12]

Accordingly, the Ninth Circuit erred in directing the issuance of a preliminary injunction.

III

Petitioners also contend that the Court of Appeals erred in holding that ANILCA § 810 applies to the OCS. We agree. By its plain language, that provision imposes obligations on federal agencies with respect to decisions affecting use of federal lands *within the boundaries of the State of Alaska.* Section 810 applies to "public lands." Section 102 of ANILCA, 16 U. S. C. § 3102, defines "public lands," and included terms, for purposes of the Act[13] as follows:

> "(1) The term 'land' means lands, waters, and interests therein.

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[12] Finally, the Ninth Circuit distinguished *Romero-Barcelo* on the ground that the District Court in that case refused to issue a permanent injunction after a trial on the merits whereas in this case the District Court denied preliminary injunctive relief. We fail to grasp the significance of this distinction. The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success. See, *e. g.*, *University of Texas* v. *Camenisch*, 451 U. S. 390, 392 (1981). Despite the preliminary nature of the proceeding, the record before the District Court was complete enough to allow it to decide that exploration activities would not significantly restrict subsistence resources. The fact that, on another record, such a conclusion could not be made with any degree of confidence is a factor to be considered under the traditional equitable balancing of interests but hardly suggests that the balancing test itself must be abandoned.

[13] Section 102 provides that the definitions apply to the entire Act, except that in Title IX, which provides for implementation of ANCSA and the Alaska Statehood Act, 72 Stat. 339, and in Title XIV, which amends ANCSA and related provisions, the terms shall have the same meaning as they have in ANCSA and the Alaska Statehood Act.

"(2) The term 'Federal land' means lands the title to which is in the United States after December 2, 1980.

"(3) The term 'public lands' means land situated *in Alaska* which, after December 2, 1980, are Federal lands, except [land selected by the State of Alaska or granted to the State under the Alaska Statehood Act, 72 Stat. 339, or any other provision of federal law, land selected by a Native Corporation under ANCSA, and lands referred to in ANCSA § 19(b), 43 U. S. C. § 1618(b)]." (Emphasis added.)

The phrase "in Alaska" has a precise geographic/political meaning. The boundaries of the State of Alaska can be delineated with exactitude. The State of Alaska was "admitted into the Union on an equal footing with the other States," and its boundaries were defined as "all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Alaska Statehood Act (Statehood Act) §§ 1, 2, 72 Stat. 339. The Submerged Lands Act of 1953, 67 Stat. 29, as amended, 43 U. S. C. § 1301 *et seq.* (1982 ed. and Supp. III), was made applicable to the State. Statehood Act § 6(m), 72 Stat. 343. Under § 4 of the Submerged Lands Act, 43 U. S. C. § 1312, the seaward boundary of a coastal State extends to a line three miles from its coastline. At that line, the OCS commences. OCSLA § 2(a), 43 U. S. C. § 1331(a). By definition, the OCS is not situated in the State of Alaska. Nevertheless, the Ninth Circuit concluded that "in Alaska" should be construed in a general, "nontechnical" sense to mean the geographic region of Alaska, including the Outer Continental Shelf.[14] 746 F. 2d,

[14] The Ninth Circuit stated: "In strikingly similar circumstances, the Supreme Court has twice given an expansive and non-technical interpretation to geographical terms to achieve Congress's apparent purpose to protect native fisheries. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 110–116 . . . (1949); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 . . . (1918)." 746 F. 2d, at 580. The question in *Alaska Pacific Fisheries* was the geographic scope of "the body of lands known as Annette

at 579. We reject the notion that Congress was merely waving its hand in the general direction of northwest North America when it defined the scope of ANILCA as "Federal lands" "situated in Alaska." Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning. "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States* v. *Locke*, 471 U. S. 84, 95 (1985) (quoting *Richards* v. *United States*, 369 U. S. 1, 9 (1962)). This is not that "exceptional case" where acceptance of the plain meaning of a word would "thwart the obvious purpose of the statute." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982) (internal quotations omitted).[15]

Islands," the reservation of the Metlakahtla Indians, in particular: whether the reservation embraced only the uplands or included the intervening and surrounding waters. Similarly, the issue in *Hynes* was whether the phrase "any other public lands which are actually occupied by Indians or Eskimos within said Territory" authorized the Secretary of the Interior to include in the Karluk Reservation the waters to a distance of 3,000 feet from the shore. 337 U. S., at 91, 92. In both cases, we concluded that, in light of the purposes of the reservations, the phrases were properly interpreted to include a band of adjacent waters. These cases clearly are inapposite. Unlike "Alaska," the phrases in issue did not have precise geographic/political meanings which would have been commonly understood, without further inquiry, to exclude the waters. There is no plain meaning to "the body of lands" of an island group, 248 U. S., at 89, and clearly none to "public lands which are actually occupied by Indians or Eskimos." The meaning of the phrases had to be derived from their context in the statutes.

[15] Petitioners also assert that the OCS plainly is not "Federal land" because the United States does not claim "title" to the OCS. See ANILCA § 102(2), 16 U. S. C. § 3102(2). The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly,

Nothing in the language or structure of ANILCA compels the conclusion that "in Alaska" means something other than "in the State of Alaska." The subsistence-protection provisions of the statute must be viewed in the context of the Act as a whole.[16] ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska,[17] a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA.[18] To this end, it provided for additions to

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it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States." We also reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute. See *Hynes* v. *Grimes Packing Co.*, 337 U. S., at 114–116.

[16] ANILCA is comprised of 15 titles and spans 181 pages of the Statutes at Large, 94 Stat. 2371–2551. The subsistence protection provisions are contained in Title VIII. 94 Stat. 2422–2430, 16 U. S. C. §§ 3111–3126.

[17] Congress clearly articulated this purpose:

"(a) In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the *State of Alaska* that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

. . . . . .

"(d) This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the *State of Alaska* and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, *and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.*" ANILCA § 101, 16 U. S. C. § 3101 (emphasis added).

[18] The House Report declared the following to be the purpose of the bill:

"The principal purpose of H. R. 39 is *[sic]* amended and reported by the Committee on Interior and Insular Affairs is to designate approximately 120 million acres of Federal land in Alaska for protection of their resource

the National Park System, National Wildlife Refuge System, National Forest System, National Wild and Scenic Rivers System, and National Wilderness Preservation System, and also provided for the establishment of a National Conservation Area and National Recreation Area, within the State of Alaska. Titles II–VII, 94 Stat. 2377–2422. The Act also provided means to facilitate and expedite the conveyance of federal lands within the State to the State of Alaska under the Statehood Act and to Alaska Natives under ANCSA. Titles IX and XIV, 94 Stat. 2430–2448, 2491–2549. The remaining federal lands within the State were left available for resource development and disposition under the public land laws. The other provisions of ANILCA have no express applicability to the OCS and need not be extended beyond the State of Alaska in order to effectuate their apparent purposes.[19] It is difficult to believe that Congress intended the subsistence protection provisions of Title VIII, alone among all the provisions in the Act, to apply to the OCS. It is particularly implausible because the same definition of "public lands" which defines the scope of Title VIII applies as well to

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values under permanent Federal ownership and management. . . . It virtually completes the public land allocation process in Alaska which began with the Statehood Act of 1958 which granted the State the right to select approximately 104 million acres of public land; this land grant is less than 30 percent complete. The Federal land disposal process was continued by the Alaska Native Claims Settlement Act of 1971 which granted Alaska Natives the right to select approximately 44 million acres of federal land; this process is only one-eighth complete." H. R. Rep. No. 96–97, pt. 1, p. 135 (1979).

See also H. R. Rep. No. 96–97, pt. 2, p. 89 (1979); S. Rep. No. 96–413, p. 126 (1979).

[19] Title I sets forth the Act's purposes and definitions. Titles X and XV pertain to mineral resources. Title XI governs transportation and utility systems in and across, and access into, conservation system units, Title XII provides for federal-state cooperation, and Title XIII contains miscellaneous administrative provisions.

the rest of the statute (with the exceptions noted at n. 13, *supra*).

There is a lone reference to the OCS in the statute, in § 1001(a), 16 U. S. C. § 3141(a), and it is for the purpose of ensuring that the provision does *not* apply to the OCS.[20] Section 1001 provides for a study of oil and gas resources, wilderness characteristics, and wildlife resources of the "North Slope":

> "(a) The Secretary shall initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska north of 68 degrees north latitude and east of the western boundary of the National Petroleum Reserve—Alaska, other than lands included in the National Petroleum Reserve—Alaska and in conservation system units established by this Act."

The Secretary suggests that Congress included the parenthetical excluding the OCS out of an abundance of caution because "North Slope" is defined in a related statute—the Alaska Natural Gas Transportation Act of 1976, 15 U. S. C. § 719 *et seq.* (1982 ed. and Supp. III)—to include the OCS. See 15 U. S. C. § 719b. Whatever the reason for caution, it is apparent from ANILCA § 1008(a), 16 U. S. C. § 3148(a), that Congress did not intend "Federal lands in Alaska" to include the OCS despite the parenthetical in § 1001(a). Section 1008(a) requires the Secretary to "establish, pursuant to the Mineral [Lands] Leasing Act of 1920, as amended [30 U. S. C. § 181 *et seq.* (1982 ed. and Supp. III)], an oil and gas leasing program *on the Federal lands of Alaska* not subject to the study required by section 1001 of this Act, other than lands included in the National Petroleum Reserve—Alaska."

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[20] The Ninth Circuit relied on this provision in support of its conclusion that the phrase "in Alaska" is ambiguous and can be read to include the OCS. See 746 F. 2d, at 575.

(Emphasis added.) Congress clearly did not intend this program to extend to the OCS; OCSLA, rather than the Mineral Lands Leasing Act, governs mineral leasing on the OCS. See 43 U. S. C. § 1333(a)(1).

Title VIII itself suggests that it does not apply to the OCS. Section 810 places the duty to perform a subsistence evaluation on "the head of the Federal agency having primary jurisdiction over such lands." Unlike onshore lands, no federal agency has "primary jurisdiction" over the OCS; agency jurisdiction turns on the particular activity at issue. See G. Coggins & C. Wilkinson, Federal Public Land and Resources Law 434 (1981).

The similarity between the language of ANILCA and its predecessor statutes, the Statehood Act and ANCSA, also refutes the contention that Congress intended "Alaska" to include the OCS. In the Statehood Act, Congress provided that the State of Alaska could select over 100 million acres from the vacant and unreserved "public lands of the United States in Alaska" within 25 years of its admission. Statehood Act § 6(b), 72 Stat. 340. Similarly, in ANCSA, Congress allowed Native Alaskans to select approximately 40 million acres of "Federal lands and interests therein located in Alaska," with the exception of federal installations and land selections of the State of Alaska under the Statehood Act. 43 U. S. C. §§ 1602(e), 1610(a), 1611. We agree with the Secretary that "[i]t is inconceivable that Congress intended to allow either the State of Alaska or Native Alaskans to select portions of the OCS—'a vital national resource reserve held by the [government] for the public' (43 U. S. C. 1332(3))." Brief for Petitioners in No. 85–1406, p. 33. Clearly, the purpose of these provisions was to apportion the land within the boundaries of the State of Alaska. The nearly identical language in ANILCA strongly suggests a similar scope for that statute.

When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question

this plain meaning, that is ordinarily "the end of the matter." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). "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." *United States* v. *Locke*, 471 U. S., at 95–96 (internal quotations omitted). ANILCA's legislative history does not evidence a congressional intent contrary to our reading of the statutory language. Significantly, the legislative history nowhere expressly indicates that the subsistence provisions apply to the OCS. The Ninth Circuit relied on a number of remarks made during the floor debates which were not specifically addressed to the scope of ANILCA in general or the subsistence provisions in particular. 746 F. 2d, at 579. The central issue of the floor debates was the appropriate balance between exploitation of natural resources, particularly energy resources, and dedication of land to conservation units. A number of Congressmen addressed the amount of oil expected to be recovered from the OCS offshore of Alaska in the context of this balancing and, in doing so, referred to "Alaska" in a manner which included the OCS. Representative Udall, Chairman of the House Committee on Interior and Insular Affairs, and floor manager of the bill, for example, sought to assure Members that the bill he favored did not inordinately restrict energy development:

> "The experts tell us that most of the oil and gas is not going to be from onshore. . . . Offshore *in Alaska* there are 203 million acres of sedimentary basin. Let me tell the Members how much of that is put out of production by this bill so that they cannot get it. The answer is zero. Every single acre of offshore oil sedimentary basin potential in Alaska is going to be open for oil drilling and prospecting. The State owns some of it beneath the high water mark, and the Federal Government owns the rest.

> "Under other legislation those submerged lands are open, are going to be explored and developed, and that should be 203 million acres." 125 Cong. Rec. 9900 (1979) (emphasis added); see also *id.*, at 11128.

This casual use of the phrase "in Alaska" in a floor debate does not carry the same weight that it does in the definitional section of the statute.[21] Spoken language is ordinarily less precise than written language; Representative Udall could easily have intended to say "offshore *of* Alaska." Indeed, the obvious thrust of his statement was that ANILCA does *not* apply to the OCS; rather, OCSLA governs offshore oil development. Numerous statements by other legislators reveal a common understanding—consistent with the plain meaning of the statutory language—that ANILCA simply "has nothing to do with the Outer Continental Shelf," *id.*, at 11170 (remarks of Rep. Emery).[22]

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[21] See also 125 Cong. Rec. 9893 (1979) (remarks of Rep. Vento) ("[The Udall-Anderson bill] provides for the potential exploration and development of approximately 95 percent of the onshore areas which have either high or favorable potential for oil and gas and 100 percent of the offshore potential sites, which . . . comprises two-thirds of Alaska's oil potential"); *id.*, at 9907 (remarks of Rep. Young) ("I will tell the Members this: The person who supports offshore drilling in Alaska first over onshore drilling is doing a great disservice to the environment"); *id.*, at 11174 (remarks of Rep. Huckaby) ("Alaska's offshore oil potential is estimated to be some 16 to 25 billion barrels").

[22] See also 126 Cong. Rec. 21889 (1980) (remarks of Sen. Bayh) ("100 percent of the offshore sites would remain available to exploration"); *id.*, at 21657 (remarks of Sen. Cranston) (same); *id.*, at 18747 (remarks of Sen. Hart) ("[M]ost of Alaska's undiscovered oil and gas lies offshore, and so would not be affected by these land designations"); 125 Cong. Rec. 11450 (1979) (remarks of Rep. Kostmayer) ("Two hundred and five million acres offshore are untouched by the Udall-Anderson bill").

The Ninth Circuit also relied on the fact that ANILCA's subsistence provisions, as finally enacted, cover all federal lands in Alaska and that its saving clause, 16 U. S. C. § 3125, specifies that the subsistence provisions do not affect the Magnuson Fishery Conservation and Management Act (FCMA), 90 Stat. 331, 16 U. S. C. § 1801 *et seq.* (1982 ed. and Supp. III). 746 F. 2d, at 581. Under the FCMA, the United States asserts exclusive

Finally, we reject the Ninth Circuit's reliance on the familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians. 746 F. 2d, at 581. There is no ambiguity here which requires interpretation. "The canon of construction regarding the resolution of ambiguities . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe*, 476 U. S. 498, 506 (1986).

The judgment of the Ninth Circuit with respect to the entry of a preliminary injunction and the applicability of ANILCA § 810 to the OCS is reversed. We do not decide here the scope of ANCSA § 4(b). Respondents' cross-petition on this issue, No. 85–1608, is granted, the Court of Appeals' judgment that § 4(b) extinguished aboriginal rights on the OCS is vacated, and this question is remanded to the Court of Appeals for decision in light of this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

Given the Court's holding that § 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, 16 U. S. C. § 3120, does not apply to the Outer Continental Shelf, it is unnecessary to decide whether the Court of Appeals applied the proper standard in determining the

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fishery management authority in the fishery conservation zone which commences at the boundary of the coastal States and extends 200 miles from the coast. 16 U. S. C. §§ 1811, 1812(1). According to the Court of Appeals, the inclusion of the FCMA in the saving clause indicates that ANILCA applies to the OCS. However, the FCMA also applies to "anadromous species throughout the migratory range of each such species beyond the fishery conservation zone," which would include waters within the State of Alaska. 16 U. S. C. § 1812(2). Thus, there is no need to interpret "Alaska" to include the OCS in order to give meaning to the FCMA's inclusion in the saving clause.

availability of injunctive relief.* Accordingly, I join only Parts I and III of the Court's opinion.

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*Indeed, the Court itself recognizes this when it declines to reach two additional questions that were presented in the petition. See *ante*, at 534–535, n. 1. This is not a case in which discussion of a nonessential issue is arguably appropriate because the lower court is likely to employ the identical legal analysis on remand. Even if, in light of the decisions in this case and the cross-petition, the Court of Appeals finds that respondents retain aboriginal rights in the Outer Continental Shelf, it would apparently not apply the same injunctive relief standard that it applied with relation to ANILCA. The special injunctive standard applied to the ANILCA claim was based on Circuit precedent providing that, absent unusual circumstances, "[a]n injunction is the appropriate remedy for a *substantive procedural violation of an environmental statute.*" *People of Gambell* v. *Hodel*, 774 F. 2d 1414, 1422 (1985) (emphasis added). See generally *Save Our Ecosystems* v. *Clark*, 747 F. 2d 1240, 1250 (CA9 1984). There is no reason to believe that this rule would be extended to injunctions designed to prevent interference with aboriginal rights.

Syllabus

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* BUELL

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

No. 85–1140. Argued December 1, 1986—Decided March 24, 1987

Under the Federal Employers' Liability Act (FELA), railroad workers can sue their employers for personal injuries suffered at the hands of the employers or fellow employees. The Railway Labor Act (RLA) provides for the submission of minor labor disputes in the railroad industry to binding arbitration. Respondent, a carman employed by petitioner, filed an FELA suit in Federal District Court, alleging that petitioner had condoned his harassment by fellow employees, causing him to suffer an emotional breakdown. The District Court granted petitioner summary judgment, holding that the RLA precluded an FELA remedy. The Court of Appeals reversed, holding that respondent's claims were not arbitrable under the RLA, and that an FELA action was therefore not precluded. Additionally, although the question had been neither raised by the parties nor addressed by the District Court, the Court of Appeals held that purely emotional injury is compensable under the FELA.

Held:

1. The fact that an injury was caused by conduct that may have been subject to arbitration under the RLA does not deprive a railroad employee of his right to bring an FELA action for damages. The FELA not only provides substantive protection against conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief of backpay and reinstatement that is available through RLA arbitration. Although the RLA minor disputes remedy is exclusive "in at least some circumstances," it is not exclusive in situations that the FELA was enacted to address. Pp. 564–566.

2. Petitioner's argument that, even if many workplace injuries are actionable under the FELA, the RLA requires that a narrow "emotional injury" exception be carved out of the FELA because of the close relationship of such injuries to minor disputes that must be brought under the RLA is not persuasive. There is no basis for assuming that allowing FELA emotional injury actions will wreak havoc with the RLA's general arbitration scheme, and absent an intolerable conflict between the two

statutes, this Court is unwilling to read the RLA as repealing any part of the FELA. Pp. 566–567.

3. The record is insufficient at this preliminary stage to allow this Court, or the Court of Appeals, to express an opinion on respondent's ultimate chance of recovery under the FELA on his emotional injury claim. The question whether purely emotional injury is compensable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction susceptible to an all-inclusive "yes" or "no" answer. It might require exacting scrutiny of each case's facts in light of developing legal principles. Pp. 567–571.

771 F. 2d 1320, affirmed in part, vacated in part, and remanded.

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

Rex E. Lee argued the cause for petitioner. With him on the briefs were *R. Eden Martin, Ronald S. Flagg, John H. Ernster,* and *Thomas D. Peterson-More.*

James R. McCall argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

A railroad has a duty to use reasonable care in furnishing its employees with a safe place to work. That duty was recognized at common law, see *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 352–353 (1943), is given force through the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.*, and is confirmed in some, if not all, collective-bargaining agreements. Breaches of the duty may at times give rise to typical labor disputes for which the Railway Labor Act (RLA), 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, sets forth binding arbitration procedures.

*Briefs of *amici curiae* urging reversal were filed for the Association of American Railroads et al. by *Stephen A. Trimble, Richard W. Turner,* and *John M. Clifford;* and for the National Railway Labor Conference by *I. Michael Greenberger.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Marsha Berzon, Lawrence M. Mann, Jerome M. Alper,* and *Laurence Gold;* and for the Teamsters for a Democratic Union et al. by *Paul Alan Levy* and *Alan B. Morrison.*

Breaches may also result in injuries to a railroad's employees—injuries for which the FELA would appear to give employees a cause of action for damages. The question in this case is whether the possibility of pursuing a labor grievance under the RLA deprives an employee of his right to bring an FELA action.

I

Respondent, a carman employed by petitioner, the Atchison, Topeka and Santa Fe Railway Company (Railroad), filed an FELA complaint in Federal District Court, alleging that he had suffered severe personal injuries as a result of the Railroad's failure

> "to provide [him] with a safe place to work, including, but not limited to, having fellow employees harass, threaten, intimidate [him], and in particular, foreman Ed Wright threatened, harassed, and intimidated [him] maliciously and oppressively, negligently, and intentionally, in order to cause personal injury to [him] and to cause mental and emotional suffering. All said acts were condoned and approved by [the Railroad] and as a direct and proximate result of said negligence and intentional acts, [he] was caused to suffer an emotional breakdown, thus inflicting on [him] injuries and damages as hereinafter alleged." App. 7.

The Railroad filed an answer, asserting, among other defenses, that respondent's sole remedy was before the National Railroad Adjustment Board (Adjustment Board) pursuant to the RLA. *Id.*, at 10–13.

Through the ensuing discovery, the Railroad identified various incidents of harassment that were embraced within the complaint's allegations,[1] and also established that its

[1] Most of the incidents involved Ed Wright, respondent's immediate supervisor. He allegedly insisted that respondent and other carmen complete certain car inspection reports in an improper manner, directed respondent to help him remove company property from the yard, repeatedly

collective-bargaining agreement with respondent's union allowed an employee to prosecute a grievance through successive levels of appeal up to and including mutually binding arbitration before the Adjustment Board.[2] Discovery also brought out that respondent had suffered a mental breakdown, and certain associated physical disorders, that required his hospitalization for 17 days.

The Railroad then moved for dismissal or for summary judgment. The ground for its motion, in the Railroad's own words, was that "there is no subject matter jurisdiction in the district court to entertain an action concerning a labor dispute between a 'carrier' subject to the Railway Labor Act and its employees." Record Doc. No. 42, p. 6. The District Court accepted this argument, and granted summary judgment on "the narrow question of the availability to an employee covered by the RLA of an FELA remedy based on an alleged negligent failure to maintain a safe workplace." App. to Pet. for Cert. 11a. The Court of Appeals reversed. It held that respondent's claims were not arbitrable under the RLA, and that an FELA action was therefore not precluded. 771 F. 2d 1320, 1323–1324 (CA9 1985). Additionally, although the question had neither been raised by the parties[3] nor addressed by the District Court,[4] the Court of

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threatened to discharge respondent, and condoned conduct by other employees that was obviously intended to humiliate respondent.

[2] Respondent and several other carmen requested their union to prepare a written grievance and the union discussed respondent's complaints with the Railroad, but no formal grievance was ever initiated.

[3] One of the captions in the Railroad's brief in the Court of Appeals stated without reservation that "[t]he sole issue is whether plaintiff's claims are subject to the mandatory, exclusive administrative jurisdiction of the NRAB." See Brief for Appellee in No. 84–2288 (CA9), p. 18.

[4] At the hearing on the motion to dismiss or for summary judgment the District Court stated: "The matter is on today's calendar for defendant's motion for summary judgment on the grounds that the complaint raises issues that are within the jurisdiction of National Railroad Adjustment Board, and therefore not within this Court's jurisdiction." 3 Tr. 2.

Appeals proclaimed that a relevant "issue, one of first impression in this circuit, is whether a Railroad employee's wholly mental injury stemming from his railroad employment is compensable under the [FELA]." *Id.*, at 1321. The Court of Appeals concluded that the FELA does authorize recovery for emotional injury. Because of the important role these two statutes play in railway labor relations, we granted certiorari. 476 U. S. 1103 (1986).

II

In 1906,[5] Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees. A primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases. The Act expressly prohibits covered carriers from adopting any regulation, or entering into any contract, to limit their FELA liability.[6] The coverage of the statute is defined in broad language,[7] which

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[5] The original 1906 enactment, 34 Stat. 232, was struck down in *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463 (1908), on the ground that it applied to intrastate as well as interstate commerce. In 1908, Congress enacted another version, 35 Stat. 65, which applied only to interstate commerce, and included some substantive modifications.

[6] Section 5 of the FELA, as codified, provides, in part:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." 45 U. S. C. § 55.

[7] Section 1 of the FELA, as codified, provides, in part:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tract, roadbed, works, boats, wharves, or other equipment." 45 U. S. C. § 51.

has been construed even more broadly.[8] We have recognized generally that the FELA is a broad remedial statute, and have adopted a "standard of liberal construction in order to accomplish [Congress'] objects." *Urie* v. *Thompson*, 337 U. S. 163, 180 (1949).

The RLA, by contrast, provides a comprehensive framework for the resolution of labor disputes in the railroad industry. Enacted in 1926, the text of the RLA does not mention the FELA or otherwise deal with the subject of tort liability. Rather, the RLA establishes elaborate administrative procedures for the resolution of both major and minor labor disputes.[9] The statutory procedures for resolving "major

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[8] Thus, for example, with respect to causation, we have held that "the test of a jury case" under the statute is "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 506 (1957). Indeed, in the spirit of broad construction, the FELA has been construed to cover some intentional torts even though its text only mentions negligence. See *Jamison* v. *Encarnacion*, 281 U. S. 635, 641 (1930); *Lancaster* v. *Norfolk & Western R. Co.*, 773 F. 2d 807, 812–813 (CA7 1985), cert. pending, No. 85–1702; *Slaughter* v. *Atlantic Coast Line R. Co.*, 112 U. S. App. D. C. 327, 302 F. 2d 912, cert denied, 371 U. S. 827 (1962); see generally Annot., Liability Under Federal Employers' Liability Act for Intentional Tort, 8 ALR 3d 442 (1966).

[9] In enacting the RLA:

"Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. See *Gunther* v. *San Diego & A. E. R. Co.*, [382 U. S. 257 (1965)]; *Union Pacific R. Co.* v. *Price*, [360 U. S. 601 (1959)]; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950). The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules, and working conditions. *Union Pacific R. Co.* v. *Price*, *supra*, at 611; *Elgin J. & E. R. Co.* v. *Burley*, 327 U. S. 661, 664 (1946). Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.

disputes"—those arising "out of the formation or change of collective [bargaining] agreements covering rates of pay, rules, or working conditions," *Detroit & T. S. L. R. Co.* v. *Transportation Union*, 396 U. S. 142, 145, n. 7 (1969)—are not relevant to this case. The "minor dispute" provisions are relevant, however, because the Railroad argues that the underlying dangerous condition in this case could have been grieved as a minor dispute—one "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U. S. C. § 153, First (i). Minor disputes initially must be dealt with through a railroad's internal dispute resolution processes, and if not settled there, may be submitted to a division of the Adjustment Board, or to a Public Law Board, which is an arbitration board chosen by the parties. Judicial review of these Boards' determinations has been characterized as "'among the narrowest known to the law.'" *Union Pacific R. Co.* v. *Sheehan*, 439 U. S. 89, 91 (1978) (citation omitted).

The Railroad makes three arguments in support of its contention that respondent may not bring an FELA action for his injuries. First, it argues that the exclusive forum for any dispute arising out of workplace conditions is the RLA. Second, it argues that even if many workplace injuries are actionable under the FELA, emotional injuries should not be actionable because of their close relationship to minor disputes that are to be brought under the RLA. Finally, the Railroad responds to the Court of Appeals' discussion of whether the term "injury" as used in the FELA includes purely emotional injury, and argues that it does not. We reject the Railroad's first two arguments.[10] As for the third

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Trainmen v. *Chicago, R. & I. R. Co.*, 353 U. S. 30, 40 (1957)." *Union Pacific R. Co.* v. *Sheehan*, 439 U. S. 89, 94 (1978).

[10] In analyzing the Railroad's arguments that the RLA precludes an FELA action for this type of injury, it is essential to recognize that the arguments do not depend on the Railroad's alternative argument that the

argument, which focuses on the scope of the FELA, we believe that the record is insufficiently developed at this preliminary stage to allow us, or the Court of Appeals, to express an opinion on respondent's ultimate chances of recovery under the FELA.

III

The Railroad asserts first that employees have the right to have defects in the workplace corrected by resorting to the grievance machinery that is in place pursuant to the RLA, and that the RLA is the exclusive remedy for such minor disputes. Indeed, in this case, preliminary though abortive steps in that direction were actually taken. Thus, the Railroad argues that an FELA action for damages is barred. We find no merit in this argument. The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. Presumably a host of personal injuries suffered by railroad employees are caused by negligent practices and conditions that might have been cured or avoided by the timely invocation of the grievance machinery.[11] See *Yawn* v. *Southern R. Co.*, 591 F. 2d 312, 317 (CA5 1979). But we have never considered that possibility a bar to an employee's bringing an FELA claim for personal injuries, and the Railroad has not persuaded us to do so now.

This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, *e. g.*, *McDonald* v. *West Branch*, 466 U. S. 284

FELA does not provide damages for purely emotional injury. The preclusion argument turns, not on the nature of an employee's injury, but on the source of the injury.

[11] See, *e. g.*, *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350 (1943); *Lavender* v. *Kurn*, 327 U. S. 645 (1946); *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649 (1947); cf. *Gateway Co.* v. *Mine Workers*, 414 U. S. 368 (1974).

(1984); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine*, *supra*, at 737.

This principle is instructive on the question before us. The FELA not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board.[12] It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion. As then District Judge J. Skelly Wright concluded, "the Railway Labor Act . . . has no application to a claim for damages to the employee resulting from the negligence of an employer railroad." *Barnes* v. *Public Belt R. R. Comm'n for City of New York*, 101 F. Supp. 200, 203 (ED La. 1951).

It is true that the RLA remedy for the resolution of minor disputes is "in at least some situations" exclusive. *Andrews* v. *Louisville & Nashville R. Co.*, 406 U. S. 320, 325 (1972).

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[12] See *Lewy* v. *Southern Pacific Transportation Co.*, 799 F. 2d 1281, 1295, 1297 (CA9 1986) (RLA remedies are backpay and reinstatement); National Railroad Ajustment Board, First Division, Award No. 16111 (Feb. 23, 1953) ("[T]here is a remedy to correct the practice if it is wrong, even though it does not extend to a money damage"). Counsel for petitioner also represented that the Adjustment Board only awards "damages in the sense of reinstatement and back pay," and cannot "award damages in the sense of the kinds of damages that a court would under an FELA" action. Tr. of Oral Arg. 11.

In *Andrews*, an employee brought a state wrongful discharge claim based squarely on an alleged breach of the collective-bargaining agreement. We held that Congress had intended the RLA dispute resolution mechanism to be mandatory for that type of dispute, and that courts were therefore foreclosed from addressing claims that properly arise under the RLA. In this case, by contrast, Congress has enacted the FELA to serve as the statutory basis for the award of damages to employees injured through an employer's or coworker's negligence.

Unwilling to rely solely on the argument that *any* injury caused by a condition that could have been the subject of a grievance under the RLA is not actionable under the FELA, petitioner and various *amici* argue, in the alternative, that the RLA requires that a narrow "emotional injury" exception be carved out of the FELA. Because they fear that many workers alleging emotional injuries are really complaining of unhappiness arising out of everyday workplace disputes, they ask us to hold that the RLA provides the exclusive remedy for this ill-defined class of injuries. Even if we were to find some authority allowing us to rewrite the FELA in this manner, we are not persuaded that it would be appropriate to do so. There is no basis for assuming that allowing FELA actions for emotional injury will wreak havoc with the general scheme of RLA arbitration,[13] and absent an intolerable

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[13] Petitioner predicts that if emotional injuries are cognizable under the FELA, virtually no employees will pursue grievances through the RLA since "'every employee who believes he has a legitimate grievance will doubtless have some emotional anguish.'" Brief for Petitioner 24 (quoting *Magnuson* v. *Burlington Northern, Inc.*, 576 F. 2d 1367, 1369 (CA9), cert. denied, 439 U. S. 930 (1978)). Indeed, one *amicus* asserts that a large portion of the 183,800 grievances filed in 1985 would be pursued as FELA actions instead, thus creating the "potential for doubling the volume of civil filings in the federal courts." Brief for Association of American Railroads et al. as *Amici Curiae* 16. This parade of horribles mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of severe emotional injury that has generally been required to estab-

conflict between the two statutes, we are unwilling to read the RLA as repealing any part of the FELA. See *Morton* v. *Mancari*, 417 U. S. 535, 550 (1974). Although we do not decide today whether purely emotional injuries are cognizable under the FELA, we stress that it is the FELA that controls that inquiry, not the RLA. As far as a worker's right to damages under the FELA is concerned, Congress' enactment of the RLA has had no effect.

IV

The Railroad also contends that the judgment of the Court of Appeals should be reversed because it erroneously concluded that a railroad employee's "wholly mental injury" is compensable under the FELA. The problem with our addressing this argument is that, because of the posture in which this case comes before us, the record has never been developed on the exact nature of the allegedly tortious activity, or the extent of the injuries that respondent claims to have suffered. As we have mentioned, petitioner's motion for dismissal or for summary judgment was based on the sole ground that an employee's exclusive remedy for a railroad's failure to maintain a safe workplace is to file a grievance

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lish liability for purely emotional injury, see n. 18, *infra*, and that a significant percentage of employees are subject to the type of unconscionable abuse which is a prerequisite to recovery. In *Farmer* v. *Carpenters*, 430 U. S. 290 (1977), we held that a state action for intentional infliction of emotional distress was not pre-empted by the National Labor Relations Act (NLRA), and pointed out that the risk of interference with the NLRA was minimized by the fact that state law permitted "recovery only for emotional distress sustained as a result of 'outrageous' conduct." *Id.*, at 305. See generally American Bar Association's Special Committee on the Tort Liability System, Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law 5–17 (1984) (courts have been properly concerned to keep tort from becoming a remedy for minor upsets); Restatement (Second) of Torts § 46(d) (1965) (hereafter Restatement) (discussing "outrage" element).

under the RLA.[14] Respondent's memorandum, of course, sought to respond to that narrow argument alone, and did not deal with the question whether emotional injury is actionable under the FELA.[15]

The question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common-law developments, see *Urie* v. *Thompson*, 337 U. S., at 174, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. For example, while most States now recognize a tort of intentional infliction of emotional distress,[16] they vary in the degree of intent required to

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[14] See nn. 3 and 4, *supra*. Indeed, in ruling on the motion the District Court explicitly stated that the railroad did not dispute at that juncture that the claim fell under the FELA, but instead "[sought] to avoid the issue by contending that exclusive jurisdiction to resolve plaintiff's claim lies elsewhere." Record Doc. No. 44, p. 4.

[15] Under the Federal Rules of Civil Procedure, respondent had no duty to set out all of the relevant facts in his complaint. See Fed. Rule Civ. Proc. 8; *Conley* v. *Gibson*, 355 U. S. 41, 47–48 (1957). Had petitioner moved for summary judgment on the ground that FELA does not recognize claims for respondent's type of injury, respondent would have had the opportunity to supplement the record with relevant facts to contest that motion. See Fed. Rule Civ. Proc. 56(c). As we explained last Term, summary judgment is available only when, "after adequate time for discovery and upon motion," the party seeking summary judgment has satisfied its "responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 323 (1986).

[16] "The tort of intentional infliction of mental distress as described in § 46 of the Restatement [(Second) of Torts] can be safely characterized as the general rule in the United States. . . . As of 1977, 37 jurisdictions had rec-

establish liability,[17] and the level of physical manifestation of the emotional injury required to support recovery.[18] Moreover, some States consider the context and the relationship between the parties significant, placing special emphasis on the workplace.[19] In addition, although many States have now recognized a tort of negligent infliction of emotional distress,[20] they too vary in the degree of objective symptomatol-

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ognized the tort." *Leithead* v. *American Colloid Co.*, 721 P. 2d 1059, 1066 (Wyo. 1986).

[17] The Restatement § 46(1) sets forth an "intentionally or recklessly" standard. Many jurisdictions have adopted this test. See, *e. g.*, *Watts* v. *Golden Age Nursing Home*, 127 Ariz. 255, 258, 619 P. 2d 1032, 1035 (1980) (recklessness); *Davidson* v. *Westminster*, 32 Cal. 3d 197, 209, 649 P. 2d 894, 901 (1982) (recklessness); *Freihofer* v. *Hearst Corp.*, 65 N. Y. 2d 135, 143, 480 N. E. 2d 349, 355 (1985) (recklessness). Others apply different standards. See, *e. g.*, *M. B. M. Co.* v. *Counce*, 268 Ark. 269, 277, 596 S. W. 2d 681, 685–686 (1980) (willful or wanton); *Anderson* v. *Prease*, 445 A. 2d 612, 613 (D. C. App. 1982) (intention can be inferred from outrageousness of conduct); *Hall* v. *May Department Stores Co.*, 292 Ore. 131, 135, 637 P. 2d 126, 129 (1981) (indifference and gross negligence not enough); *Wright* v. *Hasley*, 86 Wis. 2d 572, 576, 273 N. W. 2d 319, 321 (1979) ("purposely").

[18] One leading commentary states that "[i]n the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 64 (5th ed. 1984). The American Law Institute urges that as long as the distress is "genuine and severe," bodily harm should not be required. Restatement § 46(k). Many jurisdictions have adopted the Restatement's approach, see, *e. g.*, *Poulsen* v. *Russell*, 300 N. W. 2d 289, 291 (Iowa 1981); *Vicnire* v. *Ford Motor Credit Co.*, 401 A. 2d 148, 154 (Me. 1979). Others, however, appear to be more demanding in their scrutiny. See, *e. g.*, *Hubbard* v. *United Press International, Inc.*, 330 N. W. 2d 428, 437–440 (Minn. 1983); *Hassing* v. *Wortman*, 214 Neb. 154, 158–166, 333 N. W. 2d 765, 767–771 (1983).

[19] See *Hall*, *supra*, at 131, 637 P. 2d, at 126; *Contreras* v. *Crown Zellerbach Corp.*, 88 Wash. 2d 735, 741, 565 P. 2d 1173, 1176–1177 (1977); *Alcorn* v. *Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498, n. 2, 468 P. 2d 216, 218, n. 2 (1970).

[20] For example, while the traditional rule was that a plaintiff could not recover for mental injuries unconnected with actual or threatened impact,

ogy the victim must demonstrate.[21] These issues are only exemplary of the doctrinal divergences in this area. In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

Since, through no fault of either party, we do not know what all those facts are in this case, we cannot begin to decide whether respondent will be able to support his allegation that petitioners are liable to him under the FELA.[22] Given the posture of the case, there was no reason for the Court of Appeals to express an opinion on this issue. Without agreeing or disagreeing with the merits of the Court of Appeals' discussion of the emotional injury issue, we affirm its judgment

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the majority of jurisdictions now appear to have abandoned that rule. See generally *Gates* v. *Richardson*, 719 P. 2d 193, 195, n. 1 (Wyo. 1986) (citing cases from 37 jurisdictions); Restatement §§ 313, 436, 436A; Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury, 36 U. Fla. L. Rev. 333, 336–340 (1984); Note, Administering the Tort of Negligent Infliction of Emotional Distress: A Synthesis, 4 Cardozo L. Rev. 487 (1983).

[21] As the Wyoming Supreme Court recently observed: "[A]mong the courts that recognize the cause of action for negligent infliction of emotional distress, there is a great deal of variation in the damages they allow." *Gates*, *supra*, at 199–200. See, *e. g.*, *Leong* v. *Takasaki*, 55 Haw. 398, 403, 520 P. 2d 758, 762 (1974) (no minimum showing of severity); *Barnhill* v. *Davis*, 300 N. W. 2d 104, 108 (Iowa 1981) (severe injury); *Corso* v. *Merrill*, 119 N. H. 647, 659, 406 A. 2d 300, 308 (1979) (objective physical symptoms). Some courts require an objective showing of physical symptoms to recover for negligent, but not intentional, infliction of emotional distress. See *Vicnire*, *supra*, at 157.

[22] Indeed, it appears that once the facts of this case are fleshed out through appropriate motions or through an eventual trial, it might not squarely present the question of pure emotional injury at all. In the course of respondent's deposition, he testified that there was at least one episode of an actual assault by some co-workers. 2 Tr. 101, 102. Moreover, he claimed to have suffered physical symptoms in addition to his severe psychological illness. *Id.*, at 7, 8.

only to the extent that it rejects the RLA preclusion argument advanced by the Railroad.

Accordingly, the judgment of the Court of Appeals is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

CALIFORNIA COASTAL COMMISSION ET AL. *v.* GRANITE ROCK CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–1200. Argued December 2, 1986—Decided March 24, 1987

The Mining Act of 1872 authorizes a private citizen to enter federal lands to explore for mineral deposits, to perfect a mining claim, and to secure a patent to the land by complying with the requirements of the Act and regulations promulgated thereunder. Appellee Granite Rock Co. holds unpatented mining claims on federally owned lands in a national forest located in California. In accordance with federal regulations, Granite Rock obtained approval from the Forest Service in 1981 of its 5-year plan for mining limestone on the lands, and began to mine shortly thereafter. In 1983, the California Coastal Commission (Commission), acting pursuant to the California Coastal Act (CCA), instructed Granite Rock to apply for a coastal development permit for any mining undertaken after the date of the Commission's letter. Under the CCA, the Commission is the State's coastal zone management program for purposes of the federal Coastal Zone Management Act of 1972 (CZMA), which provides for financial assistance to States for the development of coastal zone management programs and which defines a State's coastal zone so as to exclude "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." Granite Rock filed suit in Federal District Court for declaratory and injunctive relief on the ground that the Commission's permit requirement was pre-empted by Forest Service Regulations, by the Mining Act of 1872, and by the CZMA. The court denied Granite Rock's motion for summary judgment and dismissed the action. The Court of Appeals reversed, holding that the Commission's permit requirement, which enforced state environmental standards, was pre-empted by the Mining Act of 1872 and Forest Service regulations.

Held:

1. The case is not moot even though Granite Rock's 5-year plan of operations expired during the course of the litigation. Because the Commission asserts that Granite Rock needed a Commission permit for work undertaken after the date of the Commission's letter, the Commission may require reclamation efforts to prevent river pollution resulting from the mining that has already occurred. Granite Rock disputes the Commission's authority to require such reclamation. Also, it is likely that

Granite Rock will submit new plans of operation in the future, and dispute would continue as to enforcement of the conditions of a Commission permit. This Court does not have appellate jurisdiction under 28 U. S. C. § 1254(2) because the Court of Appeals invalidated only the Commission's exercise of authority under the CCA, not any portion of the state statute itself as is required under § 1254(2). However, treating the jurisdictional statement as a petition for certiorari, the petition is granted. Pp. 577–579.

2. Neither Forest Service regulations, nor federal land use statutes, nor the CZMA pre-empts the Commission's imposition of a permit requirement on operation of an unpatented mining claim in a national forest. Pp. 579–594.

(a) The Property Clause of the Constitution—which gives Congress plenary power to legislate the use of federal lands—does not itself automatically conflict with all state regulation of federal lands. The question in this case is governed by the usual pre-emption analysis whereby state law is pre-empted if Congress has evidenced an intent to occupy entirely a given field or, where Congress has not entirely displaced state regulation, if state law actually conflicts with federal law. Pp. 579–581.

(b) The Forest Service regulations, governing the use of unpatented mining claims on federal forest lands authorized by the Mining Act of 1872 (which expressed no legislative intent on the then rarely contemplated subject of environmental regulation), do not justify a facial challenge to all conditions that might be imposed by the Commission's permit requirement. It is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity. The Forest Service regulations here not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operation will comply with state environmental protection laws. Pp. 581–584.

(c) There is no merit to the contention that federal land management statutes—the Federal Land Policy and Management Act and the National Forest Management Act—demonstrate a legislative intent to limit States to a purely advisory role in federal land management decisions, and that the Commission permit requirement is therefore pre-empted as an impermissible state land use regulation. Even if it is assumed (without deciding the issue) that the combination of those federal Acts pre-empts the extension of state land use plans to unpatented mining claims in national forest lands, the Commission asserts that it will use permit conditions to impose environmental regulation, not land use planning. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities, and thus it is anomalous to maintain that Congress intended any state environmental regulation

of unpatented mining claims in national forests to be *per se* pre-empted as an impermissible exercise of state land use planning. In the present posture of this litigation, the Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement. Pp. 584–589.

(d) The CZMA, by excluding federal lands from its definition of the coastal zone, does not demonstrate a congressional intent to pre-empt any possible Commission permit requirement as applied to the mining of Granite Rock's unpatented claim. The CZMA's language and legislative history expressly disclaim an intent to automatically pre-empt all state regulation of activities on federal lands. Congress' statements indicate that it intended the CZMA *not* to be an independent cause of pre-emption except in cases of actual conflict between state and federal law. Pp. 589–593.

768 F. 2d 1077, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, and in Parts I and II of which POWELL and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post*, p. 594. SCALIA, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 607.

Linus Masouredis, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *Joseph Barbieri*, Deputy Attorney General.

Barbara R. Banke argued the cause for appellee. With her on the brief were *Jess S. Jackson*, *Burton J. Goldstein*, *James G. Heisinger, Jr.*, and *Janet A. Econome*.

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Wallace*, *Peter R. Steenland, Jr.*, and *Anne S. Almy*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *Harold M. Brown*, Attorney General of Alaska, *Jim Smith*, Attorney General of Florida, *Robert K. Corbin*, Attorney General of Arizona, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *James*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether Forest Service regulations, federal land use statutes and regulations, or the Coastal Zone Management Act of 1972 (CZMA), 16 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), pre-empt the California Coastal Commission's imposition of a permit requirement on operation of an unpatented mining claim in a national forest.

I

Granite Rock Company is a privately owned firm that mines chemical and pharmaceutical grade white limestone. Under the Mining Act of 1872, 17 Stat. 91, as amended, 30 U. S. C. § 22 *et seq.*, a private citizen may enter federal lands to explore for mineral deposits. If a person locates a valuable mineral deposit on federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," 30 U. S. C. § 26, although the United States retains title to the land. The holder of a perfected mining claim may secure a patent to the land by com-

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T. Jones, Attorney General of Idaho, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Brian McKay*, Attorney General of Nevada, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *W. J. Michael Cody*, Attorney General of Tennessee, *David L. Wilkinson*, Attorney General of Utah, *Kenneth O. Eikenberry*, Attorney General of Washington, *Paul Bardacke*, Attorney General of New Mexico, *William J. Guste, Jr.*, Attorney General of Louisiana, *Michael T. Greely*, Attorney General of Montana, *David B. Frohnmayer*, Attorney General of Oregon, *Mark V. Meierhenry*, Attorney General of South Dakota, *Jim Mattox*, Attorney General of Texas, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Archie G. McClintock*, Attorney General of Wyoming, and *John D. Leshy;* for the Council of State Governments et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin;* and for the Big Sur Foundation et al. by *Barry P. Goode* and *Christopher Berka.*

Briefs of *amici curiae* urging affirmance were filed for the Alaska Miners Association et al. by *Ronald A. Zumbrun* and *Robin L. Rivett;* and for the American Mining Congress by *Mary Jane C. Due.*

plying with the requirements of the Mining Act and regulations promulgated thereunder, see 43 CFR § 3861.1 *et seq.* (1986), and, upon issuance of the patent, legal title to the land passes to the patent holder. Granite Rock holds unpatented mining claims on federally owned lands on and around Mount Pico Blanco in the Big Sur region of Los Padres National Forest.

From 1959 to 1980, Granite Rock removed small samples of limestone from this area for mineral analysis. In 1980, in accordance with federal regulations, see 36 CFR § 228.1 *et seq.* (1986), Granite Rock submitted to the Forest Service a 5-year plan of operations for the removal of substantial amounts of limestone. The plan discussed the location and appearance of the mining operation, including the size and shape of excavations, the location of all access roads, and the storage of any overburden. App. 27–34. The Forest Service prepared an Environmental Assessment of the plan. *Id.*, at 38–53. The Assessment recommended modifications of the plan, and the responsible Forest Service Acting District Ranger approved the plan with the recommended modifications in 1981. *Id.*, at 54. Shortly after Forest Service approval of the modified plan of operations, Granite Rock began to mine.

Under the California Coastal Act (CCA), Cal. Pub. Res. Code Ann. § 30000 *et seq.* (West 1986), any person undertaking any development, including mining, in the State's coastal zone must secure a permit from the California Coastal Commission. §§ 30106, 30600. According to the CCA, the Coastal Commission exercises the State's police power and constitutes the State's coastal zone management program for purposes of the federal CZMA, described *infra*, at 589–590. In 1983 the Coastal Commission instructed Granite Rock to apply for a coastal development permit for any mining undertaken after the date of the Commission's letter.[1]

[1] The Coastal Commission also instructed Granite Rock to submit a certification of consistency pursuant to the consistency review process of the CZMA, 16 U. S. C. § 1456(c)(3)(A), described *infra*, at 590–591. The

Granite Rock immediately filed an action in the United States District Court for the Northern District of California seeking to enjoin officials of the Coastal Commission from compelling Granite Rock to comply with the Coastal Commission permit requirement and for declaratory relief under 28 U. S. C. § 2201 (1982 ed., Supp. III). Granite Rock alleged that the Coastal Commission permit requirement was pre-empted by Forest Service regulations, by the Mining Act of 1872, and by the CZMA. Both sides agreed that there were no material facts in dispute. The District Court denied Granite Rock's motion for summary judgment and dismissed the action. 590 F. Supp. 1361 (1984). The Court of Appeals for the Ninth Circuit reversed. 768 F. 2d 1077 (1985). The Court of Appeals held that the Coastal Commission permit requirement was pre-empted by the Mining Act of 1872 and Forest Service regulations. The Court of Appeals acknowledged that the statute and regulations do not "go so far as to occupy the field of establishing environmental standards," specifically noting that Forest Service regulations "recognize that a state may enact environmental regulations in addition to those established by federal agencies," and that the Forest Service "will apply [the state standards] in exercising its permit authority." 768 F. 2d, at 1083. However, the Court of Appeals held that "an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is pre-empted." *Ibid.*

The Coastal Commission appealed to this Court under 28 U. S. C. § 1254(2). We postponed consideration of the question of jurisdiction to the hearing of the case on the merits, 475 U. S. 1094 (1986).

II

First we address two jurisdictional issues. In the course of this litigation, Granite Rock's 5-year plan of operations

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Commission subsequently admitted that it had waived its right to review the 1981–1986 plan of operation under the CZMA consistency provision by failing to raise its right to review in a timely manner. App. 17.

expired. The controversy between Granite Rock and the Coastal Commission remains a live one, however, for two reasons. First, the Coastal Commission's 1983 letter instructed Granite Rock that a Coastal Commission permit was required for work undertaken after the date of the letter. App. 22–24. Granite Rock admitted that it has done work after that date. *Id.*, at 83. Because the Coastal Commission asserts that Granite Rock needed a Coastal Commission permit for the work undertaken after the date of the Commission's letter, the Commission may require "reclamation for the mining that [has] occurred, measures to prevent pollution into the Little Sur River." Tr. of Oral Arg. 8. Granite Rock disputes the Coastal Commission's authority to require reclamation efforts. Second, Granite Rock stated in answer to interrogatories that its "investments and activities regarding its valid and unpatented mining claims require continuing operation beyond the present Plan of Operations," and that it intended to conduct mining operations on the claim at issue "as long as [Granite Rock] can mine an economically viable and valuable mining deposit under applicable federal laws." App. 83–84. Therefore it is likely that Granite Rock will submit new plans of operations in the future. Even if future participation by California in the CZMA consistency review process, see *infra*, at 590–591, or requirements placed on Granite Rock by the Forest Service called for compliance with the conditions of the Coastal Commission's permit, dispute would continue over whether the Coastal Commission itself, rather than the Federal Government, could *enforce* the conditions placed on the permit. This controversy is one capable of repetition yet evading review. See *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 285, n. 3 (1986); *Dunn* v. *Blumstein*, 405 U. S. 330, 333, n. 2 (1972). Accordingly, this case is not moot.

The second jurisdictional issue we must consider is whether this case is properly within our authority, under 28 U. S. C. § 1254(2), to review the decision of a federal court

of appeals by appeal if a state statute is "held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." Statutes authorizing appeals are to be strictly construed. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 247 (1984); *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 43 (1983). As noted in *Silkwood*, *supra*, at 247, "we have consistently distinguished between those cases in which a state statute is expressly struck down" as repugnant to the Constitution, treaties, or laws of the United States, and those cases in which "an exercise of authority under state law is invalidated without reference to the state statute." This latter group of cases do not fall within this Court's appellate jurisdiction.

In the present case, the Court of Appeals held that the particular exercise of the Coastal Commission permit requirement over Granite Rock's operation in a national forest was pre-empted by federal law. The Court of Appeals did not invalidate any portion of the CCA. In fact, it did not discuss whether the CCA itself actually authorized the imposition of a permit requirement over Granite Rock. See Cal. Pub. Res. Code Ann. § 30008 (West 1986) (limiting jurisdiction over federal lands to that which is "consistent with applicable federal . . . laws"). Accordingly this case is one in which "an exercise of authority under state law is invalidated without reference to the state statute," *Silkwood*, *supra*, at 247, and not within our § 1254(2) appellate jurisdiction. We therefore treat the jurisdictional statement as a petition for certiorari, 28 U. S. C. § 2103, and having done so, grant the petition and reverse the judgment of the Court of Appeals.

III

Granite Rock does not argue that the Coastal Commission has placed any particular conditions on the issuance of a permit that conflict with federal statutes or regulations. Indeed, the record does not disclose what conditions the

Coastal Commission will place on the issuance of a permit. Rather, Granite Rock argues, as it must given the posture of the case, that there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law—that any state permit requirement is *per se* pre-empted. The only issue in this case is this purely facial challenge to the Coastal Commission permit requirement.

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., Art. IV, § 3, cl. 2. This Court has "repeatedly observed" that "'[t]he power over the public land thus entrusted to Congress is without limitations.'" *Kleppe* v. *New Mexico*, 426 U. S. 529, 539 (1976), quoting *United States* v. *San Francisco*, 310 U. S. 16, 29 (1940). Granite Rock suggests that the Property Clause not only invests unlimited power in Congress over the use of federally owned lands, but also exempts federal lands from state regulation whether or not those regulations conflict with federal law. In *Kleppe*, 426 U. S., at 543, we considered "totally unfounded" the assertion that the Secretary of the Interior had even proposed such an interpretation of the Property Clause. We made clear that "the State is free to enforce its criminal and civil laws" on federal land so long as those laws do not conflict with federal law. *Ibid.* The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather, as we explained in *Kleppe:*

> "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power *to enact legislation* respecting those lands pursuant to the Property Clause. *And when Congress so acts*, the federal legislation necessarily overrides conflicting state laws under

the Supremacy Clause." *Ibid.* (citations omitted) (emphasis supplied).

We agree with Granite Rock that the Property Clause gives Congress plenary power to legislate the use of the federal land on which Granite Rock holds its unpatented mining claim. The question in this case, however, is whether Congress has enacted legislation respecting this federal land that would pre-empt any requirement that Granite Rock obtain a California Coastal Commission permit. To answer this question we follow the pre-emption analysis by which the Court has been guided on numerous occasions:

> "[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [*Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U. S. 190,] 203–204 [(1983)]; *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)." *Silkwood* v. *Kerr-McGee Corp.*, *supra*, at 248.

A

Granite Rock and the United States as *amicus* have made basically three arguments in support of a finding that any possible state permit requirement would be pre-empted. First, Granite Rock alleges that the Federal Government's environmental regulation of unpatented mining claims in na-

tional forests demonstrates an intent to pre-empt any state regulation. Second, Granite Rock and the United States assert that indications that state land use planning over unpatented mining claims in national forests is pre-empted should lead to the conclusion that the Coastal Commission permit requirement is pre-empted. Finally, Granite Rock and the United States assert that the CZMA, by excluding federal lands from its definition of the coastal zone, declared a legislative intent that federal lands be excluded from all state coastal zone regulation. We conclude that these federal statutes and regulations do not, either independently or in combination, justify a facial challenge to the Coastal Commission permit requirement.

Granite Rock concedes that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation. Brief for Appellee 31–32. In 1955, however, Congress passed the Multiple Use Mining Act, 69 Stat. 367, 30 U. S. C. § 601 *et seq.*, which provided that the Federal Government would retain and manage the surface resources of subsequently located unpatented mining claims. 30 U. S. C. § 612(b). Congress has delegated to the Secretary of Agriculture the authority to make "rules and regulations" to "regulate [the] occupancy and use" of national forests. 16 U. S. C. § 551. Through this delegation of authority, the Department of Agriculture's Forest Service has promulgated regulations so that "use of the surface of National Forest System lands" by those such as Granite Rock, who have unpatented mining claims authorized by the Mining Act of 1872, "shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 CFR §§ 228.1, 228.3(d) (1986). It was pursuant to these regulations that the Forest Service approved the Plan of Operations submitted by Granite Rock. If, as Granite Rock claims, it is the federal intent that Granite Rock conduct its mining unhindered by any state environmental regulation,

one would expect to find the expression of this intent in these Forest Service regulations. As we explained in *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 718 (1985), it is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity:

> "[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt."

Upon examination, however, the Forest Service regulations that Granite Rock alleges pre-empt any state permit requirement not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws. The regulations explicitly require all operators within the national forests to comply with state air quality standards, 36 CFR § 228.8(a) (1986), state water quality standards, § 228.8(b), and state standards for the disposal and treatment of solid wastes, § 228.8(c). The regulations also provide that, pending final approval of the plan of operations, the Forest Service officer with authority to approve plans of operation "will approve such operations as may be necessary for timely compliance with the requirements of Federal and *State laws* . . . ." § 228.5(b) (emphasis added). Finally, the final subsection of § 228.8, "[r]equirements for environmental protection," provides:

> "(h) Certification or other approval issued by *State agencies* or other Federal agencies of compliance with laws and regulations relating to mining operations will

> be accepted as compliance with similar or parallel requirements of these regulations." (Emphasis supplied.)

It is impossible to divine from these regulations, which expressly contemplate coincident compliance with state law as well as with federal law, an intention to pre-empt all state regulation of unpatented mining claims in national forests. Neither Granite Rock nor the United States contends that these Forest Service regulations are inconsistent with their authorizing statutes.

Given these Forest Service regulations, it is unsurprising that the Forest Service team that prepared the Environmental Assessment of Granite Rock's plan of operation, as well as the Forest Service officer that approved the plan of operation, expected compliance with state as well as federal law. The Los Padres National Forest Environmental Assessment of the Granite Rock plan stated that "Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission." App. 46. The Decision Notice and Finding of No Significant Impact issued by the Acting District Ranger accepted Granite Rock's plan of operation with modifications, stating:

> "The claimant, in exercising his rights granted by the Mining Law of 1872, shall comply with the regulations of the Departments of Agriculture and Interior. The claimant is further responsible for obtaining any necessary permits required by State and/or county laws, regulations and/or ordinance." *Id.*, at 54.

B

The second argument proposed by Granite Rock is that federal land management statutes demonstrate a legislative intent to limit States to a purely advisory role in federal land management decisions, and that the Coastal Commission permit requirement is therefore pre-empted as an impermissible state land use regulation.

In 1976 two pieces of legislation were passed that called for the development of federal land use management plans affecting unpatented mining claims in national forests. Under the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, 43 U. S. C. § 1701 *et seq.* (1982 ed. and Supp. III), the Department of the Interior's Bureau of Land Management is responsible for managing the mineral resources on federal forest lands; under the National Forest Management Act (NFMA), 90 Stat. 2949, 16 U. S. C. §§ 1600–1614 (1982 ed. and Supp. III), the Forest Service under the Secretary of Agriculture is responsible for the management of the surface impacts of mining on federal forest lands. Granite Rock, as well as the Solicitor General, point to aspects of these statutes indicating a legislative intent to limit States to an advisory role in federal land management decisions. For example, the NFMA directs the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies," 16 U. S. C. § 1604(a). The FLPMA directs that land use plans developed by the Secretary of the Interior "shall be consistent with State and local plans to the maximum extent [the Secretary] finds consistent with Federal law," and calls for the Secretary, "to the extent he finds practical," to keep apprised of state land use plans, and to "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans." 43 U. S. C. § 1712(c)(9).

For purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands. The Coastal Commission[2] asserts that it will use permit con-

[2] Although the California Coastal Act requires local governments to adopt Local Coastal Programs, which include a land use plan and zoning

ditions to impose environmental regulation. See Cal. Pub. Res. Code Ann. § 30233 (West 1986) (quality of coastal waters); § 30253(2) (erosion); § 30253(3) (air pollution); § 30240(b) (impact on environmentally sensitive habitat areas).

While the CCA gives land use as well as environmental regulatory authority to the Coastal Commission, the state statute also gives the Coastal Commission the ability to limit the requirements it will place on the permit. The CCA declares that the Coastal Commission will "provide maximum state involvement in federal activities allowable under federal law or regulations . . . ." Cal. Pub. Res. Code Ann. § 30004 (West 1986). Since the state statute does not detail exactly what state standards will and will not apply in connection with various federal activities, the statute must be understood to allow the Coastal Commission to limit the regulations it will impose in those circumstances. In the present case, the Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land. See 768 F. 2d, at 1080 ("The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land *unless the regulation prohibits mining altogether* . . .") (emphasis supplied); 590 F. Supp., at 1373 ("The [Coastal Commission] seeks not to prohibit or 'veto,' but to regulate [Granite Rock's] mining activity in accordance with the detailed requirements of the CCA. . . . There is no reason to find that the [Coastal Commission] will apply the CCA's regulations so as to deprive [Granite Rock] of its rights under the Mining Act"); Defendants' Memorandum of Points

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ordinance, see Cal. Pub. Res. Code Ann. §§ 30500, 30512, 30513 (West 1986), no Local Coastal Program permit requirement is involved in this case. The permit at issue in this litigation is issued by the Coastal Commission directly. §§ 30600(a), (c); Tr. of Oral Arg. 52 ("We're dealing with the second type of permitting, which is by the Coastal Commission itself, not a local government. . . . [T]he Coastal Commission issues permits based upon compliance with the environmental criteria in the Coastal Act itself").

and Authorities in Opposition to Plaintiff's Motion for Summary Judgment in No. C–83–5137 (ND Cal.), pp. 41–42. ("Despite Granite Rock's characterization of Coastal Act regulation as a 'veto' or ban of mining, Granite Rock has not applied for any coastal permit, and the State . . . has not indicated that it would in fact ban such activity. . . . [T]he question presented is merely whether the state can *regulate* uses rather than *prohibit* them. Put another way, the state is not seeking to *determine* basic uses of federal land: rather it is seeking to *regulate* a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion").

The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities. As noted above, 43 U. S. C. § 1712(c)(9) requires that the Secretary of the Interior's land use plans be consistent with state plans only "to the extent he finds practical." The immediately preceding subsection, however, requires that the Secretary's land use plans "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." § 1712(c)(8). Congress has also illustrated its understanding of land use planning and environmental regulation as distinct activities by delegating the authority to regulate these activities to different agencies. The stated purpose of part 228, subpart A of the Forest Service regulations, 36 CFR § 228.1

(1986), is to "set forth rules and procedures" through which mining on unpatented claims in national forests "shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." The next sentence of the subsection, however, declares that "[i]t is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior." Congress clearly envisioned that although environmental regulation and land use planning may hypothetically overlap in some instances, these two types of activity would in most cases be capable of differentiation. Considering the legislative understanding of environmental regulation and land use planning as distinct activities, it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be *per se* pre-empted as an impermissible exercise of state land use planning. Congress' treatment of environmental regulation and land use planning as generally distinguishable calls for this Court to treat them as distinct, until an actual overlap between the two is demonstrated in a particular case.

Granite Rock suggests that the Coastal Commission's true purpose in enforcing a permit requirement is to prohibit Granite Rock's mining entirely. By choosing to seek injunctive and declaratory relief against the permit requirement before discovering what conditions the Coastal Commission would have placed on the permit, Granite Rock has lost the possibility of making this argument in this litigation. Granite Rock's case must stand or fall on the question whether *any possible* set of conditions attached to the Coastal Commission's permit requirement would be pre-empted. As noted in the previous section, the Forest Service regulations do not indicate a federal intent to pre-empt all state environmental regulation of unpatented mining claims in national forests. Whether or not state land use planning over unpatented mining claims in national forests is pre-empted, the Coastal Com-

mission insists that its permit requirement is an exercise of environmental regulation rather than land use planning. In the present posture of this litigation, the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement. This analysis is not altered by the fact that the Coastal Commission chooses to impose its environmental regulation by means of a permit requirement. If the Federal Government occupied the field of environmental regulation of unpatented mining claims in national forests—concededly not the case—then state environmental regulation of Granite Rock's mining activity would be pre-empted, whether or not the regulation was implemented through a permit requirement. Conversely, if reasonable state environmental regulation is not pre-empted, then the use of a permit requirement to impose the state regulation does not create a conflict with federal law where none previously existed. The permit requirement itself is not talismanic.

C

Granite Rock's final argument involves the CZMA, 16 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), through which financial assistance is provided to States for the development of coastal zone management programs. Section 304(a) of the CZMA, 16 U. S. C. § 1453(1), defines the coastal zone of a State, and specifically excludes from the coastal zone "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." The Department of Commerce, which administers the CZMA, has interpreted § 1453(1) to exclude all federally owned land from the CZMA definition of a State's coastal zone. 15 CFR § 923.33(a) (1986).

Granite Rock argues that the exclusion of "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or

agents" excludes all federally owned land from the CZMA definition of a State's coastal zone, and demonstrates a congressional intent to pre-empt any possible Coastal Commission permit requirement as applied to the mining of Granite Rock's unpatented claim in the national forest land.

According to Granite Rock, because Granite Rock mines land owned by the Federal Government, the Coastal Commission's regulation of Granite Rock's mining operation must be limited to participation in a consistency review process detailed in the CZMA. Under the CZMA, once a state coastal zone management program has been approved by the Secretary of Commerce for federal administrative grants, "any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application . . . a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the [state] program." 16 U. S. C. § 1456(c)(3)(A). At the same time, the applicant must provide the State a copy of the certification. The State, after public notice and appropriate hearings, is to notify the federal agency concerned that the State concurs or objects to the certification. If the State fails to notify the federal agency within six months of receiving notification, it is presumed that the State concurs. If the State neither concurs nor is presumed to concur, the federal agency must reject the application, unless the Secretary of Commerce finds that the application is consistent with the objectives of the CZMA or is "otherwise necessary in the interest of national security." *Ibid.*

In order for an activity to be subject to CZMA consistency review, the activity must be on a list that the State provides federal agencies, which describes the type of federal permit and license applications the State wishes to review. 15 CFR § 930.53 (1986). If the activity is unlisted, the State must within 30 days of receiving notice of the federal permit appli-

cation inform the federal agency and federal permit applicant that the proposed activity requires CZMA consistency review. § 930.54. If the State does not provide timely notification, it waives the right to review the unlisted activity. In the present case, it appears that Granite Rock's proposed mining operations were not listed pursuant to § 930.53, and that the Coastal Commission did not timely notify the Forest Service or Granite Rock that Granite Rock's plan of operations required consistency review. App. 17. Therefore, the Coastal Commission waived its right to consistency review of the 1981–1986 plan of operations.

Absent any other expression of congressional intent regarding the pre-emptive effect of the CZMA, we would be required to decide, first, whether unpatented mining claims in national forests were meant to be excluded from the § 1453(1) definition of a State's coastal zone, and, second, whether this exclusion from the coastal zone definition was intended to pre-empt state regulations that were not pre-empted by any other federal statutes or regulations. Congress has provided several clear statements of its intent regarding the pre-emptive effect of the CZMA; those statements, which indicate that Congress clearly intended the CZMA *not* to be an independent cause of pre-emption except in cases of actual conflict, end our inquiry.

Title 16 U. S. C. § 1456(e)(1) provides:

> "Nothing in this chapter shall be construed —
>
> "(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects. . . ."

The Senate Report describes the above section as "a standard clause disclaiming intent to diminish Federal or State authority in the fields affected by the Act," or "to change interstate agreements." S. Rep. No. 92–753, p. 20 (1972). The Conference Report stated, "[t]he Conferees also adopted language which would make certain that there is no intent in this legislation to change Federal or state jurisdiction or rights in specified fields, including submerged lands." H. R. Conf. Rep. No. 92–1544, p. 14 (1972). While the land at issue here does not appear to fall under the categories listed in 16 U. S. C. § 1456(e)(1), the section and its legislative history demonstrate Congress' refusal to use the CZMA to alter the balance between state and federal jurisdiction.

The clearest statement of congressional intent as to the pre-emptive effect of the CZMA appears in the "Purpose" section of the Senate Report, quoted in full:

> "[The CZMA] has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. The bill authorizes Federal grants-in-aid to coastal states to develop coastal zone management programs. Additionally, it authorizes grants to help coastal states implement these management programs once approved, and States would be aided in the acquisition and operation of estuarine sanctuaries. Through the system of providing grants-in-aid, the States are provided financial incentives to undertake the responsibility for setting up management programs in the coastal zone. *There is no attempt to diminish state authority through federal preemption.* The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones." S. Rep. No. 92–753, *supra*, at 1 (emphasis supplied).

Because Congress specifically disclaimed any intention to pre-empt pre-existing state authority in the CZMA, we conclude that even if all federal lands are excluded from the CZMA definition of "coastal zone," the CZMA does not automatically pre-empt all state regulation of activities on federal lands.

IV

Granite Rock's challenge to the California Coastal Commission's permit requirement was broad and absolute; our rejection of that challenge is correspondingly narrow. Granite Rock argued that any state permit requirement, whatever its conditions, was *per se* pre-empted by federal law. To defeat Granite Rock's facial challenge, the Coastal Commission needed merely to identify a possible set of permit conditions not in conflict with federal law. The Coastal Commission alleges that it will use its permit requirement to impose reasonable environmental regulation. Rather than evidencing an intent to pre-empt such state regulation, the Forest Service regulations appear to assume compliance with state laws. Federal land use statutes and regulations, while arguably expressing an intent to pre-empt state land use planning, distinguish environmental regulation from land use planning. Finally, the language and legislative history of the CZMA expressly disclaim an intent to pre-empt state regulation.

Following an examination of the "almost impenetrable maze of arguably relevant legislation," *post*, at 606, JUSTICE POWELL concludes that "[i]n view of the Property Clause . . . , as well as common sense, federal authority must control . . . ." *Ibid.* As noted above, the Property Clause gives Congress plenary power over the federal land at issue; however, even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress "evidences an intent to occupy a given field," *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S., at 248. The suggestion that traditional pre-emption analysis is inapt in this context can be

justified, if at all, only by the assertion that the state regulation in this case would be "duplicative." The description of the regulation as duplicative, of course, is based on JUSTICE POWELL's conclusions that land use regulation and environmental regulation are indistinguishable, *post*, at 600–601, and that any state permit requirement, by virtue of being a permit requirement rather than some other form of regulation, would duplicate federal permit requirements, *post*, at 604–605. Because we disagree with these assertions, see *supra*, at 587–588, 589, we apply the traditional pre-emption analysis which requires an actual conflict between state and federal law, or a congressional expression of intent to pre-empt, before we will conclude that state regulation is pre-empted.

Contrary to the assertion of JUSTICE POWELL that the Court today gives States power to impose regulations that "conflict with the views of the Forest Service," *post*, at 606, we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme.

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

It is so ordered.

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

Because I agree that this case is properly before us, I join Parts I and II of the Court's opinion. In Part III, the Court considers the Forest Service's approval of Granite Rock's plan to operate its mine in a national forest. Because I cannot agree with the Court's conclusion that Congress intended to allow California to require a state permit, I dissent from Part III.

I

A

To understand Part III of the Court's opinion, one must have some knowledge of two groups of statutes and regulations. The first group of provisions regulates mining. As the Court explains, the basic source of federal mining law is the Mining Act of 1872, ch. 152, 17 Stat. 91, as amended, 30 U. S. C. § 22 *et seq.* In general, that law opens the public lands to exploration. If one discovers valuable mineral deposits, the statute grants him the right to extract and sell the minerals without paying a royalty to the United States, as well as the right—subject to certain statutory requirements—to obtain fee title to the land. See Mining Act § 1, 30 U. S. C. § 22; *United States* v. *Locke*, 471 U. S. 84, 86 (1985). As the demand for minerals has increased during the past century, Congress has emphasized that an "economically sound and stable domestic mining . . . industr[y]" is important to the economy, and to our Nation's security. See Mining and Minerals Policy Act of 1970, § 2, 30 U. S. C. § 21a.[1]

B

The second area of federal law important to this case concerns the management of federal lands. In response to the increasing commercial importance of federal lands, as well as the awareness of the environmental values of these lands,

[1] See also National Materials and Minerals Policy, Research and Development Act of 1980, § 2(a)(1), 30 U. S. C. § 1601(a)(1) (congressional finding that the availability of minerals "is essential for national security, economic well-being, and industrial production"); § 2(a)(3), 30 U. S. C. § 1601(a)(3) (congressional finding that the extraction of minerals is "closely linked with national concerns for energy and the environment"); § 3, 30 U. S. C. § 1602 ("[I]t is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs").

Congress passed the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U. S. C. § 1701 *et seq.* (1982 ed. and Supp. III). That statute promotes the effective development of federal lands in two ways pertinent to this case. First, it directs the Secretary of the Interior to inventory the resources located on federal lands and to develop comprehensive plans for future development. §§ 1701(a)(2), 1711, 1712. Second, it ensures that the States' interests in these resources will not be ignored:

> "[T]he Secretary shall . . . coordinate [his plans] with the land use planning and management programs of . . . the States and local governments within which the lands are located. . . . Land use plans of the Secretary . . . shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." § 1712(c)(9).

Significantly, the FLPMA only requires the Secretary to listen to the States, not obey them. As the Conference Report explained: "[T]he ultimate decision as to determining the extent of feasible consistency between [the Secretary's] plans and [state or local] plans rests with the Secretary of the Interior." H. R. Conf. Rep. No. 94–1724, p. 58 (1976).

The surface management provisions of the FLPMA do not apply to national forest lands. 43 CFR § 3809.0–5(c) (1986). Congress first provided for management of these lands in the Organic Administration Act of 1897. The current version of that statute delegates to the Secretary of Agriculture the authority to "regulate [the] occupancy and use" of national forests. 16 U. S. C. § 551. The Forest Service, as the Secretary's delegate, has promulgated regulations to control the "use" of national forests. 36 CFR § 228.1 *et seq.* (1986). Persons wishing to mine in the national forests submit plans of operation detailing their anticipated activities. If the For-

est Service determines that the plans comply with the regulations, it approves them and authorizes the mining operation. The Court, by focusing on the Forest Service's concern for preservation of the national forests, characterizes these regulations as "environmental" regulations, in its view something entirely different from "land use" regulations. *Ante*, at 587–589.

In fact, the regulation of land use is more complicated than the Court suggests. First, as is true with respect to the Secretary of the Interior, the Secretary of Agriculture has been directed to develop comprehensive plans for the use of resources located in national forests. See Forest and Rangeland Renewable Resources Planning Act of 1974 (Forest Planning Act) § 3(a), as amended, 16 U. S. C. § 1601. The Forest Planning Act initially did not require the Forest Service to consider the views of state regulators. But when Congress passed the FLPMA in 1976, it also passed the National Forest Management Act (NFMA), that amended the Forest Planning Act. Of special importance, § 6(a) of the NFMA requires the Secretary of Agriculture to coordinate his land management plans "with the land and resource management planning processes of State and local governments." 16 U. S. C. § 1604(a). Section 14 specifically requires the Secretary of Agriculture to give state governments "adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." § 1612(a). Thus, it is clear that the Secretary of Agriculture has the final authority to determine the best use for federal lands, and that he must consider the views of state regulators before making a decision. There is no suggestion in the statute or the legislative history that state regulators should have the final authority in determining how particular federal lands should be used.

The Forest Service also has a role in implementing the Nation's mineral development policy. The Court shrugs off the

importance of this obligation, noting that "'the responsibility for managing [mineral] resources is in the Secretary of the Interior.'" *Ante*, at 588 (quoting 36 CFR §228.1 (1986)). This statement erroneously equates mineral resources management with land use management. Title 43 of the Code of Federal Regulations details the activities of the Bureau of Land Management (BLM) in this context. Generally, BLM manages the process by which rights to minerals are obtained from the United States and protected against others, the payment of royalties to the Federal Government, and the conservation of the minerals themselves. In some cases—like those of oil, gas, and coal—BLM supervises leasing of the right to extract the materials. But this case involves "hardrock" minerals governed by the Mining Act of 1872. With respect to those minerals, BLM's actions are limited to determining whether the land is subject to location under the mining laws; whether a mining claim is properly located and recorded; whether assessment work is properly performed; and whether the requirements for patenting a claim have been complied with. See 43 CFR pts. 3800–3870 (1986). None of these determinations is a "land use" determination in the sense of balancing mineral development against environmental hazard to surface resources. The Forest Service makes these determinations through its review of a mining plan of operation.

The Organic Administration Act of 1897 makes clear that the Forest Service must act consistently with the federal policy of promoting mineral development. Section 1 of that Act precludes the Secretary of Agriculture from taking any action that would "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U. S. C. §478.[2] Forest Service ma-

[2] More recently, congressional solicitude for development of federal mineral resources led Congress to order the President to "coordinate the responsible departments and agencies to, among other measures . . . en-

terials confirm its duty to balance "[t]he demand for mineral development . . . against the demand for renewable resources and the land management agency's responsibility to reasonably protect the environment." United States Dept. of Agriculture, Forest Service Minerals Program Handbook preface (1983). See also Forest Service Manual § 2802 (Dec. 1986) (stating that the Forest Service's policy is to "ensure that exploration, development, and production of mineral and energy resources are conducted in an environmentally sound manner and that these activities are integrated with planning and management of other national forest resources"); 30 U. S. C. § 1602. In sum, although the Secretary of the Interior has a substantial responsibility for managing mineral resources, Congress has entrusted the task of balancing mineral development and environmental protection in the national forests to the Department of Agriculture, and its delegate the Forest Service.

II

The Court's analysis of this case focuses on selected provisions of the federal statutes and regulations, to the exclusion of other relevant provisions and the larger regulatory context. First, it examines the Forest Service regulations themselves, apart from the statutes that authorize them. Because these regulations explicitly require the federal permits to comply with specified state environmental standards, the Court assumes that Congress intended to allow state enforcement of any and all state environmental standards. Careful comparison of the regulations with the authorizing statutes casts serious doubt on this conclusion. The regulations specifically require compliance with only three types of state regulation: air quality, see 36 CFR § 228.8(a) (1986); water quality, see § 228.8(b); and solid waste disposal, see § 228.8(c). But the Court fails to mention that the types of

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courage Federal agencies to facilitate availability and development of domestic resources to meet critical materials needs." 30 U. S. C. § 1602(7).

state regulation preserved by § 228.8 already are preserved by specific nonpre-emption clauses in other federal statutes. See 42 U. S. C. § 7418(a) (Clean Air Act requires federal agencies to comply with analogous state regulations); 33 U. S. C. § 1323(a) (similar provision of the Clean Water Act); 42 U. S. C. § 6961 (similar provision of the Solid Waste Disposal Act). The Forest Service's specific preservation of certain types of state regulation—already preserved by federal law—hardly suggests an implicit intent to allow the States to apply other types of regulation to activities on federal lands. Indeed the maxim *expressio unius est exclusio alterius* suggests the contrary.[3]

The second part of the Court's analysis considers both the NFMA and the FLPMA. The Court assumes, *ante*, at 585, that these statutes "pre-emp[t] the extension of state land use plans onto unpatented mining claims in national forest lands." But the Court nevertheless holds that the Coastal Commission can require Granite Rock to secure a state permit before conducting mining operations in a national forest. This conclusion rests on a distinction between "land use plan-

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[3] The Court rests this part of its pre-emption analysis on *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707 (1985). In that case, the Court stated: "[W]e will pause before saying that the mere volume and complexity of [an agency's] regulations indicate that the agency did in fact intend to pre-empt." *Id.*, at 718. *Hillsborough*, however, is quite different from this case. First, the state regulations were designed to ensure the health of plasma donors, an aim entirely separate from the aim of the federal regulations, to ensure the purity of the donated plasma. In this case, by contrast, federal authorities already have considered the environmental effects of Granite Rock's mine. The California Coastal Commission seeks only to reconsider the decision of the federal authorities. In any event, the argument for pre-emption in this case does not rest on the Forest Service regulations alone, but also on the comprehensive regulatory system enacted by Congress. The Court cannot make *Hillsborough* controlling simply by considering the regulations separately from their statutory source. As I explain, *infra*, at 604–606, the complex of applicable statutes and regulations, considered as a whole, pre-empts the Coastal Commission's permit requirement.

ning" and "environmental regulation." In the Court's view, the NFMA and the FLPMA indicate a congressional intent to pre-empt state land use regulations, but not state environmental regulations. I find this analysis unsupportable, either as an interpretation of the governing statutes or as a matter of logic.

The basis for the alleged distinction is that Congress has understood land use planning and environmental regulation to be distinct activities. The only statute cited for this proposition is § 202(c)(8) of the FLPMA, 43 U. S. C. § 1712(c)(8), that requires the Secretary of the Interior's land use plans to "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." But this statute provides little support for the majority's analysis. A section mandating consideration of environmental standards in the formulation of land use plans does not demonstrate a general separation between "land use planning" and "environmental regulation." Rather, § 202(c)(8) recognizes that the Secretary's land use planning will affect the environment, and thus directs the Secretary to comply with certain pollution standards.

Nor does this section support the Court's ultimate conclusion, that Congress intended the Secretary's plans to comply with all state environmental regulations. As I have explained *supra*, at 599–600, other federal statutes require compliance with the listed standards.[4] Also, because the

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[4] The Forest Service regulations discussed above mention a slightly different set of environmental standards than does the FLPMA. Both provisions specifically preserve air and water standards. The Forest Service regulations also mention solid waste disposal standards; the Land Management Act also mentions noise control standards. Cf. 42 U. S. C. § 4901(a)(3) (Noise Control Act provision stating that the "primary responsibility for control of noise rests with State and local governments"). The slight difference between the two lists of pollution standards, however, is insignificant. The feature that *all* the listed standards have in common is

FLPMA requires compliance only with "applicable" standards, it is difficult to treat this one section as an independent and controlling command that the Secretary comply with all state environmental standards. Rather, viewing the complex of statutes and regulations as a whole, it is reasonable to view § 202(c)(8) simply as a recognition that the Secretary's plans must comply with standards made applicable to federal activities by other federal laws.

The only other authority cited by the Court for the distinction between environmental regulation and land use planning is a Forest Service regulation stating that the Forest Service's rules do not "provide for the management of mineral resources," 36 CFR § 228.1 (1986). From this, the Court concludes that the Forest Service enforces environmental regulation but does not engage in land use planning. This conclusion misunderstands the division of authority between the BLM and the Forest Service. As explained *supra*, at 597–598, the BLM's management of minerals does not entail management of surface resources or the evaluation of surface impacts. Indeed, the Court acknowledges that the Forest Service is "responsible for the management of the surface impacts of mining on federal forest lands." *Ante*, at 585. The Forest Planning Act and the NFMA direct the Secretary of Agriculture and the Forest Service to develop comprehensive plans for the use of forest resources. Similarly, the Organic Administration Act commands the Secretary of Agriculture to promulgate regulations governing the "occupancy and use" of national forests, 16 U. S. C. § 551. These regulations are integral to the Forest Service's management of national forests. To view them as limited to environmental concerns ignores both the Forest Service's broader responsibility to manage the use of forest resources and the federal policy of making mineral resources accessible to

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that other federal statutes specifically preserve a place for state regulation. See *supra*, at 599–600.

development.[5] The Coastal Commission has no interest in the matters within the jurisdiction of the BLM; the regulations that it seeks to impose concern matters wholly within the control of the Forest Service. Thus, this regulation does not support the Court's distinction between environmental regulation and land use planning.

The most troubling feature of the Court's analysis is that it is divorced from the realities of its holding. The Court cautions that its decision allows only "reasonable" environmental regulation and that it does not give the Coastal Commission a veto over Granite Rock's mining activities. But if the Coastal Commission can require Granite Rock to secure a permit before allowing mining operations to proceed, it necessarily can forbid Granite Rock from conducting these operations. It may be that reasonable environmental regulations would not force Granite Rock to close its mine. This misses the point. The troubling fact is that the Court has given a state authority—here the Coastal Commission—the power to prohibit Granite Rock from exercising the rights granted by

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[5] The lack of statutory support for the Court's distinction is not surprising, because—with all respect—it seems to me that the distinction is one without a rational difference. As the Court puts it: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Ante*, at 587. This explanation separates one of the reasons for Forest Service decisions from the decisions themselves. In considering a proposed use of a parcel of land in the national forest, the Forest Service regulations consider the damage the use will cause to the environment as well as the federal interest in making resources on public lands accessible to development. The Forest Service may decide that the proposed use is appropriate, that it is inappropriate, or that it would be appropriate only if further steps are taken to protect the environment. The Court divides this decision into two distinct types of regulation and holds that Congress intended to pre-empt duplicative state regulation of one part but not the other. Common sense suggests that it would be best for one expert federal agency, the Forest Service, to consider all these factors and decide what use best furthers the relevant federal policies.

its Forest Service permit. This abdication of federal control over the use of federal land is unprecedented.[6]

III

Apart from my disagreement with the Court's characterization of the governing statutes, its pre-emption analysis accords little or no weight to both the location of the mine in a national forest, and the comprehensive nature of the federal statutes that authorized Granite Rock's federal permit.

One important factor in pre-emption analysis is the relative weight of the state and federal interests in regulating a particular matter. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52, 66–69 (1941). The Court recognizes that the mine in this case is located in a national forest, but curiously attaches no significance to that fact. The Property Clause specifically grants Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., Art. IV, § 3, cl. 2. See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404 (1917). This provision may not of its own force pre-empt the authority of a State to regulate activities on federal land, but it clearly empowers Congress to limit the extent to which a State may regulate in this area. In light of this clear constitutional allocation of power, the location of the mine in a national forest should make us less reluctant to find pre-emption than we are in other contexts.

The state regulation in this case is particularly intrusive because it takes the form of a separate, and duplicative, permit system. As the Court has recognized, state permit requirements are especially likely to intrude on parallel federal authority, because they effectively give the State the power to veto the federal project. See *International Paper Co.* v.

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[6] I express no view as to the Court's conclusion that the Coastal Zone Management Act of 1972 (CZMA), 16 U. S. C. § 1451 *et seq.* (1982 ed. and Supp. III), does not pre-empt the state regulation in this case. See *ante*, at 589–593.

Ouellette, 479 U. S. 481, 495 (1987); *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152, 164 (1946). Although the intrusive effect of duplicative state permit systems may not lead to a finding of pre-emption in all cases, it certainly is relevant to a careful pre-emption analysis.

The dangers of duplicative permit requirements are evident in this case. The federal permit system reflects a careful balance between two important federal interests: the interest in developing mineral resources on federal land, and the interest in protecting our national forests from environmental harm. The Forest Service's issuance of a permit to Granite Rock reflects its conclusion that environmental concerns associated with Granite Rock's mine do not justify restricting mineral development on this portion of a federal forest. Allowing the Coastal Commission to strike a different balance necessarily conflicts with the federal system.

Furthermore, as discussed *supra*, at 595–597, Congress already has provided that affected States must be afforded an opportunity to communicate their concerns to the federal regulators charged with deciding how federal lands should be used.[7] Because Congress has ensured that any federal de-

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[7] The discussion in Part I deals primarily with the FLPMA and the NFMA. In this case, the Coastal Commission actually had yet another statutory basis for influencing the federal decisionmaking process. Because Granite Rock's mine is near the California Coast, the Coastal Commission has a right to consistency review under the CZMA. Thus, if the Coastal Commission had voiced its concerns, the Secretary could not have approved this permit unless he determined, after a hearing, that "the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security." 16 U. S. C. § 1456(c)(3)(A). Although the Coastal Commission had notice of Granite Rock's application to the Forest Service, it did not object to Granite Rock's activities until two years after the application was approved and Granite Rock began mining pursuant to the federal permit. Because the Coastal Commission failed to make a timely complaint to the Forest Service, it forfeited its right to consistency review under the CZMA.

By noting the provision for consistency review, I do not imply that the CZMA itself pre-empts the Coastal Commission's permit requirement. See

cision will reflect the environmental concerns of affected States, a duplicative system of permits would serve no purpose. Indeed, the potential for conflict between state and federal decisions has obvious disadvantages.

IV

In summary, it is fair to say that, commencing in 1872, Congress has created an almost impenetrable maze of arguably relevant legislation in no less than a half-dozen statutes, augmented by the regulations of two Departments of the Executive. There is little cause for wonder that the language of these statutes and regulations has generated considerable confusion. There is an evident need for Congress to enact a single, comprehensive statute for the regulation of federal lands.

Having said this, it is at least clear that duplicative federal and state permit requirements create an intolerable conflict in decisionmaking.[8] In view of the Property Clause of the Constitution, as well as common sense, federal authority must control with respect to land "belonging to the United States." Yet, the Court's opinion today approves a system of twofold authority with respect to environmental matters. The result of this holding is that state regulators, whose views on environmental and mineral policy may conflict with the views of the Forest Service, have the power, with respect to federal lands, to forbid activity expressly authorized by the Forest Service. I dissent.

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n. 6, *supra*. I believe, however, that the provision for consistency review, considered with the other specific provisions for state participation in the federal regulatory process, indicates that Congress did not believe the States could have imposed separate permit requirements, even before passage of the CZMA.

[8] The Court concludes that Granite Rock has failed to demonstrate a conflict because it rejects my conclusion that land use regulation and environmental regulation are indistinguishable and because it sees no harm in allowing state permit requirements to supersede the decisions of federal officials. *Ante*, at 593–594.

JUSTICE SCALIA, with whom JUSTICE WHITE joins, dissenting.

I agree with the Court that this case is live because of continuing dispute over California's ability to assert a reclamation claim, *ante*, at 578.[1] In my view, however, the merits of this case must be decided on simpler and narrower grounds than those addressed by the Court's opinion. It seems to me ultimately irrelevant whether state environmental regulation has been pre-empted with respect to federal lands, since the exercise of state power at issue here is not environmental regulation but land use control. The Court errs in entertaining the Coastal Commission's contention that "its permit requirement is an exercise of environmental regulation," *ante*, at 589; and mischaracterizes the issue when it describes it to be whether "any state permit requirement, whatever its conditions, [is] *per se* pre-empted by federal law," *ante*, at 593. We need not speculate as to what the nature of this permit requirement was. We are not dealing with permits in the abstract, but with a specific permit, purporting to require application of particular criteria, mandated by a numbered section of a known California law. That law is plainly a land use statute, and the permit that statute requires Granite Rock to obtain is a land use control device. Its character

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[1] I would not rely upon the alternative ground that the dispute between these parties is "capable of repetition yet evading review." *Ante*, at 578. Assuming that Granite Rock submits a new 5-year plan to the Forest Service and that California again seeks to require it to comply with the coastal permitting requirements, I see no reason why that action would evade our review. See *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975). Moreover, for a dispute to be "capable of repetition," there must be a "reasonable expectation that the same complaining party [will] be subjected to the same action again." *Ibid.* The Court may be correct that it is *possible* that California will seek to enforce its permit requirement directly again, *ante*, at 578; but since California may well be able to accomplish what it wants through the Coastal Zone Management Act's consistency review procedures, 16 U. S. C. § 1456(c)(3)(A), I do not think it likely that it will do so.

as such is not altered by the fact that the State may now be agreeable to issuing it so long as environmental concerns are satisfied. Since, as the Court's opinion quite correctly assumes, *ante*, at 585, state exercise of land use authority over federal lands is pre-empted by federal law, California's permit requirement must be invalid.

The permit at issue here is a "coastal development permit," required by the California Coastal Act, Cal. Pub. Res. Code Ann. § 30000 *et seq.* (West 1986). It is provided for by § 30600 of Chapter 7 of that Act (entitled "Development Controls"), which states that a person wishing to undertake any "development" in the coastal zone—a term defined to include construction, mining, and "change in the density or intensity of use of land," § 30106—must obtain a coastal development permit from a local government or the California Coastal Commission. The permit is to be granted if the proposed development is in conformity with a state-approved local coastal program or, where no such program yet exists, if the proposed development "is in conformity with the provisions of Chapter 3 . . . and . . . will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3." § 30604. The "local coastal programs" to which these provisions refer consist of two parts: (1) a land use plan, and (2) zoning ordinances, zoning maps, and other implementing actions. §§ 30511(b), 30512, 30513. Chapter 3 of the Act, with which these local coastal programs must comply, consists largely of land use prescriptions—for example, that developments providing public recreational opportunities shall be preferred, § 30213; that oceanfront land suitable for recreational use shall be protected for recreational use and development, § 30221; that commercial recreational facilities shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry, § 30222; that oceanfront land suitable for coastal-dependent aquaculture shall be protected for that use,

§ 30222.5; that facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded, § 30234; that the maximum amount of prime agricultural land shall be maintained in agricultural production, § 30241; that all other lands suitable for agricultural use shall not be converted to nonagricultural use except in specified circumstances, § 30242; that conversions of coastal commercial timberlands in units of commercial size to other uses shall be limited to providing for necessary timber processing and related facilities, § 30243; that the location and amount of new development should maintain and enhance public access to the coast, § 30252; that coastal-dependent developments shall have priority over other developments on or near the shoreline, § 30255; and that coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites, § 30260.[2]

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[2] The State Coastal Commission is responsible for issuing coastal development permits until the Commission has certified a local land use plan, Cal. Pub. Res. Code Ann. § 30600.5(b) (West 1986), at which time the responsibility devolves upon the local government, *ibid.* Regardless of which governmental entity has the authority to issue the permit, the requirements for its issuance are those set forth in Chapter 3 of the California Coastal Act discussed *supra.* These apply directly if a local coastal program has not been certified, § 30604(a), or by enforcement of the requirements of the local coastal program, § 30604(b), whose land use plan must conform with that Chapter in order to be certified, §§ 30512(c), 30512.1(c), 30512.2. Because local coastal programs consist of such classic land use regulation tools as a land use plan, zoning maps, zoning ordinances, and other implementing devices, §§ 30511(b), 30512, permits issued upon a showing of consistency with a local coastal program may be even more obviously land use control devices than permits issued upon a showing of consistency with the provisions of Chapter 3. But under the plain terms of the statute, the latter no less than the former are permits for land use. To establish the contrary proposition, which is essential to its holding, the majority relies upon nothing more substantial than the statement of counsel for the Commission, in oral argument before us, that "[T]he Coastal Commission issues permits based upon compliance with the environmental criteria in the Coastal Act itself." Tr. of Oral Arg. 52, quoted *ante,* at 586, n. 2. Read literally (*i. e.*, without inferring the adverb

It could hardly be clearer that the California Coastal Act is land use regulation. To compound the certainty, California has designated its Coastal Act as the State's coastal management program for purposes of the Coastal Zone Management Act (CZMA), 16 U. S. C. § 1451 *et seq.* Cal. Pub. Res. Code Ann. § 30008 (West 1986). The requirements for such a program include "[a] definition of what shall constitute permissible land uses and water uses within the coastal zone," 16 U. S. C. § 1454(b)(2), and "[a]n identification of the means by which the state proposes to exert control over [those] land uses and water uses." § 1454(b)(4).

The § 30600 permit requirement, of course, is one of those means of control—and whenever a permit application is evaluated pursuant to the statutory standards, land (or water) use management is afoot. Even if, as the State has argued before us and as the Court has been willing to postulate, California intended to employ the land use permit in this case only as a device for exacting environmental assurances, the power to demand *that permit* nevertheless hinges upon the State's power to do what the statutory permitting requirements authorize: to control land use. The legal status of the matter is that Granite Rock, having received land use approval from the Federal Government, has been requested to obtain land use approval from the State of California. If state land use regulation is in fact pre-empted in this location, there is no justification for requiring Granite Rock to go through the motions of complying with that ultra vires request on the chance that permission will be granted with no more than environmental limitations. It is inconceivable

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"exclusively"), the statement is true (the Act does contain some environmental criteria) but unhelpful to the majority's case. If, however, counsel meant to imply that the Commission's permits could not be conditioned upon compliance with the land use criteria, the statement would not only contradict the plain language of the Act, but would also be inconsistent with the litigating position taken by the Commission in the previous stages of this lawsuit, see *infra*, at 611–612.

that, if a labor union federally certified as an authorized bargaining agent sought injunctive or declaratory relief against a requirement that it submit to state certification for the same purpose, we would say that "[b]y choosing to seek . . . relief against the . . . requirement before discovering what conditions the [State] would have placed on the [certification], [the union] has lost the possibility" of prevailing. *Ante*, at 588. I see no basis for making the equivalent statement here. In the one case as in the other, the demand for state approval is in and of itself invalid. As the Ninth Circuit said in a similar case that we summarily affirmed:

> "The issue is whether [the State] has the power of ultimate control over the Government's lessee, and this issue persists whether or not a use permit would eventually be granted." *Ventura County* v. *Gulf Oil Corp.*, 601 F. 2d 1080, 1085 (1979), summarily aff'd, 445 U. S. 947 (1980).

Even on the assumption, therefore, that California was only using its land use permit requirement as a means of enforcing its environmental laws, Granite Rock was within its rights to ignore that requirement—*unless* California has land use authority over the federal lands in question.

In fact, however, this case is even more straightforward than that, for there is no reason to believe that California was seeking anything less than what the Coastal Act requires: land use regulation. The Commission's letter to Granite Rock demanding a permit application read as follows:

> "Because of the significant control and authority enjoyed by Granite Rock Company over the land subject to its mining claims at Pico Blanco and the concommitant *[sic]* significant diminution of federal discretionary control, this land cannot be included among the federal lands excluded from the coastal zone by the CZMA. . . . Consequently, because the land is located seaward of the coastal zone boundary established by the state legisla-

ture effective January 1, 1977, it is subject to the permit requirements of the California Coastal Act.

"This letter will serve to notify Granite Rock of its obligation to apply to the Coastal Commission for a coastal development permit for any development, as defined in Section 30106 of the Coastal Act, at the site undertaken after the date of this letter." App. 22.

This letter contains no hint that only environmental constraints are at issue, as opposed to compliance with all of the requirements of the State's coastal management program. Even in the litigation stage—both in the District Court and in the Court of Appeals—the argument that California was (or might be) seeking to enforce only environmental controls was merely an alternative position. The Commission's more sweeping contention was that the land in question is not excluded from the CZMA, and that the CZMA permits designated state coastal management programs to override the Mining Act. See App. to Juris. Statement A–4, A–12, A–24. That argument has not been pressed here, having been rejected by both lower courts. 768 F. 2d 1077, 1080–1081 (CA9 1985); 590 F. Supp. 1361, 1370–1371 (ND Cal. 1984). It is perfectly clear, however, that the assertion that the State is only enforcing its environmental laws is purely a litigating position—and a late-asserted one at that.

On any analysis, therefore, the validity of California's demand for permit application, and the lawfulness of Granite Rock's refusal, depend entirely upon whether California has authority to regulate land use at Pico Blanco. The Court is willing to assume that California lacks such authority on account of the National Forest Management Act of 1976 (NFMA), 16 U. S. C. § 1600 *et seq.* (1982 ed. and Supp. III), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U. S. C. § 1701 *et seq.* (1982 ed. and Supp. III). *Ante*, at 585. I believe that assumption is correct. Those statutes, as well as the CZMA, require federal officials to coordinate and consult with the States regarding use of fed-

eral lands in order to assure consistency with state land use plans to the maximum extent compatible with federal law and objectives. 16 U. S. C. §§ 1456(c)(3)(A), 1604(a); 43 U. S. C. § 1712(c). Those requirements would be superfluous, and the limitation upon federal accommodation meaningless, if the States were meant to have independent land use authority over federal lands. The Court is quite correct that the CZMA did not purport to change the status quo with regard to state authority over the use of federal lands. *Ante*, at 589–593. But as the CZMA's federal lands exclusion, 16 U. S. C. § 1453(1), and consistency review provisions, 16 U. S. C. § 1456(c)(3)(A), clearly demonstrate, that status quo was assumed to be exclusive federal regulation.

Finally, any lingering doubt that exercise of Coastal Act authority over federal lands is an exercise of land use authority pre-empted by federal laws is removed by the fact that that is not only the view of the federal agencies in charge of administering those laws, see Brief for United States as *Amicus Curiae*, but also was the original view of California, which until 1978 excluded from the Coastal Act, in language exactly mirroring that of the federal lands exclusion from the CZMA, 16 U. S. C. § 1453(1), "lands the use of which is by law subject solely to the discretion of or which is held in trust by the federal government, its officers or agents." 1976 Cal. Stats., ch. 1331, § 1, as amended by 1978 Cal. Stats., ch. 1075, § 2, codified at Cal. Pub. Res. Code Ann. § 30008 (West 1986).

Any competent lawyer, faced with a demand from the California Coastal Commission that Granite Rock obtain a § 30600 coastal development permit for its Pico Blanco operations, would have responded precisely as Granite Rock's lawyers essentially did: Our use of federal land has been approved by the Federal Government, thank you, and does not require the approval of the State. We should not allow California to claim, in the teeth of the plain language of its legislation, and in violation of the assurance it gave to the Federal Gov-

ernment by designating its Coastal Act as a coastal management program under the CZMA, that it would use the permitting requirement to achieve, not land use management, but only environmental controls. We should particularly not give ear to that claim since it was not the representation made to Granite Rock when application for the permit was demanded. If environmental control is, as California now assures us, its limited objective in this case, then it must simply achieve that objective by means other than a land use control scheme. If and when it does so, we may have occasion to decide (as we need not today) whether state environmental controls are also pre-empted. More likely, however, the question will not arise in the future, as it has not arisen in the past, because of the Federal Government's voluntary accommodation of state environmental concerns—an accommodation that could not occur here only because California neglected to participate in the proceedings. *Ante*, at 576–577, n. 1, 591.

I would affirm the court below on the ground that the California Coastal Act permit requirement constitutes a regulation of the use of federal land and is therefore pre-empted by federal law.

UNITED STATES *v.* MERCHANT

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

No. 85–1672. Argued March 4, 1987—Decided March 24, 1987

Certiorari dismissed. Reported below: 760 F. 2d 963.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Bryson.*

Penelope M. Cooper argued the cause for respondent. With her on the brief were *Cristina C. Arguedas* and *Ted W. Cassman.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Nancy Gertner* and *Judith H. Mizner* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

JOHNSON *v.* TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

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

No. 85–1129. Argued November 12, 1986—Decided March 25, 1987

In 1978, an Affirmative Action Plan (Plan) for hiring and promoting minorities and women was voluntarily adopted by respondent Santa Clara County Transportation Agency (Agency). The Plan provides, *inter alia*, that in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant. The Plan is intended to achieve a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are underrepresented, and the long-term goal is to attain a work force whose composition reflects the proportion of minorities and women in the area labor force. The Plan sets aside no specific number of positions for minorities or women, but requires that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. When the Agency announced a vacancy for the promotional position of road dispatcher, none of the 238 positions in the pertinent Skilled Craft Worker job classification, which included the dispatcher position, was held by a woman. The qualified applicants for the position were interviewed and the Agency, pursuant to the Plan, ultimately passed over petitioner, a male employee, and promoted a female, Diane Joyce, both of whom were rated as well qualified for the job. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, petitioner filed suit in Federal District Court, which held that the Agency had violated Title VII of the Civil Rights Act of 1964. The court found that Joyce's sex was the determining factor in her selection and that the Agency's Plan was invalid under the criterion announced in *Steelworkers v. Weber*, 443 U. S. 193, that the Plan be temporary. The Court of Appeals reversed.

Held: The Agency appropriately took into account Joyce's sex as one factor in determining that she should be promoted. The Agency's Plan represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women

in the Agency's work force, and is fully consistent with Title VII. Pp. 626–640.

(a) Petitioner bears the burden of proving that the Agency's Plan violates Title VII. Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision, such as the existence of an affirmative action plan. The burden then shifts to the plaintiff to prove that the plan is invalid and that the employer's justification is pretextual. Pp. 626–627.

(b) Assessment of the legality of the Agency's Plan must be guided by the decision in *Weber*. An employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discriminatory practices, but need point only to a conspicuous imbalance in traditionally segregated job categories. Voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts. Pp. 627–630.

(c) The employment decision here was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*, *supra*. Consideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." *Id.*, at 197. Where a job requires special training, the comparison for determining whether an imbalance exists should be between the employer's work force and those in the area labor force who possess the relevant qualifications. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would improperly dictate mere blind hiring by the numbers. However, the Agency's Plan did not authorize such blind hiring, but expressly directed that numerous factors be taken into account in making employment decisions, including specifically the number of female applicants qualified for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft Worker job category when Joyce was promoted, the Agency's management had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for the job category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard. Pp. 631–637.

(d) The Agency Plan did not unnecessarily trammel male employees' rights or create an absolute bar to their advancement. The Plan sets aside no positions for women, and expressly states that its goals should

not be construed as "quotas" that must be met. Denial of the promotion to petitioner unsettled no legitimate, firmly rooted expectation on his part, since the Agency Director was authorized to select any of the seven applicants deemed qualified for the job. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. However, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to "maintain" a permanent racial and sexual balance. Pp. 637–640.

770 F. 2d 752, 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. 642. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 647. WHITE, J., filed a dissenting opinion, *post*, p. 657. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, and in Parts I and II of which WHITE, J., joined, *post*, p. 657.

Constance E. Brooks argued the cause for petitioner. With her on the briefs was *James L. Dawson.*

Steven Woodside argued the cause for respondents. With him on the brief for respondent Transportation Agency, Santa Clara County, California, were *Ann Miller Ravel*, *James Rumble*, and *Morris J. Baller*. *David A. Rosenfeld* filed a brief for respondent Service Employees International Union Local 715.*

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Ayer*, *Deputy Assistant Attorney General Carvin*, *Roger Clegg*, and *David K. Flynn;* for the Mid-Atlantic Legal Foundation by *Richard B. McGlynn* and *Douglas Foster;* and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun*, *John H. Findley*, and *Anthony T. Caso.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Marian M. Johnston*,

JUSTICE BRENNAN delivered the opinion of the Court.

Respondent, Transportation Agency of Santa Clara County, California, unilaterally promulgated an Affirmative Action Plan applicable, *inter alia*, to promotions of employees. In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to the Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant, Diane Joyce. The question for decision is whether in making the promotion the Agency impermissibly took into account the sex of the applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*[1] The District Court for the

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Supervising Deputy Attorney General, *Beverly Tucker*, Deputy Attorney General, *Jim Jones*, Attorney General of Idaho, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Robert M. Spire*, Attorney General of Nebraska, *Robert Abrams*, Attorney General of New York, *David Frohnmayer*, Attorney General of Oregon, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Elisabeth S. Shuster;* for the American Federation of Labor and Congress of Industrial Organizations by *David Silberman* and *Laurence Gold;* for the American Society for Personnel Administration by *Lawrence Z. Lorber* and *J. Robert Kirk;* for the National League of Cities et al. by *Cynthia M. Pols, John J. Gunther, Carolyn F. Corwin, Bruce N. Kuhlik*, and *Frederic Lee Ruck;* and for the NOW Legal Defense and Education Fund et al. by *Marsha Levick, Emily J. Spitzer*, and *Judith L. Lichtman.*

Briefs of *amici curiae* were filed for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell*, and *Thomas R. Bagby;* for the city of Detroit et al. by *Daniel B. Edelman, James R. Murphy, Charles L. Reischel, Frederick N. Merkin*, and *Robert Cramer;* and for the Lawyers' Committee for Civil Rights Under Law et al. by *Harold R. Tyler, Jr., James Robertson, Norman Redlich, William L. Robinson, Richard T. Seymour, James D. Crawford, Antonia Hernandez, Grover G. Hankins*, and *Kenneth Kimerling.*

[1] Section 703(a) of the Act, 78 Stat. 255, as amended, 86 Stat. 109, 42 U. S. C. §2000e–2(a), provides that it "shall be an unlawful employment practice for an employer—

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

Northern District of California, in an action filed by petitioner following receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), held that respondent had violated Title VII. App. to Pet. for Cert. 1a. The Court of Appeals for the Ninth Circuit reversed. 770 F. 2d 752 (1985). We granted certiorari, 478 U. S. 1019 (1986). We affirm.[2]

I

A

In December 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted, declared the County, because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." App. 31.[3] Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have

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

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

[2] No constitutional issue was either raised or addressed in the litigation below. See 770 F. 2d 752, 754, n. 1 (1985). We therefore decide in this case only the issue of the prohibitory scope of Title VII. Of course, where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. See *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986).

[3] The Plan reaffirmed earlier County and Agency efforts to address the issue of employment discrimination, dating back to the County's adoption in 1971 of an Equal Employment Opportunity Policy. App. 37–40.

been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its work force, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the County labor force in both the Agency as a whole and in five of seven job categories. Specifically, while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women: women made up 76% of Office and Clerical Workers, but only 7.1% of Agency Officials and Administrators, 8.6% of Professionals, 9.7% of Technicians, and 22% of Service and Maintenance Workers. As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. *Id.*, at 49. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them "because of the limited opportunities that have existed in the past for them to work in such classifications." *Id.*, at 57. The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such minorities in the County work force, a smaller percentage of minority employees held management, professional, and technical positions.[4]

The Agency stated that its Plan was intended to achieve "a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented." *Id.*, at 43. As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a work force whose composition reflected the pro-

[4] While minorities constituted 19.7% of the County labor force, they represented 7.1% of the Agency's Officials and Administrators, 19% of its Professionals, and 16.9% of its Technicians. *Id.*, at 48.

portion of minorities and women in the area labor force. *Id.*, at 54. Thus, for the Skilled Craft category in which the road dispatcher position at issue here was classified, the Agency's aspiration was that eventually about 36% of the jobs would be occupied by women.

The Plan acknowledged that a number of factors might make it unrealistic to rely on the Agency's long-term goals in evaluating the Agency's progress in expanding job opportunities for minorities and women. Among the factors identified were low turnover rates in some classifications, the fact that some jobs involved heavy labor, the small number of positions within some job categories, the limited number of entry positions leading to the Technical and Skilled Craft classifications, and the limited number of minorities and women qualified for positions requiring specialized training and experience. *Id.*, at 56–57. As a result, the Plan counseled that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. Among the tasks identified as important in establishing such short-term goals was the acquisition of data "reflecting the ratio of minorities, women and handicapped persons who are working in the local area in major job classifications relating to those utilized by the County Administration," so as to determine the availability of members of such groups who "possess the desired qualifications or potential for placement." *Id.*, at 64. These data on qualified group members, along with predictions of position vacancies, were to serve as the basis for "realistic yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification." *Ibid.*

The Agency's Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented. One such job was the road dispatcher position that is the subject of the dispute in this case.

B

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division. Dispatchers assign road crews, equipment, and materials, and maintain records pertaining to road maintenance jobs. *Id.*, at 23–24. The position requires at minimum four years of dispatch or road maintenance work experience for Santa Clara County. The EEOC job classification scheme designates a road dispatcher as a Skilled Craft Worker.

Twelve County employees applied for the promotion, including Joyce and Johnson. Joyce had worked for the County since 1970, serving as an account clerk until 1975. She had applied for a road dispatcher position in 1974, but was deemed ineligible because she had not served as a road maintenance worker. In 1975, Joyce transferred from a senior account clerk position to a road maintenance worker position, becoming the first woman to fill such a job. Tr. 83–84. During her four years in that position, she occasionally worked out of class as a road dispatcher.

Petitioner Johnson began with the County in 1967 as a road yard clerk, after private employment that included working as a supervisor and dispatcher. He had also unsuccessfully applied for the road dispatcher opening in 1974. In 1977, his clerical position was downgraded, and he sought and received a transfer to the position of road maintenance worker. *Id.*, at 127. He also occasionally worked out of class as a dispatcher while performing that job.

Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this interview, which meant that they were certified as eligible for selection by the appointing authority. The scores awarded ranged from 70 to 80. Johnson was tied for second

with a score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted. Prior to the second interview, Joyce had contacted the County's Affirmative Action Office because she feared that her application might not receive disinterested review.[5] The Office in turn contacted the Agency's Affirmative Action Coordinator, whom the Agency's Plan makes responsible for, *inter alia*, keeping the Director informed of opportunities for the Agency to accomplish its objectives under the Plan. At the time, the Agency employed no women in any Skilled Craft position, and had never employed a woman as a road dispatcher. The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted.

Graebner, authorized to choose any of the seven persons deemed eligible, thus had the benefit of suggestions by the second interview panel and by the Agency Coordinator in arriving at his decision. After deliberation, Graebner con-

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[5] Joyce testified that she had had disagreements with two of the three members of the second interview panel. One had been her first supervisor when she began work as a road maintenance worker. In performing arduous work in this job, she had not been issued coveralls, although her male co-workers had received them. After ruining her pants, she complained to her supervisor, to no avail. After three other similar incidents, ruining clothes on each occasion, she filed a grievance, and was issued four pairs of coveralls the next day. Tr. 89–90. Joyce had dealt with a second member of the panel for a year and a half in her capacity as chair of the Roads Operations Safety Committee, where she and he "had several differences of opinion on how safety should be implemented." *Id.*, at 90–91. In addition, Joyce testified that she had informed the person responsible for arranging her second interview that she had a disaster preparedness class on a certain day the following week. By this time about 10 days had passed since she had notified this person of her availability, and no date had yet been set for the interview. Within a day or two after this conversation, however, she received a notice setting her interview at a time directly in the middle of her disaster preparedness class. *Id.*, at 94–95. This same panel member had earlier described Joyce as a "rebel-rousing, skirt-wearing person," *id.*, at 153.

cluded that the promotion should be given to Joyce. As he testified: "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that. . . . I believe it was a combination of all those." *Id.*, at 68.

The certification form naming Joyce as the person promoted to the dispatcher position stated that both she and Johnson were rated as well qualified for the job. The evaluation of Joyce read: "Well qualified by virtue of 18 years of past clerical experience including 3½ years at West Yard plus almost 5 years as a [road maintenance worker]." App. 27. The evaluation of Johnson was as follows: "Well qualified applicant; two years of [road maintenance worker] experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago." *Ibid.* Graebner testified that he did not regard as significant the fact that Johnson scored 75 and Joyce 73 when interviewed by the two-person board. Tr. 57–58.

Petitioner Johnson filed a complaint with the EEOC alleging that he had been denied promotion on the basis of sex in violation of Title VII. He received a right-to-sue letter from the EEOC on March 10, 1981, and on March 20, 1981, filed suit in the United States District Court for the Northern District of California. The District Court found that Johnson was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the "*determining factor* in her selection." App. to Pet. for Cert. 4a (emphasis in original). The court acknowledged that, since the Agency justified its decision on the basis of its Affirmative Action Plan, the criteria announced in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), should be applied in evaluating the validity of the Plan. App. to Pet. for Cert. 5a. It then found the Agency's Plan invalid on the ground that the evidence did not satisfy *Weber*'s criterion that the Plan be temporary. App. to Pet. for Cert. 6a. The Court of Appeals for the Ninth Circuit re-

versed, holding that the absence of an express termination date in the Plan was not dispositive, since the Plan repeatedly expressed its objective as the attainment, rather than the maintenance, of a work force mirroring the labor force in the County. 770 F. 2d, at 756. The Court of Appeals added that the fact that the Plan established no fixed percentage of positions for minorities or women made it less essential that the Plan contain a relatively explicit deadline. 770 F. 2d, at 757. The Court held further that the Agency's consideration of Joyce's sex in filling the road dispatcher position was lawful. The Agency Plan had been adopted, the court said, to address a conspicuous imbalance in the Agency's work force, and neither unnecessarily trammeled the rights of other employees, nor created an absolute bar to their advancement. *Id.*, at 757–759.

II

As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. Only last Term, in *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 277–278 (1986), we held that "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program," and we see no basis for a different rule regarding a plan's alleged violation of Title VII. This case also fits readily within the analytical framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of

pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.

The assessment of the legality of the Agency Plan must be guided by our decision in *Weber*, *supra*.[6] In that case, the

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[6] JUSTICE SCALIA's dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore should be governed by *Wygant*. This rests on the following logic: Title VI embodies the same constraints as the Constitution; Title VI and Title VII have the same prohibitory scope; therefore, Title VII and the Constitution are coterminous for purposes of this case. The flaw is with the second step of the analysis, for it advances a proposition that we explicitly considered and rejected in *Weber*. As we noted in that case, Title VI was an exercise of federal power "over a matter in which the Federal Government was already directly involved," since Congress "was legislating to assure federal funds would not be used in an improper manner." 443 U. S., at 206, n. 6. "Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*." *Ibid.* This point is underscored by Congress' concern that the receipt of any form of financial assistance might render an employer subject to the commands of Title VI rather than Title VII. As a result, Congress added § 604 to Title VI, 78 Stat. 253, as set forth in 42 U. S. C. § 2000d–3, which provides:

"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."

The sponsor of this section, Senator Cooper, stated that it was designed to clarify that "it was not intended that [T]itle VI would impinge on [T]itle VII." 110 Cong. Rec. 11615 (1964).

While public employers were not added to the definition of "employer" in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive

Court addressed the question whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." *Id.*, at 197. The respondent employee in that case challenged the employer's denial of his application for a position in a newly established craft training program, contending that the employer's selection process impermissibly took into account the race of the applicants. The selection process was guided by an affirmative action plan, which provided that 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had been prompted by the fact that only 5 of 273, or 1.83%, of skilled craftworkers at the plant were black, even though the work force in the area was approximately 39% black. Because of the historical exclusion of blacks from craft positions, the employer regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its work force.

We upheld the employer's decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." *Id.*, at 208. As we stated:

> "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' consti-

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standard governing employer conduct. Indeed, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, 433 U. S. 321, 332, n. 14 (1977). The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.

tuted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id.*, at 204 (quoting remarks of Sen. Humphrey, 110 Cong. Rec. 6552 (1964)).[7]

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[7] JUSTICE SCALIA's dissent maintains that *Weber*'s conclusion that Title VII does not prohibit voluntary affirmative action programs "rewrote the statute it purported to construe." *Post*, at 670. *Weber*'s decisive rejection of the argument that the "plain language" of the statute prohibits affirmative action rested on (1) legislative history indicating Congress' clear intention that employers play a major role in eliminating the vestiges of discrimination, 443 U. S., at 201–204, and (2) the language and legislative history of § 703(j) of the statute, which reflect a strong desire to preserve managerial prerogatives so that they might be utilized for this purpose. *Id.*, at 204–207. As JUSTICE BLACKMUN said in his concurrence in *Weber*, "[I]f the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." *Id.*, at 216. Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.

JUSTICE SCALIA's dissent faults the fact that we take note of the absence of congressional efforts to amend the statute to nullify *Weber*. It suggests that congressional inaction cannot be regarded as acquiescence under all circumstances, but then draws from that unexceptional point the conclusion that *any* reliance on congressional failure to act is necessarily a "canard." *Post*, at 672. The fact that inaction may not always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees. *Weber*, for instance, was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is not a plausible explanation for congressional inaction. Furthermore, Congress not only passed no contrary legislation in the wake of *Weber*, but not one legislator even proposed a bill to do so. The barriers of the legislative process therefore also seem a poor explanation for failure to act. By contrast, when Congress has been displeased with our interpretation of Title VII, it has not hesitated to amend the statute to tell us so. For instance, when Congress passed the Pregnancy Discrimination Act of 1978, 42 U. S. C. § 2000e(k), "it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in [*General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976)]." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983). Surely, it is appropriate to find some probative value in such radically

We noted that the plan did not "unnecessarily trammel the interests of the white employees," since it did not require "the discharge of white workers and their replacement with new black hirees." 443 U. S., at 208. Nor did the plan create "an absolute bar to the advancement of white employees," since half of those trained in the new program were to be white. *Ibid.* Finally, we observed that the plan was a temporary measure, not designed to maintain racial balance, but to "eliminate a manifest racial imbalance." *Ibid.* As JUSTICE BLACKMUN's concurrence made clear, *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. *Id.*, at 212. Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories." *Id.*, at 209. Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts. *Id.*, at 204.[8]

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different congressional reactions to this Court's interpretations of the same statute.

As one scholar has put it, "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'" G. Calabresi, A Common Law for the Age of Statutes 31–32 (1982). Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.

[8] See also *Firefighters* v. *Cleveland*, 478 U. S. 501, 515 (1986) ("We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII"); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal"). JUSTICE SCALIA's suggestion that an affirmative action program may be adopted only to redress an employer's past discrimination, see *post*, at 664–665, was rejected in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), because the prospect of liability created by such an admission would create a significant disincentive for voluntary ac-

In reviewing the employment decision at issue in this case, we must first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*. Next, we must determine whether the effect of the Plan on males and nonminorities is comparable to the effect of the plan in that case.

The first issue is therefore whether consideration of the sex of applicants for Skilled Craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." *Id.*, at 197. In determining whether an imbalance exists that would justify taking sex or race into account, a

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tion. As JUSTICE BLACKMUN's concurrence in that case pointed out, such a standard would "plac[e] voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the 'tightrope' it creates would be to eschew all forms of voluntary affirmative action." *Id.*, at 210. Similarly, JUSTICE O'CONNOR has observed in the constitutional context that "[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant*, 476 U. S., at 290 (O'CONNOR, J., concurring in part and concurring in judgment).

Contrary to JUSTICE SCALIA's contention, *post*, at 664–668, our decisions last term in *Firefighters*, *supra*, and *Sheet Metal Workers* v. *EEOC*, 478 U. S. 501 (1986), provide no support for a standard more restrictive than that enunciated in *Weber*. *Firefighters* raised the issue of the conditions under which parties could enter into a consent decree providing for explicit numerical quotas. By contrast, the affirmative action plan in this case sets aside no positions for minorities or women. See *infra*, at 635. In *Sheet Metal Workers*, the issue we addressed was the scope of judicial remedial authority under Title VII, authority that has not been exercised in this case. JUSTICE SCALIA's suggestion that employers should be able to do no more voluntarily than courts can order as remedies, *post*, at 664–668, ignores the fundamental difference between volitional private behavior and the exercise of coercion by the State. Plainly, "Congress' concern that federal courts not impose unwanted obligations on employers and unions," *Firefighters*, *supra*, at 524, reflects a desire to preserve a relatively large domain for voluntary employer action.

comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise, see *Teamsters* v. *United States*, 431 U. S. 324 (1977) (comparison between percentage of blacks in employer's work force and in general population proper in determining extent of imbalance in truck driving positions), or training programs designed to provide expertise, see *Steelworkers* v. *Weber*, 443 U. S. 193 (1979) (comparison between proportion of blacks working at plant and proportion of blacks in area labor force appropriate in calculating imbalance for purpose of establishing preferential admission to craft training program). Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. See *Hazelwood School District* v. *United States*, 433 U. S. 299 (1977) (must compare percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions). The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed.

A manifest imbalance need not be such that it would support a prima facie case against the employer, as suggested in JUSTICE O'CONNOR's concurrence, *post*, at 649, since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans.[9] Application of the "prima facie" standard in Title VII cases would be inconsistent with *Weber*'s focus on

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

statistical imbalance,[10] and could inappropriately create a significant disincentive for employers to adopt an affirmative action plan. See *Weber*, *supra*, at 204 (Title VII intended as a "catalyst" for employer efforts to eliminate vestiges of discrimination). A corporation concerned with maximizing return on investment, for instance, is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit.[11]

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[10] The difference between the "manifest imbalance" and "prima facie" standards is illuminated by *Weber*. Had the Court in that case been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled, workers, since only the scarcity of the former in Kaiser's work force would have made it vulnerable to a Title VII suit. In order to make out a prima facie case on such a claim, a plaintiff would be required to compare the percentage of black skilled workers in the Kaiser work force with the percentage of black skilled craft workers in the area labor market.

Weber obviously did not make such a comparison. Instead, it focused on the disparity between the percentage of black skilled craft workers in Kaiser's ranks and the percentage of blacks in the area labor force. 443 U. S., at 198–199. Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities. Thus, in cases such as *Weber*, where the employment decision at issue involves the selection of unskilled persons for a training program, the "manifest imbalance" standard permits comparison with the general labor force. By contrast, the "prima facie" standard would require comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself.

[11] In some cases, of course, the manifest imbalance may be sufficiently egregious to establish a prima facie case. However, as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking, without being required to introduce the nonstatistical evidence of past discrimination that would be demanded by the "prima facie" standard. See, *e. g.*, *Teamsters* v. *United States*, 431 U. S. 324, 339 (1977) (statistics in pattern and practice case supplemented by testimony

It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation. The Agency Plan acknowledged the "limited opportunities that have existed in the past," App. 57, for women to find employment in certain job classifications "where women have not been traditionally employed in significant numbers." *Id.*, at 51.[12] As a result, observed the Plan, women were concentrated in traditionally female jobs in the Agency, and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred. Specifically, 9 of the 10 Para-Professionals and 110 of the 145 Office and Clerical Workers were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers, and 1—who was Joyce—of the 110 Road Maintenance Workers. *Id.*, at 51–52. The Plan sought to remedy these imbalances through "hiring, training and promotion of . . . women throughout the Agency in all major job classifications where they are underrepresented." *Id.*, at 43.

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regarding employment practices). Of course, when there is sufficient evidence to meet the more stringent "prima facie" standard, be it statistical, nonstatistical, or a combination of the two, the employer is free to adopt an affirmative action plan.

[12] For instance, the description of the Skilled Craft Worker category, in which the road dispatcher position is located, is as follows:

"Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen; electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers." App. 108.

As the Court of Appeals said in its decision below, "A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation." 748 F. 2d, at 1313.

As an initial matter, the Agency adopted as a benchmark for measuring progress in eliminating underrepresentation the long-term goal of a work force that mirrored in its major job classifications the percentage of women in the area labor market.[13] Even as it did so, however, the Agency acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories. For positions requiring specialized training and experience, the Plan observed that the number of minorities and women "who possess the qualifications required for entry into such job classifications is limited." *Id.*, at 56. The Plan therefore directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions. *Id.*, at 61–64. The Plan stressed that such goals "should not be construed as 'quotas' that must be met," but as reasonable aspirations in correcting the imbalance in the Agency's work force. *Id.*, at 64. These goals were to take into account factors such as "turnover, layoffs, lateral transfers, new job openings, retirements and availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential for placement." *Ibid.* The Plan specifically directed that, in establishing such goals, the Agency work with the County Planning Department and other sources in attempting to compile data on the percentage of minorities and women in the local labor force that were actually working in the job classifications constituting the Agency work force. *Id.*, at 63–64. From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention.

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[13] Because of the employment decision at issue in this case, our discussion henceforth refers primarily to the Plan's provisions to remedy the underrepresentation of women. Our analysis could apply as well, however, to the provisions of the plan pertaining to minorities.

As the Agency Plan recognized, women were most egregiously underrepresented in the Skilled Craft job category, since *none* of the 238 positions was occupied by a woman. In mid-1980, when Joyce was selected for the road dispatcher position, the Agency was still in the process of refining its short-term goals for Skilled Craft Workers in accordance with the directive of the Plan. This process did not reach fruition until 1982, when the Agency established a short-term goal for that year of 3 women for the 55 expected openings in that job category—a modest goal of about 6% for that category.

We reject petitioner's argument that, since only the long-term goal was in place for Skilled Craft positions at the time of Joyce's promotion, it was inappropriate for the Director to take into account affirmative action considerations in filling the road dispatcher position. The Agency's Plan emphasized that the long-term goals were not to be taken as guides for actual hiring decisions, but that supervisors were to consider a host of practical factors in seeking to meet affirmative action objectives, including the fact that in some job categories women were not qualified in numbers comparable to their representation in the labor force.

By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants . . . ." *Sheet Metal Workers* v. *EEOC*, 478

U. S. 421, 495 (1986) (O'CONNOR, J., concurring in part and dissenting in part).

The Agency's Plan emphatically did *not* authorize such blind hiring. It expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft category in mid-1980, the Agency's management nevertheless had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for this category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard.

Furthermore, in considering the candidates for the road dispatcher position in 1980, the Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision.[14] The promotion of Joyce thus satisfies the first requirement enunciated in *Weber*, since it was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories.

We next consider whether the Agency Plan unnecessarily trammeled the rights of male employees or created an abso-

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[14] In addition, the Agency was mindful of the importance of finally hiring a woman in a job category that had formerly been all male. The Director testified that, while the promotion of Joyce "made a small dent, for sure, in the numbers," nonetheless "philosophically it made a larger impact in that it probably has encouraged other females and minorities to look at the possibility of so-called 'non-traditional' jobs as areas where they and the agency both have samples of a success story." Tr. 64.

lute bar to their advancement. In contrast to the plan in *Weber*, which provided that 50% of the positions in the craft training program were exclusively for blacks, and to the consent decree upheld last Term in *Firefighters* v. *Cleveland*, 478 U. S. 501 (1986), which required the promotion of specific numbers of minorities, the Plan sets aside no positions for women. The Plan expressly states that "[t]he 'goals' established for each Division should not be construed as 'quotas' that must be met." App. 64. Rather, the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants. As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into acount in arriving at his decision. Tr. 68. The Plan thus resembles the "Harvard Plan" approvingly noted by JUSTICE POWELL in *Regents of University of California* v. *Bakke*, 438 U. S. 265, 316–319 (1978), which considers race along with other criteria in determining admission to the college. As JUSTICE POWELL observed: "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.*, at 317. Similarly, the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants.

In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of petitioner. Furthermore, while petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.[15]

[15] Furthermore, from 1978 to 1982 Skilled Craft jobs in the Agency increased from 238 to 349. The Agency's personnel figures indicate that the

Finally, the Agency's Plan was intended to *attain* a balanced work force, not to maintain one. The Plan contains 10 references to the Agency's desire to "attain" such a balance, but no reference whatsoever to a goal of maintaining it. The Director testified that, while the "broader goal" of affirmative action, defined as "the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis," is something that is "a permanent part" of "the Agency's operating philosophy," that broader goal "is divorced, if you will, from specific numbers or percentages." Tr. 48–49.

The Agency acknowledged the difficulties that it would confront in remedying the imbalance in its work force, and it anticipated only gradual increases in the representation of minorities and women.[16] It is thus unsurprising that the Plan contains no explicit end date, for the Agency's flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is

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Agency fully expected most of these positions to be filled by men. Of the 111 new Skilled Craft jobs during this period, 105, or almost 95%, went to men. As previously noted, the Agency's 1982 Plan set a goal of hiring only 3 women out of the 55 new Skilled Craft positions projected for that year, a figure of about 6%. While this degree of employment expansion by an employer is by no means essential to a plan's validity, it underscores the fact that the Plan in this case in no way significantly restricts the employment prospects of such persons. Illustrative of this is the fact that an additional road dispatcher position was created in 1983, and petitioner was awarded the job. Brief for Respondent Transportation Agency 36, n. 35.

[16] As the Agency Plan stated, after noting the limited number of minorities and women qualified in certain categories, as well as other difficulties in remedying underrepresentation:

"As indicated by the above factors, it will be much easier to attain the Agency's employment goals in some job categories than in others. It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented. Similarly, only gradual increases in the representation of women, minorities or handicapped persons in management and professional positions can realistically be expected due to the low turnover that exists in these positions and the small numbers of persons who can be expected to compete for available openings." App. 58.

only temporary may be necessary if the program actually sets aside positions according to specific numbers. See, *e. g.*, *Firefighters*, *supra*, at 510 (4-year duration for consent decree providing for promotion of particular number of minorities); *Weber*, 443 U. S., at 199 (plan requiring that blacks constitute 50% of new trainees in effect until percentage of employer work force equal to percentage in local labor force). This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan's goals "[are] not being used simply to achieve and maintain . . . balance, but rather as a benchmark against which" the employer may measure its progress in eliminating the underrepresention of minorities and women. *Sheet Metal Workers*, 478 U. S., at 477–478. In this case, however, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance.

III

In evaluating the compliance of an affirmative action plan with Title VII's prohibition on discrimination, we must be mindful of "this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" *Wygant*, 476 U. S., at 290 (O'CONNOR, J., concurring in part and concurring in judgment) (quoting *Bakke*, *supra*, at 364). The Agency in the case before us has undertaken such a voluntary effort, and has done so in full recognition of both the difficulties and the potential for intrusion on males and nonminorities. The Agency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, how-

ever, that employment decisions may not be justified solely by reference to this imbalance, but must rest on a multitude of practical, realistic factors. It has therefore committed itself to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position.[17] As both the Plan's language and its manner of operation attest, the Agency has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining

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[17] JUSTICE SCALIA's dissent predicts that today's decision will loose a flood of "less qualified" minorities and women upon the work force, as employers seek to forestall possible Title VII liability. *Post*, at 673–677. The first problem with this projection is that it is by no means certain that employers could in every case necessarily avoid liability for discrimination merely by adopting an affirmative action plan. Indeed, our unwillingness to require an admission of discrimination as the price of adopting a plan has been premised on concern that the potential liability to which such an admission would expose an employer would serve as a disincentive for creating an affirmative action program. See n. 8, *supra*.

A second, and more fundamental, problem with JUSTICE SCALIA's speculation is that he ignores the fact that

"[i]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective." Brief for the American Society for Personnel Administration as *Amicus Curiae* 9.

This case provides an example of precisely this point. Any differences in qualifications between Johnson and Joyce were minimal, to say the least. See *supra*, at 623–625. The selection of Joyce thus belies JUSTICE SCALIA's contention that the beneficiaries of affirmative action programs will be those employees who are merely not "utterly unqualified." *Post*, at 675.

that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring.

While I join the Court's opinion, I write separately to explain my view of this case's position in our evolving antidiscrimination law and to emphasize that the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups.

I

Antidiscrimination measures may benefit protected groups in two distinct ways. As a sword, such measures may confer benefits by specifying that a person's membership in a disadvantaged group must be a neutral, irrelevant factor in governmental or private decisionmaking or, alternatively, by compelling decisionmakers to give favorable consideration to disadvantaged group status. As a shield, an antidiscrimination statute can also help a member of a protected class by assuring decisionmakers in some instances that, when they elect for good reasons of their own to grant a preference of some sort to a minority citizen, they will not violate the law. The Court properly holds that the statutory shield allowed respondent to take Diane Joyce's sex into account in promoting her to the road dispatcher position.

Prior to 1978 the Court construed the Civil Rights Act of 1964 as an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory prefer-

ences for any group, minority or majority. The Court unambiguously endorsed the neutral approach, first in the context of gender discrimination[1] and then in the context of racial discrimination against a white person.[2] As I explained in my separate opinion in *Regents of University of California* v. *Bakke*, 438 U. S. 265, 412–418 (1978), and as the Court forcefully stated in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 280 (1976), Congress intended "'to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians'" (citations omitted). If the Court had adhered to that construction of the Act, petitioner would unquestionably prevail in this case. But it has not done so.

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[1] "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971).

[2] "Similarly the EEOC, whose interpretations are entitled to great deference, [401 U. S.,] at 433–434, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would

"'constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians.' EEOC Decision No. 74–31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions ¶ 6404, p. 4084 (1973).

"This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' 110 Cong. Rec. 2578 (1964) (remarks of Rep. Celler), and create an 'obligation not to discriminate against whites,' *id.*, at 7218 (memorandum of Sen. Clark). See also *id.*, at 7213 (memorandum of Sens. Clark and Case); *id.*, at 8912 (remarks of Sen. Williams). We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white." *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 279–280 (1976) (footnotes omitted).

In the *Bakke* case in 1978 and again in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), a majority of the Court interpreted the antidiscriminatory strategy of the statute in a fundamentally different way. The Court held in the *Weber* case that an employer's program designed to increase the number of black craftworkers in an aluminum plant did not violate Title VII.[3] It remains clear that the Act does not *require* any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted. Neither the "same standards" language used in *McDonald*, nor the "color blind" rhetoric used by the Senators and Congressmen who enacted the bill, is now controlling. Thus, as was true in *Runyon* v. *McCrary*, 427 U. S. 160, 189 (1976) (STEVENS, J., concurring), the only problem for me is whether to adhere to an authoritative construction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation. I conclude without hesitation that I must answer that question in the affirmative, just as I did in *Runyon*. *Id.*, at 191–192.

Bakke and *Weber* have been decided and are now an important part of the fabric of our law. This consideration is sufficiently compelling for me to adhere to the basic construction of this legislation that the Court adopted in *Bakke* and in *Weber*. There is an undoubted public interest in "stability and orderly development of the law." 427 U. S., at 190.[4]

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[3] Toward the end of its opinion, the Court mentioned certain reasons why the plan did not impose a special hardship on white employees or white applicants for employment. *Steelworkers* v. *Weber*, 443 U. S., at 208. I have never understood those comments to constitute a set of conditions that every race-conscious plan must satisfy in order to comply with Title VII.

[4] "As Mr. Justice Cardozo remarked, with respect to the routine work of the judiciary: 'The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the

The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave "breathing room" for employer initiatives to benefit members of minority groups. If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view. The Court's opinion in *Weber* reflects the same approach; the opinion relied heavily on legislative history indicating that Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible. See 443 U. S., at 206–207. As we observed last Term, "'[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.'" *Firefighters* v. *Cleveland*, 478 U. S. 501, 516 (1986) (quoting *Weber*, 443 U. S., at 204). In *Firefighters*, we again acknowledged Congress' concern in Title VII to avoid "undue federal interference with managerial discretion." 478 U. S., at 519.[5]

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courses laid by others who had gone before him.' Turning to the exceptional case, Mr. Justice Cardozo noted: '[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.' In this case, those admonitions favor adherence to, rather than departure from, precedent." 427 U. S., at 190–191. Even while writing in dissent in the *Weber* case, Chief Justice Burger observed that the result reached by the majority was one that he "would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII." 443 U. S., at 216.

[5] As JUSTICE BLACKMUN observed in *Weber*, 443 U. S., at 209, 214–215 (concurring opinion):

"Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself

As construed in *Weber* and in *Firefighters*, the statute does not absolutely prohibit preferential hiring in favor of minorities; it was merely intended to protect historically disadvantaged groups *against* discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose. The preference granted by respondent in this case does not violate the statute as so construed; the record amply supports the conclusion that the challenged employment decision served the legitimate purpose of creating diversity in a category of employment that had been almost an exclusive province of males in the past. Respondent's voluntary decision is surely not prohibited by Title VII as construed in *Weber*.

II

Whether a voluntary decision of the kind made by respondent would ever be prohibited by Title VII is a question we need not answer until it is squarely presented. Given the interpretation of the statute the Court adopted in *Weber*, I see no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII. Indeed, in some instances the employer may find it more helpful to focus on the future. Instead of retroactively scrutinizing his own or society's possible exclusions of minorities in the past to determine the outer limits of a valid affirmative-action program—or indeed, any particular affirmative-action decision—in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of underrepresented groups.

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does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. . . . Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of 'locking in' the effects of discrimination for which Title VII provides no remedy."

Statutes enacted for the benefit of minority groups should not block these forward-looking considerations.

> "Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The Jackson school board, for example, said it had done so in part to improve the quality of education in Jackson—whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force, to name but a few examples. Or they might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste. All of these reasons aspire to a racially integrated future, but none reduces to 'racial balancing for its own sake.'" Sullivan, The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 Harv. L. Rev. 78, 96 (1986).

The Court today does not foreclose other voluntary decisions based in part on a qualified employee's membership in a disadvantaged group. Accordingly, I concur.

JUSTICE O'CONNOR, concurring in the judgment.

In *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), this Court held that § 703(d) of Title VII does not prohibit voluntary affirmative action efforts if the employer sought to remedy a "manifest . . . imbalanc[e] in traditionally segregated job categories." *Id.*, at 197. As JUSTICE SCALIA illuminates with excruciating clarity, § 703 has been interpreted by *Weber* and succeeding cases to permit what its language read literally would prohibit. *Post*, at 669–671; see also *ante*, at 642–643

(STEVENS, J., concurring). Section 703(d) prohibits employment discrimination "against *any individual* because of his race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(d) (emphasis added). The *Weber* Court, however, concluded that voluntary affirmative action was permissible in some circumstances because a prohibition of every type of affirmative action would "'bring about an end completely at variance with the purpose of the statute.'" 443 U. S., at 202 (quoting *United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 315 (1953)). This purpose, according to the Court, was to open employment opportunities for blacks in occupations that had been traditionally closed to them.

None of the parties in this case have suggested that we overrule *Weber* and that question was not raised, briefed, or argued in this Court or in the courts below. If the Court is faithful to its normal prudential restraints and to the principle of *stare decisis* we must address once again the propriety of an affirmative action plan under Title VII in light of our precedents, precedents that have upheld affirmative action in a variety of circumstances. This time the question posed is whether a public employer violates Title VII by promoting a qualified woman rather than a marginally better qualified man when there is a statistical imbalance sufficient to support a claim of a pattern or practice of discrimination against women under Title VII.

I concur in the judgment of the Court in light of our precedents. I write separately, however, because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers despite the limitations imposed by the Constitution and by the provisions of Title VII, and because JUSTICE SCALIA's dissent rejects the Court's precedents and addresses the question of how Title VII should be interpreted as if the Court were writing on a clean slate. The former course of action gives insufficient guidance to courts and litigants; the latter course of action serves as a useful point of academic discussion, but fails

to reckon with the reality of the course that the majority of the Court has determined to follow.

In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause. In either case, consistent with the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees, the employer must have had a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination.

In *Weber*, this Court balanced two conflicting concerns in construing § 703(d): Congress' intent to root out invidious discrimination against *any* person on the basis of race or gender, *McDonald* v. *Santa Fe Transportation Co.*, 427 U. S. 273 (1976), and its goal of eliminating the lasting effects of discrimination against minorities. Given these conflicting concerns, the Court concluded that it would be inconsistent with the background and purpose of Title VII to prohibit affirmative action in all cases. As I read *Weber*, however, the Court also determined that Congress had balanced these two competing concerns by permitting affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.

Contrary to the intimations in JUSTICE STEVENS' concurrence, this Court did not approve preferences for minorities "for any reason that might seem sensible from a business or a social point of view." *Ante*, at 645. Indeed, such an approach would have been wholly at odds with this Court's holding in *McDonald* that Congress intended to prohibit practices that operate to discriminate against the employment opportunities of nonminorities as well as minorities. Moreover, in *Weber* the Court was careful to consider the effects of the af-

firmative action plan for black employees on the employment opportunities of white employees. 443 U. S., at 208. Instead of a wholly standardless approach to affirmative action, the Court determined in *Weber* that Congress intended to permit affirmative action only if the employer could point to a "manifest . . . imbalanc[e] in traditionally segregated job categories." *Id.*, at 197. This requirement both "provides assurance . . . that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination," *ante*, at 632, and is consistent with this Court's and Congress' consistent emphasis on the value of voluntary efforts to further the antidiscrimination purposes of Title VII. *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 290 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

The *Weber* view of Congress' resolution of the conflicting concerns of minority and nonminority workers in Title VII appears substantially similar to this Court's resolution of these same concerns in *Wygant* v. *Jackson Board of Education*, *supra*, which involved the claim that an affirmative action plan by a public employer violated the Equal Protection Clause. In *Wygant*, the Court was in agreement that remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action plan. The Court also concluded, however, that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.*, at 276. Instead, we determined that affirmative action was valid if it was crafted to remedy past or present discrimination by the employer. Although the employer need not point to any contemporaneous findings of actual discrimination, I concluded in *Wygant* that the employer must point to evidence sufficient to establish a firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a Title VII prima facie

case against the employer would satisfy this firm basis requirement:

> "Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination." *Id.*, at 292.

The *Wygant* analysis is entirely consistent with *Weber*. In *Weber*, the affirmative action plan involved a training program for unskilled production workers. There was little doubt that the absence of black craftworkers was the result of the exclusion of blacks from craft unions. *Steelworkers* v. *Weber*, 443 U. S., at 198, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). The employer in *Weber* had previously hired as craftworkers only persons with prior craft experience, and craft unions provided the sole avenue for obtaining this experience. Because the discrimination occurred at entry into the craft union, the "manifest racial imbalance" was powerful evidence of prior race discrimination. Under our case law, the relevant comparison for a Title VII prima facie case in those circumstances—discrimination in admission to entry-level positions such as membership in craft unions—is to the total percentage of blacks in the labor force. See *Teamsters* v. *United States*, 431 U. S. 324 (1977); cf. *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 437–439 (1986) (observing that lower courts had relied on comparison to general labor force in finding Title VII violation by union). Here, however, the evidence of past discrimination is more complex. The num-

ber of women with the qualifications for entry into the relevant job classification was quite small. A statistical imbalance between the percentage of women in the work force generally and the percentage of women in the particular specialized job classification, therefore, does not suggest past discrimination for purposes of proving a Title VII prima facie case. See *Hazelwood School District* v. *United States*, 433 U. S. 299, 308, and n. 13 (1977).

Unfortunately, the Court today gives little guidance for what statistical imbalance is sufficient to support an affirmative action plan. Although the Court denies that the statistical imbalance need be sufficient to make out a prima facie case of discrimination against women, *ante*, at 632, the Court fails to suggest an alternative standard. Because both *Wygant* and *Weber* attempt to reconcile the same competing concerns, I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause.

While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities. Employers are "trapped between the competing hazards of liability to minorities if affirmative action is *not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant* v. *Jackson Board of Education*, 476 U. S., at 291 (O'CONNOR, J., concurring in part and concurring in judgment). Moreover, this Court has long emphasized the importance of voluntary efforts to eliminate discrimination. *Id.*, at 290. Thus, I concluded in *Wygant* that a contemporaneous finding of discrimination should not be required because it would discourage voluntary efforts to remedy apparent discrimination. A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination. As I emphasized in *Wygant*, a chal-

lenge to an affirmative action plan "does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld." *Id.*, at 292. Evidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate.

In applying these principles to this case, it is important to pay close attention to both the affirmative action plan, and the manner in which that plan was applied to the specific promotion decision at issue in this case. In December 1978, the Santa Clara Transit District Board of Supervisors adopted an affirmative action plan for the Santa Clara County Transportation Agency (Agency). At the time the plan was adopted, not one woman was employed in respondents' 238 skilled craft positions, and the plan recognized that women "are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." App. 57. Additionally, the plan stated that respondents "recognize[d] that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons," *id.*, at 31, and that "the selection and appointment processes are areas where hidden discrimination frequently occurs." *Id.*, at 71. Thus, respondents had the expectation that the plan "should result in improved personnel practices that will benefit all Agency employees who may have been subjected to discriminatory personnel practices in the past." *Id.*, at 35.

The long-term goal of the plan was "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women . . . in the Santa Clara County work force." *Id.*, at 54. If this long-term goal had been applied to the hiring decisions made by the Agency, in my view, the affirmative action plan would violate Title VII. "[I]t is completely unrealistic to assume that individuals of each [sex] will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination." *Sheet Metal Workers*, 478 U. S., at 494 (O'CONNOR, J., concurring in part and dissenting in part). Thus, a goal that makes such an assumption, and simplistically focuses on the proportion of women and minorities in the work force without more, is not remedial. Only a goal that takes into account the number of women and minorities qualified for the relevant position could satisfy the requirement that an affirmative action plan be remedial. This long-range goal, however, was never used as a guide for actual hiring decisions. Instead, the goal was merely a statement of aspiration wholly without operational significance. The affirmative action plan itself recognized the host of reasons why this goal was extremely unrealistic, App. 56–57, and as I read the record, the long-term goal was not applied in the promotion decision challenged in this case. Instead, the plan provided for the development of short-term goals, which alone were to guide respondents, *id.*, at 61, and the plan cautioned that even these goals "should not be construed as 'quotas' that must be met." *Id.*, at 64. Instead, these short-term goals were to be focused on remedying past apparent discrimination, and would "[p]rovide an objective standard for use in determining if the representation of minorities, women and handicapped persons in particular job classifications is at a reasonable level in comparison with estimates of the numbers of persons from these groups in the area work force who can meet the educational and experience requirements for employment." *Id.*, at 61.

At the time of the promotion at issue in this case, the short-term goals had not been fully developed. Nevertheless, the Agency had already recognized that the long-range goal was unrealistic, and had determined that the progress of the Agency should be judged by a comparison to the *qualified* women in the area work force. As I view the record, the promotion decision in this case was entirely consistent with the philosophy underlying the development of the short-term goals.

The Agency announced a vacancy for the position of road dispatcher in the Agency's Roads Division on December 12, 1979. Twelve employees applied for this position, including Diane Joyce and petitioner. Nine of these employees were interviewed for the position by a two-person board. Seven applicants—including Joyce and petitioner—scored above 70 on this interview, and were certified as eligible for selection for the promotion. Petitioner scored 75 on the interview, while Joyce scored 73. After a second interview, a committee of three agency employees recommended that petitioner be selected for the promotion to road dispatcher. The County's Affirmative Action Officer, on the other hand, urged that Joyce be selected for the position.

The ultimate decision to promote Joyce rather than petitioner was made by James Graebner, the Director of the Agency. As JUSTICE SCALIA views the record in this case, the Agency Director made the decision to promote Joyce rather than petitioner solely on the basis of sex and with indifference to the relative merits of the two applicants. See *post*, at 662–663. In my view, however, the record simply fails to substantiate the picture painted by JUSTICE SCALIA. The Agency Director testified that he "tried to look at the whole picture, the combination of [Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their experience, their background, affirmative action matters, things like that." Tr. 68. Contrary to JUSTICE SCALIA's suggestion, *post*, at 663, the Agency Director knew far more than

merely the sex of the candidates and that they appeared on a list of candidates eligible for the job. The Director had spoken to individuals familiar with the qualifications of both applicants for the promotion, and was aware that their scores were rather close. Moreover, he testified that over a period of weeks he had spent several hours making the promotion decision, suggesting that Joyce was not selected solely on the basis of her sex. Tr. 63. Additionally, the Director stated that had Joyce's experience been less than that of petitioner by a larger margin, petitioner might have received the promotion. *Id.*, at 69–70. As the Director summarized his decision to promote Joyce, the underrepresentation of women in skilled craft positions was only one element of a number of considerations that led to the promotion of Ms. Joyce. *Ibid.* While I agree with JUSTICE SCALIA's dissent that an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of "proportionate representation by race and sex," would violate Title VII, I cannot agree that this is such a case. Rather, as the Court demonstrates, Joyce's sex was simply used as a "plus" factor. *Ante*, at 636–637.

In this case, I am also satisfied that respondents had a firm basis for adopting an affirmative action program. Although the District Court found no discrimination against women in fact, at the time the affirmative action plan was adopted, there were *no* women in its skilled craft positions. Petitioner concedes that women constituted approximately 5% of the local labor pool of skilled craft workers in 1970. Reply Brief for Petitioner 9. Thus, when compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a prima facie Title VII case brought by unsuccessful women job applicants. See *Teamsters*, 431 U. S., at 342, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers. . . . [T]he company's inability to rebut the in-

ference of discrimination came not from a misuse of statistics but from 'the inexorable zero'").

In sum, I agree that respondents' affirmative action plan as implemented in this instance with respect to skilled craft positions satisfies the requirements of *Weber* and of *Wygant*. Accordingly, I concur in the judgment of the Court.

JUSTICE WHITE, dissenting.

I agree with Parts I and II of JUSTICE SCALIA's dissenting opinion. Although I do not join Part III, I also would overrule *Weber*. My understanding of *Weber* was, and is, that the employer's plan did not violate Title VII because it was designed to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories. That is how I understood the phrase "traditionally segregated jobs" that we used in that case. The Court now interprets it to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force. As so interpreted, that case, as well as today's decision, as JUSTICE SCALIA so well demonstrates, is a perversion of Title VII. I would overrule *Weber* and reverse the judgment below.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE WHITE joins in Parts I and II, dissenting.

With a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII of the Civil Rights Act of 1964 declares:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a).

The Court today completes the process of converting this from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace. Part I of this dissent will describe the nature of the plan that the Court approves, and its effect upon this petitioner. Part II will discuss prior holdings that are tacitly overruled, and prior distinctions that are disregarded. Part III will describe the engine of discrimination we have finally completed.

I

On October 16, 1979, the County of Santa Clara adopted an Affirmative Action Program (County plan) which sought the "attainment of a County work force whose composition . . . includes women, disabled persons and ethnic minorities in a ratio in all job categories that reflects their distribution in the Santa Clara County area work force." App. 113. In order to comply with the County plan and various requirements imposed by federal and state agencies, the Transportation Agency adopted, effective December 18, 1978, the Equal Employment Opportunity Affirmative Action Plan (Agency plan or plan) at issue here. Its stated long-range goal was the same as the County plan's: "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County work force." *Id.*,

at 54. The plan called for the establishment of a procedure by which Division Directors would review the ethnic and sexual composition of their work forces whenever they sought to fill a vacancy, which procedure was expected to include "a requirement that Division Directors indicate why they did *not* select minorities, women and handicapped persons if such persons were on the list of eligibles considered and if the Division had an underrepresentation of such persons in the job classification being filled." *Id.*, at 75 (emphasis in original).

Several salient features of the plan should be noted. Most importantly, the plan's purpose was assuredly not to remedy prior sex discrimination by the Agency. It could not have been, because there was no prior sex discrimination to remedy. The majority, in cataloging the Agency's alleged misdeeds, *ante*, at 624, n. 5, neglects to mention the District Court's finding that the Agency "has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." App. to Pet. for Cert. 13a. This finding was not disturbed by the Ninth Circuit.

Not only was the plan not directed at the results of past sex discrimination by the Agency, but its objective was not to achieve the state of affairs that this Court has dubiously assumed would result from an absence of discrimination—an overall work force "more or less representative of the racial and ethnic composition of the population in the community." *Teamsters* v. *United States*, 431 U. S. 324, 340, n. 20 (1977). Rather, the oft-stated goal was to mirror the racial and sexual composition of the entire county labor force, not merely in the Agency work force as a whole, but in each and every individual job category at the Agency. In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of even that portion of the county work force *qualified* for that job; it would be utterly miraculous for each of them to match, as the plan expected, the composition of the *entire* work force.

Quite obviously, the plan did not seek to replicate what a lack of discrimination would produce, but rather imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined "proper" proportion of each job category.

That the plan was not directed at remedying or eliminating the effects of past discrimination is most clearly illustrated by its description of what it regarded as the "*Factors Hindering Goal Attainment*"—*i. e.*, the existing impediments to the racially and sexually representative work force that it pursued. The plan noted that it would be "difficult," App. 55, to attain its objective of across-the-board statistical parity in at least some job categories, because:

> "a. Most of the positions require specialized training and experience. Until recently, relatively few minorities, women and handicapped persons sought entry into these positions. Consequently, the number of persons from these groups in the area labor force who possess the qualifications required for entry into such job classifications is limited.
>
> . . . . . .
>
> "c. Many of the Agency positions where women are underrepresented involve heavy labor; e. g., Road Maintenance Worker. Consequently, few women seek entry into these positions.
>
> . . . . . .
>
> "f. Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." *Id.*, at 56–57.

That is, the qualifications and desires of women may fail to match the Agency's Platonic ideal of a work force. The plan concluded from this, of course, not that the ideal should be reconsidered, but that its attainment could not be immediate.

Id., at 58–60. It would, in any event, be rigorously pursued, by giving "special consideration to Affirmative Action requirements in every individual hiring action pertaining to positions where minorities, women and handicapped persons continue to be underrepresented." *Id.*, at 60.[1]

Finally, the one message that the plan unmistakably communicated was that concrete results were expected, and supervisory personnel would be evaluated on the basis of the affirmative-action numbers they produced. The plan's implementation was expected to "result in a statistically measurable yearly improvement in the hiring, training and promotion of minorities, women and handicapped persons in the major job classifications utilized by the Agency where these groups are underrepresented." *Id.*, at 35. Its Preface declared that "[t]he degree to which each Agency Division *attains the Plan's objectives* will provide a direct measure of that Division Director's personal commitment to the EEO Policy," *ibid.* (emphasis added), and the plan itself repeated that "[t]he degree to which each Division *attains the Agency Affirmative Action employment goals* will provide a measure of that Director's commitment and effectiveness in carrying out the Division's EEO Affirmative Action requirements." *Id.*, at 44 (emphasis added). As noted earlier, supervisors were reminded of the need to give attention to affirmative action in every employment decision, and to explain their reasons for *failing* to hire women and minorities whenever there was an opportunity to do so.

The petitioner in the present case, Paul E. Johnson, had been an employee of the Agency since 1967, coming there from a private company where he had been a road dispatcher for 17 years. He had first applied for the position of Road Dispatcher at the Agency in 1974, coming in second. Sev-

[1] This renders utterly incomprehensible the majority's assertion that "the Agency acknowledged that [its long-term goal] could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." *Ante*, at 635.

eral years later, after a reorganization resulted in a downgrading of his Road Yard Clerk II position, in which Johnson "could see no future," Tr. 127, he requested and received a voluntary demotion from Road Yard Clerk II to Road Maintenance Worker, to increase his experience and thus improve his chances for future promotion. When the Road Dispatcher job next became vacant, in 1979, he was the leading candidate—and indeed was assigned to work out of class full time in the vacancy, from September 1979 until June 1980. There is no question why he did not get the job.

The fact of discrimination against Johnson is much clearer, and its degree more shocking, than the majority and JUSTICE O'CONNOR's concurrence would suggest—largely because neither of them recites a single one of the District Court findings that govern this appeal, relying instead upon portions of the transcript which those findings implicitly rejected, and even upon a document (favorably comparing Joyce to Johnson), *ante*, at 625, that was prepared *after* Joyce was selected. See App. 27–28; Tr. 223–227. Worth mentioning, for example, is the trier of fact's determination that, if the Affirmative Action Coordinator had not intervened, "the decision as to whom to promote . . . would have been made by [the Road Operations Division Director]," App. to Pet. for Cert. 12a, who had recommended that Johnson be appointed to the position. *Ibid.*[2] Likewise, the even more extraordi-

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[2] The character of this intervention, and the reasoning behind it, was described by the Agency Director in his testimony at trial:

"Q. How did you happen to become involved in this particular promotional opportunity?

"A. I . . . became aware that there was a difference of opinion between specifically the Road Operations people [Mr. Shields] and the Affirmative Action Director [Mr. Morton] as to the desirability of certain of the individuals to be promoted.

. . . . . .

". . . Mr. Shields felt that Mr. Johnson should be appointed to that position.

"Q. Mr. Morton felt that Diane Joyce should be appointed?

nary findings that James Graebner, the Agency Director who made the appointment, "did not inspect the applications and related examination records of either [Paul Johnson] or Diane Joyce before making his decision," *ibid.*, and indeed "did little or nothing to inquire into the results of the interview process and conclusions which [were] described as of critical importance to the selection process." *Id.*, at 3a. In light of these determinations, it is impossible to believe (or to think that the District Court believed) Graebner's self-serving statements relied upon by the majority and JUSTICE O'CONNOR's concurrence, such as the assertion that he "tried to look at the whole picture, the combination of [Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that," Tr. 68 (quoted *ante*, at 625; *ante*, at 655 (O'CONNOR, J., concurring in judgment)). It was evidently enough for Graebner to know that both candidates (in the words of Johnson's counsel, to which Graebner assented) "met the M. Q.'s, the minimum. Both were minimally qualified." Tr. 25. When asked whether he had "any basis," *ibid.*, for determining whether one of the candidates was more qualified than the other, Graebner candidly answered, "No. . . . As I've said, they both appeared, and my conversations with people tended to corroborate, that they were both capable of performing the work." *Ibid.*

After a 2-day trial, the District Court concluded that Diane Joyce's gender was "*the determining factor*," App. to Pet. for Cert. 4a, in her selection for the position. Specifically, it found that "[b]ased upon the examination results and the departmental interview, [Mr. Johnson] was more qualified for

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"A. Mr. Morton was less interested in the particular individual; he felt that this was an opportunity for us to take a step toward meeting our affirmative action goals, and because there was only one person on the [eligibility] list who was one of the protected groups, he felt that this afforded us an opportunity to meet those goals through the appointment of that member of a protected group." Tr. 16–18.

the position of Road Dispatcher than Diane Joyce," *id.*, at 12a; that "[b]ut for [Mr. Johnson's] sex, male, he would have been promoted to the position of Road Dispatcher," *id.*, at 13a; and that "[b]ut for Diane Joyce's sex, female, she would not have been appointed to the position . . . ." *Ibid.* The Ninth Circuit did not reject these factual findings as clearly erroneous, nor could it have done so on the record before us. We are bound by those findings under Federal Rule of Civil Procedure 52(a).

II

The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs. Even if the societal attitudes in question consisted exclusively of conscious discrimination by other employers, this holding would contradict a decision of this Court rendered only last Term. *Wygant* v. *Jackson Board of Education*, 476 U. S. 267 (1986), held that the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the Equal Protection Clause. See *id.*, at 276; *id.*, at 288 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 295 (WHITE, J., concurring in judgment). While Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution. The Court has already held that the prohibitions on discrimination in Title VI, 42 U. S. C. § 2000d, are at least as stringent as those in the Constitution. See *Regents of University of California* v. *Bakke*, 438 U. S. 265, 286–287 (1978) (opinion of POWELL, J.) (Title VI embodies constitutional restraints on discrimination); *id.*, at 329–340 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (same); *id.*, at 416 (opinion of

STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ.) (Title VI "has independent force, with language and emphasis *in addition to* that found in the Constitution") (emphasis added). There is no good reason to think that Title VII, in this regard, is any different from Title VI.[3] Because, therefore, those justifications (*e. g.*, the remedying of past societal wrongs) that are inadequate to insulate discriminatory action from the racial discrimination prohibitions of the Constitution are also inadequate to insulate it from the racial discrimination prohibitions of Title VII; and because the portions of Title VII at issue here treat race and sex equivalently; *Wygant*, which dealt with race discrimination, is fully applicable precedent, and is squarely inconsistent with today's decision.[4]

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[3] To support the proposition that Title VII is more narrow than Title VI, the majority repeats the reasons for the dictum to that effect set forth in *Steelworkers* v. *Weber*, 443 U. S. 193, 206, n. 6 (1979)—a case which, as JUSTICE O'CONNOR points out, *ante*, at 651–652, could reasonably be read as consistent with the constitutional standards of *Wygant*. Those reasons are unpersuasive, consisting only of the existence in Title VII of 42 U. S. C. § 2000e–2(j) (the implausibility of which, as a *restriction* upon the scope of Title VII, was demonstrated by CHIEF JUSTICE REHNQUIST's literally unanswered *Weber* dissent) and the fact that Title VI pertains to recipients of federal funds while Title VII pertains to employers generally. The latter fact, while true and perhaps interesting, is not conceivably a reason for giving to virtually identical categorical language the interpretation, in one case, that intentional discrimination is forbidden, and, in the other case, that it is not. Compare 42 U. S. C. § 2000d ("No person . . . shall, on the ground of race, color, or national origin, be . . . subjected to discrimination"), with § 2000e–2(a)(1) (no employer shall "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").

[4] JUSTICE O'CONNOR's concurrence at least makes an attempt to bring this Term into accord with last. Under her reading of Title VII, an employer may discriminate affirmatively, so to speak, if he has a "firm basis" for believing that he might be guilty of (nonaffirmative) discrimination under the Act, and if his action is designed to remedy that suspected prior discrimination. *Ante*, at 649. This is something of a halfway house between leaving employers scot-free to discriminate against disfavored

Likewise on the assumption that the societal attitudes relied upon by the majority consist of conscious discrimination by employers, today's decision also disregards the limitations carefully expressed in last Term's opinions in *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421 (1986). While those limitations were dicta, it is remarkable to see them so readily (and so silently) swept away. The question in *Sheet Metal Workers* was whether the remedial provision of Title VII, 42 U. S. C. §2000e–5(g), empowers courts to order race-conscious relief for persons who were not identifiable victims of discrimination. Six Members of this Court concluded that it does, *under narrowly confined circumstances*. The plurality opinion for four Justices found that race-conscious relief could be ordered at least when "an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." 478 U. S., at 445 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). See also *id.*, at 476. JUSTICE POWELL concluded that race-conscious relief can be ordered "in cases involv-

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groups, as the majority opinion does, and prohibiting discrimination, as do the words of Title VII. In the present case, although the District Court found that in fact no sex discrimination existed, JUSTICE O'CONNOR would find a "firm basis" for the agency's *belief* that sex discrimination existed in the "inexorable zero": the complete absence, prior to Diane Joyce, of any women in the Agency's skilled positions. There are two problems with this: First, even positing a "firm basis" for the Agency's belief in prior discrimination, as I have discussed above the plan was patently not *designed to remedy* that prior discrimination, but rather to establish a sexually representative work force. Second, even an absolute zero is not "inexorable." While it may inexorably provide "firm basis" for belief in the mind of an outside observer, it cannot conclusively establish such a belief *on the employer's part*, since he may be aware of the particular reasons that account for the zero. That is quite likely to be the case here, given the nature of the jobs we are talking about, and the list of "*Factors Hindering Goal Attainment*" recited by the Agency plan. See *supra*, at 622. The question is in any event one of fact, which, if it were indeed relevant to the outcome, would require a remand to the District Court rather than an affirmance.

ing particularly egregious conduct," *id.*, at 483 (concurring in part and concurring in judgment), and JUSTICE WHITE similarly limited his approval of race-conscious remedies to "unusual cases." *Id.*, at 499 (dissenting). See also *Firefighters* v. *Cleveland*, 478 U. S. 501, 533 (1986) (WHITE, J., dissenting) ("I also agree with JUSTICE BRENNAN's opinion in *Sheet Metal Workers* . . . that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for nonvictims being reserved for particularly egregious conduct"). There is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination. As JUSTICE WHITE noted last Term:

> "There is no statutory authority for concluding that if an employer desires to discriminate against a white applicant or employee on racial grounds he may do so without violating Title VII but may not be ordered to do so if he objects. In either case, the harm to the discriminatee is the same, and there is no justification for such conduct other than as a permissible remedy for prior racial discrimination practiced by the employer involved." *Id.*, at 533.

The Agency here was not seeking to remedy discrimination—much less "unusual" or "egregious" discrimination. *Firefighters*, like *Wygant*, is given only the most cursory consideration by the majority opinion.

In fact, however, today's decision goes well beyond merely allowing racial or sexual discrimination in order to eliminate the effects of prior societal *discrimination*. The majority opinion often uses the phrase "traditionally segregated job category" to describe the evil against which the plan is legitimately (according to the majority) directed. As originally used in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), that phrase described skilled jobs from which employers and un-

ions had systematically and intentionally excluded black workers—traditionally segregated jobs, that is, in the sense of conscious, exclusionary discrimination. See *id.*, at 197–198. But that is assuredly not the sense in which the phrase is used here. It is absurd to think that the nationwide failure of road maintenance crews, for example, to achieve the Agency's ambition of 36.4% female representation is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel. It is a "traditionally segregated job category" *not* in the *Weber* sense, but in the sense that, because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work. Or as the majority opinion puts the point, quoting approvingly the Court of Appeals: "'A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation.'" *Ante*, at 634, n. 12 (quoting 748 F. 2d 1308, 1313 (CA9 1984)). Given this meaning of the phrase, it is patently false to say that "[t]he requirement that the 'manifest imbalance' relate to a 'traditionally segregated job category' provides assurance . . . that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination." *Ante*, at 632. There are, of course, those who believe that the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination. Whether or not that is so (and there is assuredly no consensus on the point equivalent to our national consensus against intentional discrimination), the two phenomena are certainly distinct. And it is the alteration of social attitudes, rather than the elimination of discrimination, which today's decision approves as justification for state-enforced discrimination. This is an enormous expansion, undertaken without the slightest justification or analysis.

III

I have omitted from the foregoing discussion the most obvious respect in which today's decision o'erleaps, without analysis, a barrier that was thought still to be overcome. In *Weber*, this Court held that a private-sector, affirmative-action training program that overtly discriminated against white applicants did not violate Title VII. However, although the majority does not advert to the fact, until today the applicability of *Weber* to public employers remained an open question. In *Weber* itself, see 443 U. S., at 200, 204, and in later decisions, see *Firefighters* v. *Cleveland*, *supra*, at 517; *Wygant*, 476 U. S., at 282, n. 9 (opinion of POWELL, J.), this Court has repeatedly emphasized that *Weber* involved only a private employer. See *Williams* v. *New Orleans*, 729 F. 2d 1554, 1565 (CA5 1984) (en banc) (Gee, J., concurring) ("Writing for the Court in *Weber*, Justice Brennan went out of his way, on at least eleven different occasions, to point out that what was there before the Court was *private* affirmative action") (footnote omitted). This distinction between public and private employers has several possible justifications. *Weber* rested in part on the assertion that the 88th Congress did not wish to intrude too deeply into private employment decisions. See 443 U. S., at 206–207. See also *Firefighters* v. *Cleveland*, *supra*, at 519–521. Whatever validity that assertion may have with respect to private employers (and I think it negligible), it has none with respect to public employers or to the 92d Congress that brought them within Title VII. See Equal Employment Opportunity Act of 1972, Pub. L. 92–261, § 2, 86 Stat. 103, 42 U. S. C. § 2000e(a). Another reason for limiting *Weber* to private employers is that state agencies, unlike private actors, are subject to the Fourteenth Amendment. As noted earlier, it would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids.

In truth, however, the language of 42 U. S. C. § 2000e–2 draws no distinction between private and public employers,

and the only good reason for creating such a distinction would be to limit the damage of *Weber*. It would be better, in my view, to acknowledge that case as fully applicable precedent, and to use the Fourteenth Amendment ramifications—which *Weber* did not address and which are implicated for the first time here—as the occasion for reconsidering and overruling it. It is well to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe. The language of that statute, as quoted at the outset of this dissent, is unambiguous: it is an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a). *Weber* disregarded the text of the statute, invoking instead its "'spirit,'" 443 U. S., at 201 (quoting *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892)), and "practical and equitable [considerations] only partially perceived, if perceived at all, by the 88th Congress," 443 U. S., at 209 (BLACKMUN, J., concurring). It concluded, on the basis of these intangible guides, that Title VII's prohibition of intentional discrimination on the basis of race and sex does not prohibit intentional discrimination on the basis of race and sex, so long as it is "designed to break down old patterns of racial [or sexual] segregation and hierarchy," "does not unnecessarily trammel the interests of the white [or male] employees," "does not require the discharge of white [or male] workers and their replacement with new black [or female] hirees," "does [not] create an absolute bar to the advancement of white [or male] employees," and "is a temporary measure . . . not intended to maintain racial [or sexual] balance, but simply to eliminate a manifest racial [or sexual] imbalance." *Id.*, at 208. In effect, *Weber* held that the legality of intentional discrimination by private employers against certain disfavored groups or individuals is to be judged not by Title VII but by a judicially

crafted code of conduct, the contours of which are determined by no discernible standard, aside from (as the dissent convincingly demonstrated) the divination of congressional "purposes" belied by the face of the statute and by its legislative history. We have been recasting that self-promulgated code of conduct ever since—and what it has led us to today adds to the reasons for abandoning it.

The majority's response to this criticism of *Weber*, *ante*, at 629, n. 7, asserts that, since "Congress has not amended the statute to reject our construction, . . . we . . . may assume that our interpretation was correct." This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress' desires *with respect to the particular provision in isolation*, rather than (the way the provision was originally enacted) as part of a total legislative package containing many *quids pro quo*. Whereas the statute as originally proposed may have presented to the enacting Congress a question such as "Should hospitals be required to provide medical care for indigent patients, with federal subsidies to offset the cost?," the question theoretically asked of the later Congress, in order to establish the "correctness" of a judicial interpretation that the statute provides no subsidies, is simply "Should the medical care that hospitals are required to provide for indigent patients be federally subsidized?" Hardly the same question—and many of those legislators who accepted the subsidy provisions in order to gain the votes necessary for enactment of the care requirement would not vote for the subsidy in isolation, now that an unsubsidized care requirement is, thanks to the judicial opinion, safely on the books. But even accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary

principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice. It is interesting to speculate on how the principle that congressional inaction proves judicial correctness would apply to another issue in the civil rights field, the liability of municipal corporations under § 1983. In 1961, we held that that statute did not reach municipalities. See *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961). Congress took no action to overturn our decision, but we ourselves did, in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 663 (1978). On the majority's logic, *Monell* was wrongly decided, since Congress' 17 years of silence established that *Monroe* had not "misperceived the political will," and one could therefore "assume that [*Monroe*'s] interpretation was correct." On the other hand, nine years have now gone by since *Monell*, and Congress *again* has not amended § 1983. Should we now "assume that [*Monell*'s] interpretation was correct"? Rather, I think we should admit that vindication by congressional inaction is a canard.

JUSTICE STEVENS' concurring opinion emphasizes the "undoubted public interest in 'stability and orderly development of the law,'" *ante*, at 644 (citation omitted), that often requires adherence to an erroneous decision. As I have described above, however, today's decision is a demonstration not of stability and order but of the instability and unpredictable expansion which the substitution of judicial improvisation for statutory text has produced. For a number of reasons, *stare decisis* ought not to save *Weber*. First, this Court has applied the doctrine of *stare decisis* to civil rights

statutes less rigorously than to other laws. See *Maine* v. *Thiboutot*, 448 U. S. 1, 33 (1980) (POWELL, J., dissenting); *Monroe* v. *Pape*, *supra*, at 221–222 (Frankfurter, J., dissenting in part). Second, as JUSTICE STEVENS acknowledges in his concurrence, *ante*, at 644, *Weber* was itself a dramatic departure from the Court's prior Title VII precedents, and can scarcely be said to be "so consistent with the warp and woof of civil rights law as to be beyond question." *Monell* v. *New York City Dept. of Social Services*, *supra*, at 696. Third, *Weber* was decided a mere seven years ago, and has provided little guidance to persons seeking to conform their conduct to the law, beyond the proposition that Title VII does not mean what it says. Finally, "even under the most stringent test for the propriety of overruling a statutory decision . . .—'that it appear beyond doubt . . . that [the decision] misapprehended the meaning of the controlling provision,'" 436 U. S., at 700 (quoting *Monroe* v. *Pape*, *supra*, at 192 (Harlan, J., concurring)), *Weber* should be overruled.

In addition to complying with the commands of the statute, abandoning *Weber* would have the desirable side effect of eliminating the requirement of willing suspension of disbelief that is currently a credential for reading our opinions in the affirmative-action field—from *Weber* itself, which demanded belief that the corporate employer adopted the affirmative-action program "voluntarily," rather than under practical compulsion from government contracting agencies, see 443 U. S., at 204; to *Bakke*, a Title VI case cited as authority by the majority here, *ante*, at 638, which demanded belief that the University of California took race into account as merely one of the many diversities to which it felt it was educationally important to expose its medical students, see 438 U. S., at 311–315; to today's opinion, which—in the face of a plan obviously designed to force promoting officials to prefer candidates from the favored racial and sexual classes, warning them that their "personal commitment" will be determined by how successfully they "attain" certain numerical goals,

and in the face of a particular promotion awarded to the less qualified applicant by an official who "did little or nothing" to inquire into sources "critical" to determining the final candidates' relative qualifications other than their sex—in the face of all this, demands belief that we are dealing here with no more than a program that "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." *Ante*, at 638. Any line of decisions rooted so firmly in naiveté must be wrong.

The majority emphasizes, as though it is meaningful, that "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Ibid.* One is reminded of the exchange from Shakespeare's King Henry the Fourth, Part I:

> "GLENDOWER: I can call Spirits from the vasty Deep.
>
> "HOTSPUR: Why, so can I, or so can any man. But will they come when you do call for them?" Act III, Scene I, lines 53–55.

Johnson was indeed entitled to have his qualifications weighed against those of other applicants—but more to the point, he was virtually assured that, after the weighing, if there was any minimally qualified applicant from one of the favored groups, he would be rejected.

Similarly hollow is the Court's assurance that we would strike this plan down if it "failed to take distinctions in qualifications into account," because that "would dictate mere blind hiring by the numbers." *Ante*, at 636. For what the Court means by "taking distinctions in qualifications into account" consists of no more than eliminating from the applicant pool those who are not even *minimally qualified* for the job. Once that has been done, once the promoting officer assures himself that all the candidates before him are "M. Q.'s" (minimally qualifieds), he can then ignore, as the Agency Director did here, how much better than minimally qualified some of the candidates may be, and can proceed to appoint

from the pool solely on the basis of race or sex, until the affirmative-action "goals" have been reached. The requirement that the employer "take distinctions in qualifications into account" thus turns out to be an assurance, not that candidates' comparative merits will always be considered, but only that none of the successful candidates selected over the others solely on the basis of their race or sex will be utterly unqualified. That may be of great comfort to those concerned with American productivity; and it is undoubtedly effective in reducing the effect of affirmative-action discrimination upon those in the upper strata of society, who (unlike road maintenance workers, for example) compete for employment in professional and semiprofessional fields where, for many reasons, including most notably the effects of past discrimination, the numbers of "M. Q." applicants from the favored groups are substantially less. But I fail to see how it has any relevance to whether selecting among final candidates solely on the basis of race or sex is permissible under Title VII, which prohibits discrimination on the basis of race or sex.[5]

Today's decision does more, however, than merely reaffirm *Weber*, and more than merely extend it to public actors. It is impossible not to be aware that the practical effect of our holding is to accomplish *de facto* what the law—in language

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[5] In a footnote purporting to respond to this dissent's (nonexistent) "predict[ion] that today's decision will loose a flood of 'less qualified' minorities and women upon the work force," *ante*, at 641, n. 17, the majority accepts the contention of the American Society for Personnel Administration that there is no way to determine who is the best qualified candidate for a job such as Road Dispatcher. This effectively constitutes appellate reversal of a finding of fact by the District Court in the present case ("[P]laintiff was more qualified for the position of Road Dispatcher than Diane Joyce," App. to Pet. for Cert. 12a). More importantly, it has staggering implications for future Title VII litigation, since the most common reason advanced for failing to hire a member of a protected group is the superior qualification of the hired individual. I am confident, however, that the Court considers this argument no more enduring than I do.

even plainer than that ignored in *Weber*, see 42 U. S. C. § 2000e–2(j)—forbids anyone from accomplishing *de jure:* in many contexts it effectively *requires* employers, public as well as private, to engage in intentional discrimination on the basis of race or sex. This Court's prior interpretations of Title VII, especially the decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counterrebuttal of a "prima facie case" consisting of no more than the showing that the employer's selection process "selects those from the protected class at a 'significantly' lesser rate than their counterparts." B. Schlei & P. Grossman, Employment Discrimination Law 91 (2d ed. 1983). If, however, employers are free to discriminate through affirmative action, without fear of "reverse discrimination" suits by their nonminority or male victims, they are offered a threshold defense against Title VII liability premised on numerical disparities. Thus, after today's decision the *failure* to engage in reverse discrimination is economic folly, and arguably a breach of duty to shareholders or taxpayers, wherever the cost of anticipated Title VII litigation exceeds the cost of hiring less capable (though still minimally capable) workers. (This situation is more likely to obtain, of course, with respect to the least skilled jobs—perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past.) It is predictable, moreover, that this incentive will be greatly magnified by economic pressures brought to bear by government contracting agencies upon employers who refuse to discriminate in the fashion

we have now approved. A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.

It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers (many of whom have filed briefs as *amici* in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent. I dissent.

ALASKA AIRLINES, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL.

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

No. 85–920. Argued December 1, 1986—Decided March 25, 1987

To assist airline employees dislocated as a result of the deregulation of commercial air carriers pursuant to the Airline Deregulation Act of 1978 (Act), Congress enacted an Employee Protection Program (EPP) as § 43 of the Act. The EPP imposes on covered airlines the "duty to hire" dislocated protected employees, who have a "first right of hire" in their occupational specialities with any covered airline that is hiring additional employees. Section 43 authorizes the Secretary of Labor to issue regulations for the administration of the EPP, but § 43(f)(3) contains a legislative-veto provision stating that any final regulation shall become effective after 60 legislative days following its submission to Congress, unless during that period either House of Congress adopts a resolution disapproving it. Petitioners, airlines subject to the Act's duty-to-hire provisions, filed suit in Federal District Court, which granted summary judgment for them, holding § 43(f)(3)'s legislative-veto provision unconstitutional under *INS* v. *Chadha*, 462 U. S. 919, and striking down the entire EPP on the ground that the veto provision was nonseverable. On appeal from the finding of nonseverability, the Court of Appeals reversed.

Held: Section 43(f)(3)'s legislative-veto provision is severable from the remainder of the EPP program. Pp. 684–697.

(a) The standard for determining the severability of an unconstitutional provision in a federal statute is that unless it is evident that Congress would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. The relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with Congress' intent. In considering this question in the context of a legislative veto, it must be recognized that the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government. Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto. Pp. 684–687.

(b) Severability of the legislative-veto provision here is supported by the Act's language and structure. Congress' intent that the EPP's first-hire provisions should survive in the absence of the legislative-veto provision is suggested strongly by the detailed affirmative duty the statute places directly on air carriers. The first-hire provisions scarcely need the adoption of regulations by the Secretary, and thus leave little of substance to be subject to a veto. The ancillary nature of the Secretary's obligations to implement the first-hire provisions is further evidence that Congress delegated only limited substantive discretion to the Secretary. Pp. 678–691.

(c) The legislative history of the EPP supports the conclusion that Congress would have enacted the duty-to-hire provisions even without a legislative-veto provision by revealing that Congress regarded labor protection as an important feature of the Act, while it paid scant attention to the legislative-veto provision. The emphasis during deliberations on the Act was placed overwhelmingly on the substantive provisions of the statute. Pp. 691–696.

247 U. S. App. D. C. 132, 766 F. 2d 1550, affirmed.

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

William T. Coleman, Jr., argued the cause for petitioners. With him on the briefs were *Donald T. Bliss* and *John H. Beisner.*

Deputy Solicitor General Cohen argued the cause for respondents. With him on the brief for the federal respondents were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Assistant Attorney General Spears, Lawrence S. Robbins*, and *Douglas Letter. Gary Green, Eugene B. Granof*, and *George B. Dreisen* filed a brief for respondent Air Line Pilots Association. *Matthew H. Finucane* filed a brief for respondent Association of Flight Attendants. *William J. Birney* and *William G. Mahoney* filed a brief for respondents Brotherhood of Railway and Airline Clerks et al.*

**Robert M. Weinberg* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

JUSTICE BLACKMUN delivered the opinion of the Court.

In *INS* v. *Chadha*, 462 U. S. 919 (1983), this Court held unconstitutional the congressional-veto provision in § 244 (c)(2) of the Immigration and Nationality Act, 66 Stat. 216, as amended, 8 U. S. C. § 1254(c)(2), and found it severable from the remainder of that Act. Petitioners, 14 commercial airlines, in the present case contend that provisions protecting employees in the Airline Deregulation Act of 1978 (Act), 92 Stat. 1705 (codified at various sections of Title 49 U. S. C. App.), are ineffective because § 43(f)(3) of the Act, 92 Stat. 1752, 49 U. S. C. App. § 1552(f)(3), similarly subjects to a legislative veto implementing regulations issued by the Department of Labor (DOL). We granted certiorari, 475 U. S. 1044 (1986), to consider whether that legislative-veto provision is severable from the remainder of the Act.

I

After 40 years of extensive regulation of the commercial-airline industry by the Civil Aeronautics Board (CAB), Congress in 1978 decided to make "a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation so as to place primary emphasis on competition." S. Rep. No. 95–631, p. 52 (1978). Congress abandoned the industrywide fare structure gradually, § 37(a), 49 U. S. C. App. § 1482(d); altered the procedures by which airlines could enter new markets, §§ 7 and 8, 49 U. S. C. App. §§ 1371(c) and (d); and phased out the regulatory power of the CAB, eliminating the agency altogether in 1984, § 40(a), 49 U. S. C. App. §§ 1551(a)(1)(A) and (a)(3).

Congress sought to ensure that the benefits to the public flowing from this deregulation would not be "paid for" by airline employees who had relied on the heavily regulated nature of the industry in deciding to accept and to retain positions with commercial air carriers. In order to assist employees dislocated as a result of deregulation, Congress enacted an Employee Protection Program (EPP) as § 43 of

the Act, 49 U. S. C. App. § 1552. The EPP provides for benefits, in the event of work force reductions, to "protected employees," who are defined as employees who had been employed by a certified carrier for at least four years as of October 24, 1978, the date the Act became effective. §§ 43(d) and (h)(1).

The first part of the EPP establishes a monthly compensation program. If an airline is forced to make severe work force reductions or to enter bankruptcy as a result of deregulation, furloughed or terminated eligible "protected employees" are entitled to federally provided monthly assistance payments. §§ 43(a)–(c), (e).[1] The Secretary of Labor is directed to promulgate guidelines to be used in determining the amount of the monthly assistance payments. § 43 (b)(1). The assistance, however, is expressly made "subject to such amounts as are provided in appropriation Acts." § 43 (a)(1). No funds have ever been appropriated and the assistance program has never become operative. It is not at issue here except insofar as it is relevant to the intent of Congress in providing a legislative veto.

The second portion of the EPP imposes on airlines certified under the prior regulatory system a "duty to hire" protected employees. If a protected employee is "furloughed or otherwise terminated," other than for cause, within 10 years of the enactment date of the statute, that employee has a "first right of hire, regardless of age, in his occupational specialty" with any carrier, covered by the section, who is "hiring additional employees." A hiring airline is permitted, however,

[1] A protected employee is "eligible" for monthly assistance if he has been deprived of employment or adversely affected with respect to compensation as a result of a "qualifying dislocation." Any employee terminated for cause is ineligible. § 43(a). A "qualifying dislocation" is a bankruptcy or "major contraction" of an air carrier previously certified by the CAB occurring during the first 10 complete calendar years following enactment of the Act, the major cause of which is the change in regulatory structure provided by the Act. § 43(h)(2). A major contraction is defined as a work force reduction of at least 7½% within a 12-month period. § 43(h)(4).

first to recall any of its own previously furloughed employees. § 43(d)(1). The Act also places on the Secretary the responsibility to assist protected employees in finding other employment and empowers the Secretary to require air carriers to file information necessary to provide this assistance. § 43(d)(2).

The Secretary "may issue, amend, and repeal such rules and regulations as may be necessary for the administration of [the EPP]." § 43(f)(1). The Act provides that the rule containing the guidelines for monthly assistance payments and "any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978." § 43(f)(2). Congress also included a "report and wait" provision, specifying that no final rule or regulation may be issued until 30 legislative days after it has been submitted to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Public Works and Transportation. § 43(f)(3). Finally, the EPP contains the legislative-veto provision which gave rise to this litigation. It declares that any final rule issued pursuant to § 43 shall be submitted to Congress and shall become effective after 60 legislative days, unless during that 60-day period either House of Congress adopts a resolution disapproving the rule. § 43(f)(3).[2]

II

Petitioners are certified carriers subject to the duty-to-hire provisions of the Act and to the regulations promulgated by the Secretary.[3] They challenged the EPP in the United

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[2] If both Houses adopt an approval resolution during the 60-day period, the rule becomes effective immediately. § 43(f)(3).

[3] The Act became law on October 24, 1978. In March 1979, the Secretary proposed regulations for both the financial-assistance and duty-to-hire provisions of the EPP. 44 Fed. Reg. 19146. Revised proposed regulations relating only to the duty to hire were published in September 1982. 47 Fed. Reg. 41304. The final rules were promulgated and submitted to

States District Court for the District of Columbia, contending that the legislative-veto provision in § 43 is unconstitutional under *Chadha*, and that the entire program must be invalidated because the veto provision is nonseverable from the rest of the EPP. Respondent employee unions intervened on behalf of the Secretary. The District Court granted summary judgment for petitioners, striking down the entire EPP, but leaving the remainder of the Act intact. *Alaska Airlines, Inc.* v. *Donovan*, 594 F. Supp. 92 (1984). It held the legislative-veto provision unconstitutional and ruled that it could not be severed from the EPP. Respondents appealed the finding of nonseverability. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the legislative-veto clause is severable from the remainder of the EPP program.[4] *Alaska Airlines, Inc.* v. *Donovan*, 247 U. S. App. D. C. 132, 766 F. 2d 1550 (1985). We agree and affirm the judgment of the Court of Appeals.[5]

Congress in November 1983, 48 Fed. Reg. 52854, and but for this litigation would have become effective.

[4] The Court of Appeals remanded the case to the District Court for consideration of petitioners' remaining challenges to the DOL regulations. These are not at issue here. 247 U. S. App. D. C. 132, 137, 766 F. 2d 1550, 1565 (1985). The District Court sustained all but one of the regulations. 632 F. Supp. 178 (1986). It remanded to the Secretary "for further explanation" of the issue whether 29 CFR § 220.21(a)(1) (1986), dealing with the initial hiring age of flight officers and pilots, was valid in the light of the carriers' obligation to maintain air safety. 632 F. Supp., at 184. The Court of Appeals reversed in part. 258 U. S. App. D. C. 89, 809 F. 2d 930 (1987) (Table). In an unpublished memorandum it held that the remand of this issue was inappropriate because "Congress made it absolutely clear," § 43(d)(1), that the hiring preference should apply "regardless of age." The Court of Appeals remanded for agency clarification of a different issue: the scope of the exception to the duty to hire created by an equal-opportunity agreement as established by 29 CFR §§ 220.29 and 220.01(j) (1986). With the exception of these provisions, the duty-to-hire regulations are now in force.

[5] Petitioners contend that the Court of Appeals lacked jurisdiction because the District Court held "an Act of Congress unconstitutional," which

III

"[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984) (plurality opinion), quoting *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U. S. 87, 96 (1909). The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976) *(per curiam)*, quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 234 (1932). Accord: *Regan* v. *Time, Inc.*, 468 U. S., at 653; *INS* v. *Chadha*, 462 U. S., at 931–932; *United States* v. *Jackson*, 390 U. S. 570, 585 (1968).

Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently. See, *e. g.*, *Hill* v. *Wallace*, 259 U. S. 44, 70–72 (1922) (Future Trading Act held nonseverable because valid and invalid provisions so intertwined that the Court would have to rewrite the law to allow it to stand). This is not a concern, however, when the invalid provision is a legislative veto, which by its very nature is separate from the operation

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holding must therefore be appealed directly to this Court pursuant to 28 U. S. C. § 1252. The issue at hand, however, is not the constitutionality of the remaining provisions, but their severability from the unconstitutional legislative-veto provision, which is a question of legislative intent. The appeal was properly taken to the Court of Appeals pursuant to 28 U. S. C. § 1291. See *EEOC* v. *Allstate Insurance Co.*, 467 U. S. 1232 (1984); *Heckler* v. *Edwards*, 465 U. S. 870, 885 (1984).

of the substantive provisions of a statute. Indeed, when Congress enacted legislative-veto provisions, it contemplated that activity under the legislation would take place so long as Congress *refrained* from exercising that power.[6] The independent operation of a statute in the absence of a legislative-veto provision thus could be said to indicate little about the intent of Congress regarding severability of the veto.

The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. In considering this question in the context of a legislative veto, it is necessary to recognize that the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government. Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto. Some delegations of power to the Executive or to an independent agency may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism. The final test, for legislative vetos as well as for other provisions, is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.[7]

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[6] See Hearings on the Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking, before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 98th Cong., 1st Sess., 138 (1983) (remarks of Rep. Berman) ("[I]t's hard for me to envision a statutory enactment that probably couldn't be viewed as fully operative, even though the legislative veto was struck down. It would just be a different kind of operation that Congress contemplated").

[7] Petitioners argue that the Court of Appeals formulated a completely new standard for severability. They rest this argument on the court's statement that an invalid portion of a statute may be severed unless, "as the Temporary Emergency Court of Appeals would put it," it is proved

The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. See *INS* v. *Chadha*, 462 U. S., at 932; *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S., at 235. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. In the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability. See *Tilton* v. *Richardson*, 403 U. S. 672, 684 (1971) (plurality opinion); *United States* v. *Jackson*, 390 U. S., at 585, n. 27.

In this case, the parties disagree as to whether there is a severability clause applicable to the EPP.[8] We need not re-

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"that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision." 246 U. S. App. D. C., at 143, 766 F. 2d, at 1561. See *Gulf Oil Corp.* v. *Dyke*, 734 F. 2d 797, 804 (Temp. Emerg. Ct. App.), cert. denied, 469 U. S. 852 (1984). Petitioners interpret this statement as a signal that the court asked whether Congress would have enacted *some* form of protection for airline employees, rather than whether Congress would have enacted the same protections currently found in the Act. Any such inquiry, of course, would be tautological, as Congress' intent to enact a statute on the subject is apparent from the existence of the EPP in the Act. We find the Court of Appeals' language to be completely consistent with the established severability standard. Even if one had doubts, when the court's analysis is viewed in its entirety, it is plain that the correct standard was applied in this case.

[8] The Airline Deregulation Act of 1978 does not contain a severability clause, but it amends the Federal Aviation Act of 1958, 72 Stat. 731, which does contain such a clause. See § 1504, 72 Stat. 811; see also note following 49 U. S. C. App. § 1301 (Separability of Provisions). The applicability of this clause to § 43 is in doubt, however, because, unlike many sections of the Deregulation Act, the EPP does not amend provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program. See note following 49 U. S. C. App. § 1552 (Codification: "Section

solve this question, for there is no need to resort to a presumption in order to find the legislative-veto provision severable in this case. There is abundant indication of a clear congressional intent of severability both in the language and structure of the Act and in its legislative history.

IV

A

Congress' intent that the EPP's first-hire provisions should survive in the absence of the legislative-veto provision is suggested strongly by the affirmative duty the statute places directly on air carriers. The first-hire portion of the EPP establishes in detail an obligation to hire protected employees that scarcely needs the adoption of regulations by the Secretary, and thus leaves little of substance to be subject to a veto. Section 43(d), 49 U. S. C. App. § 1552(d), designates the recipients of this "first right of hire," namely, employees defined by the Act as "protected," who are furloughed or terminated, other than for cause, during the first 10 years of deregulation. It also specifies the class of carriers that are obligated and the extent of the obligation. Carriers previously regulated by the CAB have a duty to hire protected employees before they hire any other person, although they may first recall their own employees. The preference is limited to an individual's occupational specialty and applies without regard to age. The language of these provisions is sufficiently unambiguous to notify carriers of their responsibilities and sufficiently detailed to require little further action on the part of the Secretary.[9]

Congress did direct the Secretary to take certain actions with regard to the EPP's first-hire provisions: he is to estab-

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[43] was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958 which comprises this chapter").

[9] A similar conclusion was reached in *McDonald* v. *Piedmont Aviation, Inc.*, 625 F. Supp. 762, 766 (SDNY 1986), which sustained a private action brought by an individual pilot claiming the defendant carrier wrongfully denied him first right of hire under § 43.

lish and periodically to publish a list of available jobs, to "make every effort" to assist protected employees in finding employment, and to encourage negotiations in rehiring and seniority. He also may require air carriers to file data necessary to fulfill these duties. §§ 43(d)(2) and (3). These obligations on the part of the Secretary are obviously designed merely to facilitate the obligation to hire imposed upon certain carriers, and their ancillary nature is further evidence that Congress delegated only limited substantive discretion to the Secretary. With this subsidiary role allotted to the Secretary, the veto provision could affect only the relatively insignificant actions he might take in connection with the duty-to-hire program.[10] There is thus little reason to believe that Congress contemplated the possibility of vetoing any of these actions and one can infer that Congress would have been satisfied with the duty-to-hire provisions even without preserving the opportunity to veto the DOL's regulations.

Moreover, Congress did not link specifically the operation of the first-hire provisions to the issuance of regulations. While the Secretary is explicitly directed to promulgate, by rule, guidelines for the assistance payments authorized by

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[10] The independent functioning of the Act's first-hire provisions stands in contrast to the important role of the Secretary in the monthly assistance program. The Secretary is the individual responsible for making the payments to individuals found by the Secretary to be eligible protected employees. § 43(a)(1). The Act designates that monthly assistance payments shall be made until the employee obtains other employment, for a maximum of 72 months, § 43(e), but delegates to the Secretary the task of determining the amount of the payments. He is directed by the Act to issue guidelines to be used by him in determining the amount of each monthly assistance payment for each class and craft of employees. § 43 (b)(1). He also has the responsibility to determine and reimburse "reasonable moving expenses" and losses resulting from the sale of a principal residence at a price below its fair market value. § 43(c). The compensation program, however, could be controlled through appropriations, see § 43 (a)(1), which diminishes the need for Congress to retain other means of preventing the Secretary's regulations from taking effect.

the EPP, § 43(b)(1),[11] there is no similar command with regard to the duty-to-hire provisions. The Act simply provides that the Secretary "may" issue such regulations as are necessary to the administration of the program. § 43(f)(1). A duty to hire that is not dependent upon the issuance of regulations is unlikely to be dependent upon an opportunity for Congress to veto those regulations.

The regulations eventually promulgated by the DOL, 29 CFR § 220.01 *et seq.* (1986), support the conclusion that Congress itself elaborated most of the details necessary for the first-hire program. The regulations reiterate the statutory requirements and provide a limited administrative appeal for ascertaining eligibility in the event of a dispute, § 220.26, but are otherwise silent as to a mechanism for enforcing the right of hire. The primary focus is on mechanical details—notices to be sent, information to be published, and procedures to be followed. See, *e. g.*, §§ 220.23, 220.25, and 220.27. Most importantly, in the regulations themselves the DOL acknowledges the duty to hire imposed directly by the Act, for the regulations are made effective *subject to* the proviso that "nothing in these regulations shall preclude the exercise of statutory rights and duties between October 24, 1978 [the enactment date of the Act], and the effective date of these regulations." § 220.01(g).

Not only do the first-hire provisions stand on their own, independent of any need for extensive regulations, but, should Congress object to the regulations issued, it retains a mechanism for the expression of its disapproval that reduces any disruption of congressional oversight caused by severance of the veto provision. The EPP's "report and wait" provision in the statute requires the Secretary to forward regulations to the Transportation Committees of both Chambers of

[11] In addition, the rule establishing guidelines for assistance payments is the sole rule mentioned explicitly in § 43(f)(2), which requires the Secretary to promulgate the rules necessary to "carry out" the section within six months after enactment of the Act.

Congress and to wait 30 days before issuing them as final regulations. § 43(f)(3). This interval gives Congress an opportunity to review the regulations and either to attempt to influence the agency's decision, or to enact legislation preventing the regulations from taking effect.[12]

In arguing that the legislative veto is nonseverable, petitioners place great significance on the fact that the EPP is the only section of the Act to delegate authority to the DOL and only rules issued pursuant to that section are subject to the veto. We find this emphasis misplaced. The EPP is the only aspect of the Act concerned with labor protection and thus naturally is the only provision to involve the DOL. The fact that this is the only veto in the Act is unremarkable given the nature of the rest of the statute. Although it did not remove completely the need for regulation,[13] the Act is

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[12] The 95th Congress, which enacted the Airline Deregulation Act, frequently incorporated "report and wait" provisions into statutes. For a compilation of these, see Congressional Research Service, C. Norton, 1976–1977 Congressional Acts Authorizing Prior Review, Approval or Disapproval of Proposed Executive Actions, Report No. 78–117 G, pp. 19–26 (1978); Congressional Research Service, C. Norton, 1978 Congressional Acts Authorizing Congressional Approval or Disapproval of Proposed Executive Actions, Report No. 79–46 G, pp. 16–41 (1979).

In *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941), the Court approved Rule 35 of the then newly promulgated Federal Rules of Civil Procedure, which had been subject to a "report and wait" provision stipulating that the Rules "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064. The Court stated approvingly: "The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose." 312 U. S., at 15. The statute at issue in *INS* v. *Chadha* also included notification procedures and a delay period, which this Court said would resemble a "report and wait" provision absent the one-House veto it found invalid. 462 U. S., at 935, n. 9.

[13] See, *e. g.*, § 33(a), 92 Stat. 1732 (CAB's duty to implement program ensuring adequate air service to small communities); § 12, 92 Stat. 1716

primarily a "deregulatory" statute[14] and, aside from the EPP, did not create any new programs requiring congressional oversight. Moreover, the absence of a veto clause in *other* provisions of the Act indicates nothing about whether Congress regarded the clause as essential to the duty-to-hire provisions of § 43.

B

The legislative history of the EPP supports the conclusion that Congress would have enacted the duty-to-hire provisions even without a legislative-veto provision by revealing that Congress regarded labor protection as an important feature of the Act, while it paid scant attention to the legislative-veto provision. The bill passed by the Senate contained protections for employees that later became the heart of the labor provisions in the final Act—monetary compensation for lost wages and relocation expenses, and a hiring preference within the industry. The sponsors of the primary deregulation bill, S. 689, introduced during the first session of the 95th Congress were optimistic that deregulation would lead to an increase in the number of jobs,[15] and that bill did not contain employee protections. But in response to union tes-

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(CAB's authority to issue rules modifying automatic entry program); §§ 5 and 33(a), 92 Stat. 1709 and 1738 (Secretary of Transportation's and FAA Administrator's duty to establish aircraft safety standards).

[14] As petitioners acknowledge, the Act has the stated purpose of placing "maximum reliance on competitive market forces." § 3(a)(4), 92 Stat. 1706, 49 U. S. C. App. § 1302(a)(4). See Brief for Petitioners 29–30.

[15] See Hearings on S. 292 and S. 689, Regulatory Reform in Air Transportation, before the Subcommittee on Aviation of the Senate Committee on Commerce, Science, and Transportation, 95th Cong., 1st Sess., pt. 1, p. 110 (1977) (Senate Deregulation Hearings) (remarks of Sen. Kennedy); *id.*, at pt. 4, p. 1844 (remarks of Sen. Cannon). During floor debate on the final Act, Senator Kennedy stated that "the indicators are all positive, and employment will continue to increase as the carriers respond to the changes and new opportunities deregulation has brought." 124 Cong. Rec. 37419 (1978). See also *id.*, at 10677 (statement of Sen. Cannon).

timony that the existing protections were inadequate,[16] and the support for labor-protection provisions expressed by administration witnesses,[17] the compensation program and first-hire provisions were added as § 22 of S. 2493, the bill introduced in the second session. With the inclusion of the labor provisions, the bill was viewed as "strik[ing] the proper balance between the legitimate demands of industry, consumers, labor, and management." 124 Cong. Rec. 10654 (1978) (remarks of Sen. Percy).

The Senate Committee Report expressed its reasons for providing protection for individual airline employees as follows:

> "[A]n individual employee will be able to do little to adjust to the new structure. Many airline employees have

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[16] Labor protections had been provided in the airline industry in merger cases. A typical formula for employee protection included four years of supplemental compensation for those whose new jobs were at a lower salary, a dismissal allowance for up to five years for those losing their jobs, depending on length of service, and an integration of seniority lists. See *United-Capital Merger Case*, 33 C.A.B. 307, 342–347 (1961); *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22, 31–40 (1972).

Union leaders urged that protections were needed in the event of bankruptcies and route discontinuations, similar to those afforded employees in the railroad industry. See, *e. g.*, Interstate Commerce Act, 49 U. S. C. § 11347 (railroad merger approval subject to "a fair arrangement" to protect employees, including provisions that employees will not be in a worse position with regard to employment for four years); Rail Passenger Service Act, 45 U. S. C. §§ 565(a) and (b) (similar protections for employees affected by route discontinuations). See Senate Deregulation Hearings, pt. 2, p. 717 (statement of Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters); *id.*, at pt. 3, p. 1320 (statement of William G. Mahoney, counsel to several airline labor unions).

[17] Charles L. Schultze, Chairman of the Council of Economic Advisers, voiced President Carter's concern: "In his message to the Congress, the President made it clear that the Administration recognizes an obligation to protect the legitimate interests of airline employees." Senate Deregulation Hearings, pt. 1, p. 279; see also *id.*, at pt. 3, pp. 1369–1370 (statement of Brock Adams, Secretary of Transportation).

given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be ab[l]e to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.

". . . Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system." S. Rep. No. 95–631, p. 114 (1978).

In contrast to this extensive discussion of employee protection, the Committee paid scant attention to legislative oversight. When it did show concern with retaining control over the form the program would take, it was in the context of the compensation program, not the duty to hire:

"Eligible employees who lost their jobs would be entitled to monthly assistance payments for a maximum of 3 years or until they were reemployed, whichever occurred first. The amount of such payment would be equal to a percentage of former wages, as determined by regulations promulgated by the Department of Labor. *These regulations will be subject to congressional re-*

> *view.* The committee considered setting statutory percentage figures and maximum dollar amounts, but concluded that the Secretary of Labor, after consultation with the Secretary of Transportation, will be in a better position to determine the appropriate amounts. The committee intends that the percentages chosen will result in compensation payments that are less than the employees' after-tax income in order to preserve maximum incentives for employees to secure comparable work." *Id.*, at 116–117 (emphasis added).[18]

In introducing S. 2493 on the floor, Senator Cannon discussed the EPP, but did not mention the legislative-veto power, or make note of any need for congressional oversight. 124 Cong. Rec. 10647–10649 (1978). The summary of the bill printed in the record similarly omitted any indication that the legislation contained a veto. *Id.*, at 10649. The employment provisions were discussed extensively during the floor debate on airline deregulation and support for the duty-to-hire requirement was repeatedly voiced.[19] Several amend-

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[18] Even assuming, *arguendo*, that the legislative veto was crucial to the passage of the compensation program, all that is presently operative is the first-hire portion of the EPP, which was uncontroversial. Petitioners argue that the two portions of the EPP are tightly linked, implying that if the veto was necessary to one, it was necessary to the enactment of both. The two components were related in that the right of first hire was predicted to "decrease the cash payments required under the program," S. Rep. No. 95–631, p. 116, and the Act conditions the receipt of monthly assistance payments on cooperation with the Secretary in seeking other employment, § 43(d)(2). But this is evidence that the monthly assistance program was regarded as the second line of attack, not that the right to first hire could not stand alone. As illustrated by the current inactive status of the compensation program, the first-hire program is capable of serving as the sole means of employee protection.

[19] See, *e. g.*, 124 Cong. Rec. 10674–10675 (1978) (Sen. Zorinsky's proposal to delete the assistance program and "liberal[ize]" the duty to hire by expanding the definitions of protected employee and qualifying dislocation); *id.*, at 10677 (Sen. Cannon's endorsement of the duty-to-hire provisions as a good concept that "would insure that people have the opportunity

ments modifying the monthly assistance program, both to restrict and to liberalize payments, were offered,[20] but there was no attempt to alter the duty-to-hire program. The most dramatic endorsement of the EPP as a whole came in response to an amendment offered by Senator Hatch that would have eliminated the EPP completely. The Senate resoundingly rejected the amendment by the lopsided vote of 85–7. *Id.*, at 10679, 10682. In contrast to this emphasis on the substantive aspects of the EPP, neither supporters nor opponents of the bill ever mentioned the legislative-veto provision on the floor of the Senate.

The House bill, H. R. 12611, which lacked a legislative-veto provision, contained even more encompassing protections for displaced employees. In its § 32, it provided protections for airline workers identical to those in the rail industry and stipulated that no new authority granted by the Act could be exercised by a carrier unless the Secretary certified that employees would be protected.[21] The House adopted this bill without apparent controversy over the labor provisions and, despite the broad delegation of power to the Secretary, without any mention of congressional oversight. 124 Cong. Rec. 30661–30708 (1978).

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to work, even though it is with another carrier"); *id.*, at 10695 (remarks of Sen. Muskie).

[20] Both weakening and strengthening amendments to the compensation program were defeated. See *id.*, at 10674–10683 (Sen. Zorinsky's amendment to delete the financial assistance component of the bill, but to leave the duty to hire intact); *id.*, at 10680–10681 (Sen. Danforth's amendment to extend the 3-year limit on monthly payments to 5 years and remove the prerequisite 15% work force reduction). One amendment was approved. See *id.*, at 10683 (Sen. Cannon's amendment deleting language that would have required the Secretary of Labor to guarantee the full-salary benefits of very highly paid employees).

[21] The House bill required "arrangements no less favorable than those in 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act." H. R. Rep. No. 95–1211, p. 22 (1978).

The bill that emerged from the Conference Committee contained a version of the EPP "basically the same as the Senate bill." H. R. Conf. Rep. No. 95–1779, p. 105 (1978) (listing the differences). The debate on the final bill again illustrates the relative unimportance of the legislative-veto provision in this legislation. The only discussion of the EPP reflected wholesale approval of the program, with many Members stressing their support for the provisions,[22] or regrets that the EPP provisions were not even stronger.[23] One comment alone—in fact, the only such comment made during the entire deliberation on the Act—concerned the legislative veto.[24] This was an endorsement of the provision by Representative Levitas, which is best understood as an expression of his general support for legislative-veto provisions rather than a judgment that oversight was particularly important to the EPP.[25]

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[22] See 124 Cong. Rec. 37416 (1978) (statement of Sen. Cannon); *id.*, at 37421 (statement of Sen. Stevenson); *id.*, at 38522 (statements of Rep. Anderson and Rep. Snyder); *id.*, at 38523 (statement of Rep. Johnson).

[23] See *ibid.* (statement of Rep. Harsha); *id.*, at 38524–38525 (statement of Rep. Mineta).

[24] Representative Levitas stated:

"Finally, Mr. Speaker, I cannot let this moment go by without making this observation. While there have been several bills sent to the President this year and signed by him which contained a provision for a congressional veto, I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law." *Id.*, at 38524.

[25] Indeed, Representative Levitas had earlier commented favorably on the House bill (which lacked a veto provision) without any mention of a need for the veto power. See H. R. Rep. No. 95–1211, at 73 (1978) (additional views); 124 Cong. Rec. 29529–29530 (1978); *id.*, at 30671 (House bill "far superior to the bill of the other body in every respect").

Representative Levitas was an ardent supporter of the legislative veto and an acknowledged leader in the fight to establish this device. See *id.*, at 19427 (statement of Rep. Alexander). He routinely advocated its inclusion in a wide variety of statutes. See, *e. g.*, Hearings on S. 890 and

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The language and structure of the EPP and its legislative history provide an uncontradicted view of congressional intent with regard to severance of the legislative-veto provisions from the duty-to-hire program. This evidence leads to the conclusion that any concerns about the operation of the EPP related principally to the financial-assistance program. Even this concern was minimal. The emphasis during deliberations on the Act was placed overwhelmingly on the substantive provisions of the statute, with scant attention paid to any need for congressional oversight. In the almost total absence of any contrary refrain, we cannot conclude that Congress would have failed to enact the Airline Deregulation Act, including the EPP's first-hire program, if the legislative veto had not been included. Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

S. 684, Legislative Veto Proposals, before the Subcommittee on Agency Administration of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 97 (1981); Hearings on H. R. 3658, H. R. 8231, and Related Bills, Congressional Review of Administrative Rulemaking, before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 1st Sess., 142 (1975). He has continued in this support, holding the view that this Court's ruling in *INS* v. *Chadha* was mistaken. See, *e. g.*, 130 Cong. Rec. 8488 (1984); *id.*, at 28059; Levitas & Brand, The Post Legislative Veto Response: a Call to Congressional Arms, 12 Hofstra L. Rev. 593, 613 (1984); Levitas & Brand, Congressional Review of Executive and Agency Actions After *Chad[h]a*: "The Son of Legislative Veto" Lives On, 72 Geo. L. J. 801 (1984).

MISSOURI *v.* BLAIR

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 85–303. Argued November 12, 1986—Decided March 25, 1987
Certiorari dismissed. Reported below: 691 S. W. 2d 259.

Albert A. Riederer argued the cause for petitioner. With him on the briefs were *William L. Webster*, Attorney General of Missouri, *Philip M. Koppe*, Assistant Attorney General, and *Robert Frager*.

Joseph H. Locascio argued the cause and filed a brief for respondent.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Larry W. Yackle*, *Charles S. Sims*, and *Burt Neuborne* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* PETTY

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

No. 85-1656. Argued March 3, 1987—Decided March 25, 1987

Certiorari dismissed. Reported below: 779 F. 2d 299.

Charles A. Palmer, Assistant Attorney General of Texas, argued the cause for petitioner. With him on the briefs were *Jim Mattox*, Attorney General, *Mary F. Keller*, Executive Assistant Attorney General, and *F. Scott McCown* and *William C. Zapalac*, Assistant Attorneys General.

John R. Breihan by appointment of the Court, 479 U. S. 808, argued the cause and filed a brief for respondent.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Larry W. Yackle* and *George Kannar* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

UNITED STATES *v.* CHEROKEE NATION OF OKLAHOMA

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

No. 85–1940. Argued February 23, 1987—Decided March 31, 1987

Choctaw Nation v. *Oklahoma*, 397 U. S. 620, held that, under pertinent treaties with the Federal Government, certain Indian Tribes, including respondent Tribe, were granted title to the riverbed underlying portions of the Arkansas River in Oklahoma. The Government's construction of a navigable channel in the river damaged respondent's riverbed mineral interests. After unsuccessfully seeking compensation from the Government, respondent filed suit in Federal District Court, contending that the channel project resulted in a taking under the Fifth Amendment of respondent's riverbed interests without just compensation. Granting summary judgment for respondent, the court rejected, on the basis of *Choctaw Nation*, the Government's defense that its navigational servitude under the Commerce Clause precluded liability for the alleged taking, and held that under the relevant treaties the Government had not reserved its navigational servitude. The Court of Appeals affirmed, adopting a different analysis. It found that the Government retained a navigational servitude in the river, but that—balancing the public and private interests involved—the servitude was insufficient to protect the Government from liability to compensate respondent.

Held: No "balancing" test, as formulated by the Court of Appeals, is required where, as here, the interference with in-stream interests results from an exercise of the Government's Commerce Clause power to regulate navigational uses of waters. The proper exercise of the Government's navigational servitude is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the riparian owners' interests are subject. Contrary to respondent's contention, the decision in *Choctaw Nation* does not support the conclusion that respondent's title to the riverbed is unique in scope, or that under the pertinent treaties the Government abandoned its navigational servitude in the area. Moreover, the Government's fiduciary obligations in dealing with Indian tribal property do not elevate the Government's actions into a taking. The tribal interests here simply do not

include the right to be free from the Government's navigational servitude. Pp. 703–708.

782 F. 2d 871, reversed and remanded.

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

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace, Peter R. Steenland, Jr.*, and *Jacques B. Gelin.*

James G. Wilcoxen argued the cause for respondent. With him on the brief was *Paul M. Niebell.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620 (1970), the Court determined that certain treaties between the Cherokee, Chickasaw, and Choctaw Tribes and the United States granted to the Tribes fee simple title to the riverbed underlying specified portions of the Arkansas River in Oklahoma. The Court found the circumstances sufficient to overcome the "strong presumption against conveyance by the United States" of title to the bed of a navigable water. *Montana* v. *United States*, 450 U. S. 544, 552 (1981). See *United States* v. *Holt State Bank*, 270 U. S. 49 (1926). The question presented in this case is whether the United States must pay the Cherokee Nation compensation for damage to these riverbed interests caused by navigational improvements which it has made on the Arkansas River. The damage to sand and gravel deposits resulted from the McClellan-Kerr Project, approved by Congress in 1946, Act of July 24, 1946, ch. 595, 60 Stat. 634, 635–636, and designed to improve navigation by construction of a channel in the Arkansas River from its mouth at the Mississippi to Catoosa, Oklahoma. The project was completed in 1971.

After our decision in *Choctaw Nation*, the Cherokee Nation sought compensation from the Government. Congress refused to fund the claim after the Department of the Inte-

rior and the Army Corps of Engineers concluded that the United States' navigational servitude rendered it meritless. See Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before a Subcommittee of the House Committee on Appropriations, 96th Cong., 1st Sess., pt. 7, pp. 379–392 (1979). Congress did, however, provide respondent with the opportunity to seek judicial relief, conferring jurisdiction on the United States District Court for the Eastern District of Oklahoma to determine "any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from the construction of the [McClellan-Kerr Project]." H. R. 2329, 97th Cong., 1st Sess. (1981).

The Cherokee Nation filed a complaint contending that the construction of the McClellan-Kerr Project resulted in a taking under the Fifth Amendment of the Tribe's riverbed interests without just compensation. The United States in response claimed that its navigational servitude precluded liability for the alleged taking. The District Court granted the Tribe's motion for summary judgment, finding that the decision in *Choctaw Nation* created a "unique situation by which a portion of the navigable Arkansas River is, essentially, a private waterway belonging exclusively to the Cherokee Nation." App. to Pet. for Cert. 26a. Because the United States did not reserve its navigational servitude in the relevant treaties, the court held, it owed the Tribe just compensation. *Id.*, at 27a.[1]

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[1] The Cherokee Nation also claimed that, whether or not the United States' actions resulted in a taking, the failure to pay compensation violated the Government's duty to engage in fair and honorable dealings with the Tribe. The District Court did not address this claim, and certified the takings claim for interlocutory appeal under 28 U. S. C. § 1292(b). The Court of Appeals accordingly did not consider the issue, and it is not before us here.

A divided panel of the Court of Appeals for the Tenth Circuit affirmed, adopting a different analysis. 782 F. 2d 871 (1986). The court rejected the District Court's conclusion that the United States' failure to reserve its navigational servitude defeated that interest. It found it "certain [that] the United States retained a navigational servitude in the Arkansas River." *Id.*, at 876. Nevertheless, the court held that the servitude was insufficient to protect the United States from liability. Finding that "the assertion of a navigational servitude on particular waters acknowledges *only* that the property owner's right *to use* these waters is shared with the public at large," *id.*, at 877, the court believed that the effect of the navigational servitude varied with the owner's intended use: "When the exercise of that public power affects private ownership rights not connected to a navigational use, the court must balance the public and private interests to decide whether just compensation is due." *Ibid.* Applying this test, the court concluded that though the Cherokee Nation could not interfere with the United States' exercise of the navigational servitude, it had a right to compensation for any consequent loss of property or diminution in value.[2]

We think the Court of Appeals erred in formulating a balancing test to evaluate this assertion of the navigational servitude. No such "balancing" is required where, as here, the interference with in-stream interests results from an exercise of the Government's power to regulate navigational uses of "the deep streams which penetrate our country in every

[2] The dissenting judge found no support for the balancing of public and private interests, noting that "instead the issue is whether the segment or interest is within the definition and scope of the [navigational servitude] doctrine geographically . . . ." 782 F. 2d, at 882. Relying on *United States* v. *Rands*, 389 U. S. 121 (1967), the dissent observed that privately owned riverbed interests are subject to the navigational servitude, and found "no authority and no basis for an exception to the public nature of the navigable river to create a 'private river' as plaintiff urges nor to create an exception to the application of the navigational servitude because plaintiff is an Indian tribe." 782 F. 2d, at 883.

direction." *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 (1824). Though "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation," *Kaiser Aetna* v. *United States*, 444 U. S. 164, 172 (1979), there can be no doubt that "[t]he Commerce Clause confers a unique position upon the Government in connection with navigable waters." *United States* v. *Rands*, 389 U. S. 121, 122 (1967). It gives to the Federal Government "a 'dominant servitude,' *FPC* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *Rands*, *supra*, at 123.[3] See also *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 808 (1950); *Scranton* v. *Wheeler*, 179 U. S. 141, 163 (1900).

The application of these principles to interference with streambed interests has not depended on balancing this valid public purpose in light of the intended use of those interests by the owner. Thus, in *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U. S. 82 (1913), the Court held that no taking occurred where dredging carried out under the direction of the United States destroyed oysters that had been culti-

[3] Though *Rands* spoke in terms of riparian owners, rather than those holding fee simple title to riverbed interests, our cases make clear that the navigational servitude is dominant to riverbed interests no matter how acquired. See, *e. g.*, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596 (1941) ("Whether, under local law, the title to the bed of the stream is retained by the State or the title of the riparian owner extends to the thread of the stream, or . . . to low-water mark, the rights of the title holder are subject to the dominant power of the federal Government in respect of navigation") (footnotes omitted).

vated on privately held lands under the waters of the Great South Bay in New York. The decision rested on the view that the dominant right of navigation "must include the right to use the bed of the water for every purpose which is in aid of navigation." *Id.*, at 87. The Court did not rely on the particular use to which the private owners put the bed, but rather observed that their very title to the submerged lands "is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require." *Id.*, at 88. See also *United States* v. *Commodore Park*, 324 U. S. 386, 390 (1945); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–597 (1941).

These well-established principles concerning the exercise of the United States' dominant servitude would, in the usual case, dictate that we reject respondent's "takings" claim. We do not understand respondent to argue otherwise. See *e. g.*, Brief in Opposition 11–12; Tr. of Oral Arg. 16, 28–29. Instead, the Cherokee Nation asserts that its title to the Arkansas River bed is unique in scope and that interference with that interest requires just compensation. Respondent does not rely explicitly on any language of the relevant treaties, but rather on its reading of *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620 (1970). We have noted that *Choctaw Nation* involved "very peculiar circumstances," *Montana* v. *United States*, 450 U. S., at 555, n. 5, in that "the Indians were promised virtually complete sovereignty over their new lands." *Choctaw Nation, supra*, at 635. These circumstances allowed the claimants to overcome the strong presumption against conveyance of riverbed interests by the United States, designed to protect the interests of the States under the equal-footing doctrine. See *Montana* v. *United States, supra*, at 551–553; *Shively* v. *Bowlby*, 152 U. S. 1, 48–50 (1894). Respondent urges that these circumstances further indicate that the United States abandoned its navigational servitude in the area. Thus, in respondent's view, the

treaties by which it gained fee simple title to the bed of the Arkansas River were such as to make the Arkansas River a "private stream," Brief for Respondent 28, "not intended as a public highway or artery of commerce." *Id.*, at 23.

We think that the decision in *Choctaw Nation* was quite generous to respondent, and we refuse to give a still more expansive and novel reading of respondent's property interests. There is certainly nothing in *Choctaw Nation* itself that suggests such a broad reading of the conveyance. To the contrary, the Court expressly noted that the United States had no interest in retaining title to the submerged lands because "it had all it was concerned with in its *navigational easement* via the constitutional power over commerce." *Choctaw Nation*, *supra*, at 635 (emphasis added). The parties, including respondent here, clearly understood that the navigational servitude was dominant no matter how the question of riverbed ownership was resolved. See, *e. g.*, Brief for Petitioner in *Cherokee Nation* v. *Oklahoma*, O. T. 1969, No. 59, p. 19 ("[T]here is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation").[4]

Any other conclusion would be wholly extraordinary, for we have repeatedly held that the navigational servitude applies to *all* holders of riparian and riverbed interests. See *Montana* v. *United States*, *supra*, at 555; *United States* v.

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[4] See also Reply Brief for Petitioner in *Cherokee Nation* v. *Oklahoma*, O. T. 1969, No. 59, pp. 13–14 ("Throughout their brief respondents imply that if title to the river were vested in the petitioner and not in the state (under the equal footing-implied trust doctrine) the authority and power of the United States would somehow be compromised. Such an inference is absurd; no matter who holds title to the riverbed, the petitioner or the state, the rights and power of the United States are precisely the same"). Respondent now argues that these statements merely admitted the power of the United States to exercise the servitude, but did not waive its right to compensation when this exercise damaged its interests. See Brief for Respondent 34. We find no support for the existence of such a "hybrid" navigational servitude in these circumstances.

Grand River Dam Authority, 363 U. S. 229, 233 (1960); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 63 (1913), citing *Gibson* v. *United States*, 166 U. S. 269, 271 (1897). Indeed, even when the sovereign States gain "the absolute right to all their navigable waters and the soils under them for their own common use" by operation of the equal-footing doctrine, *Martin* v. *Waddell*, 16 Pet. 367, 410 (1842), this "absolute right" is unquestionably subject to "the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana* v. *United States*, *supra*, at 551. If the States themselves are subject to this servitude, we cannot conclude that respondent—though granted a degree of sovereignty over tribal lands—gained an exemption from the servitude simply because it received title to the riverbed interests. Such a waiver of sovereign authority will not be implied, but instead must be "'surrendered in unmistakable terms.'" *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41, 52 (1986), quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 148 (1982). Respondent can point to no such terms.

We also reject respondent's suggestion that the fiduciary obligations of the United States elevate the Government's actions into a taking. It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity. See *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942). When it holds lands in trust on behalf of the tribes, the United States may not "give the tribal lands to others, or . . . appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them." *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935). These principles, however, do little to aid respondent's cause, for they do not create property rights where none would otherwise exist but rather presuppose that the United States has interfered with existing tribal property interests. As we have explained,

the tribal interests at issue here simply do not include the right to be free from the navigational servitude, for exercise of the servitude is "not an invasion of any private property rights in the stream or the lands underlying it . . . ." *United States* v. *Rands*, 389 U. S., at 123.

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.

O'CONNOR ET AL. *v.* ORTEGA

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

No. 85–530. Argued October 15, 1986—Decided March 31, 1987

Respondent, a physician and psychiatrist, was an employee of a state hospital and had primary responsibility for training physicians in the psychiatric residency program. Hospital officials became concerned about possible improprieties in his management of the program, particularly with respect to his acquisition of a computer and charges against him concerning sexual harassment of female hospital employees and inappropriate disciplinary action against a resident. While he was on administrative leave pending investigation of the charges, hospital officials, allegedly in order to inventory and secure state property, searched his office and seized personal items from his desk and file cabinets that were used in administrative proceedings resulting in his discharge. No formal inventory of the property in the office was ever made, and all the other papers in the office were merely placed in boxes for storage. Respondent filed an action against petitioner hospital officials in Federal District Court under 42 U. S. C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment, the District Court granted judgment for petitioners, concluding that the search was proper because there was a need to secure state property in the office. Affirming in part, reversing in part, and remanding the case, the Court of Appeals concluded that respondent had a reasonable expectation of privacy in his office, and that the search violated the Fourth Amendment. The court held that the record justified a grant of partial summary judgment for respondent on the issue of liability for the search, and it remanded the case to the District Court for a determination of damages.

Held: The judgment is reversed, and the case is remanded.

764 F. 2d 703, reversed and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE POWELL, concluded that:

1. Searches and seizures by government employers or supervisors of the private property of their employees are subject to Fourth Amendment restraints. An expectation of privacy in one's place of work is based upon societal expectations that have deep roots in the history of the Amendment. However, the operational realities of the workplace may make *some* public employees' expectations of privacy unreasonable

when an intrusion is by a supervisor rather than a law enforcement official. Some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. Because the record does not reveal the extent to which hospital officials may have had work-related reasons to enter respondent's office, the Court of Appeals should have remanded the matter to the District Court for its further determination. However, a majority of this Court agrees with the determination of the Court of Appeals that respondent had a reasonable expectation of privacy in his office. Regardless of any expectation of privacy in the office itself, the undisputed evidence supports the conclusion that respondent had a reasonable expectation of privacy at least in his desk and file cabinets. Pp. 714–719.

2. In determining the appropriate standard for a search conducted by a public employer in areas in which an employee has a reasonable expectation of privacy, what is a reasonable search depends on the context within which the search takes place, and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace. Requiring an employer to obtain a warrant whenever the employer wishes to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unreasonable. Moreover, requiring a probable cause standard for searches of the type at issue here would impose intolerable burdens on public employers. Their intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this standard, both the inception and the scope of the intrusion must be reasonable. Pp. 719–726.

3. In the procedural posture of this case, it cannot be determined whether the search of respondent's office, and the seizure of his personal belongings, satisfied the standard of reasonableness. Both courts below were in error because summary judgment was inappropriate. The parties were in dispute about the actual justification for the search, and the record was inadequate for a determination of the reasonableness of the search and seizure. On remand, the District Court must determine these matters. Pp. 726–729.

JUSTICE SCALIA concluded that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter, and no special cir-

cumstances were present here that would call for an exception to the ordinary rule. However, government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the search did not have such a validating purpose, the decision must be reversed and remanded. Pp. 731–732.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C. J., and WHITE and POWELL, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 729. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 732.

Jeffrey T. Miller argued the cause for petitioners. With him on the briefs were *John K. Van de Kamp*, Attorney General of California, *Marvin Goldsmith*, Assistant Attorney General, and *Jeffrey T. Miller* and *Teresa Tan*, Deputy Attorneys General.

Joel I. Klein, by invitation of the Court, 475 U. S. 1006, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. *Magno J. Ortega, pro se*, filed a brief as respondent.*

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE POWELL join.

This suit under 42 U. S. C. § 1983 presents two issues concerning the Fourth Amendment rights of public employees. First, we must determine whether the respondent, a public

**Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Alan I. Horowitz, Barbara L. Herwig*, and *John P. Schnitker* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Peter W. Morgan, Jack Novik, Burt Neuborne*, and *Michael Simpson;* and for the American Federation of State, County, and Municipal Employees, AFL–CIO, by *Richard Kirschner*.

employee, had a reasonable expectation of privacy in his office, desk, and file cabinets at his place of work. Second, we must address the appropriate Fourth Amendment standard for a search conducted by a public employer in areas in which a public employee is found to have a reasonable expectation of privacy.

I

Dr. Magno Ortega, a physician and psychiatrist, held the position of Chief of Professional Education at Napa State Hospital (Hospital) for 17 years, until his dismissal from that position in 1981. As Chief of Professional Education, Dr. Ortega had primary responsibility for training young physicians in psychiatric residency programs.

In July 1981, Hospital officials, including Dr. Dennis O'Connor, the Executive Director of the Hospital, became concerned about possible improprieties in Dr. Ortega's management of the residency program. In particular, the Hospital officials were concerned with Dr. Ortega's acquisition of an Apple II computer for use in the residency program. The officials thought that Dr. Ortega may have misled Dr. O'Connor into believing that the computer had been donated, when in fact the computer had been financed by the possibly coerced contributions of residents. Additionally, the Hospital officials were concerned with charges that Dr. Ortega had sexually harassed two female Hospital employees, and had taken inappropriate disciplinary action against a resident.

On July 30, 1981, Dr. O'Connor requested that Dr. Ortega take paid administrative leave during an investigation of these charges. At Dr. Ortega's request, Dr. O'Connor agreed to allow Dr. Ortega to take two weeks' vacation instead of administrative leave. Dr. Ortega, however, was requested to stay off Hospital grounds for the duration of the investigation. On August 14, 1981, Dr. O'Connor informed Dr. Ortega that the investigation had not yet been completed, and that he was being placed on paid administrative leave. Dr. Ortega remained on administrative leave until

the Hospital terminated his employment on September 22, 1981.

Dr. O'Connor selected several Hospital personnel to conduct the investigation, including an accountant, a physician, and a Hospital security officer. Richard Friday, the Hospital Administrator, led this "investigative team." At some point during the investigation, Mr. Friday made the decision to enter Dr. Ortega's office. The specific reason for the entry into Dr. Ortega's office is unclear from the record. The petitioners claim that the search was conducted to secure state property. Initially, petitioners contended that such a search was pursuant to a Hospital policy of conducting a routine inventory of state property in the office of a terminated employee. At the time of the search, however, the Hospital had not yet terminated Dr. Ortega's employment; Dr. Ortega was still on administrative leave. Apparently, there was no policy of inventorying the offices of those on administrative leave. Before the search had been initiated, however, petitioners had become aware that Dr. Ortega had taken the computer to his home. Dr. Ortega contends that the purpose of the search was to secure evidence for use against him in administrative disciplinary proceedings.

The resulting search of Dr. Ortega's office was quite thorough. The investigators entered the office a number of times and seized several items from Dr. Ortega's desk and file cabinets, including a Valentine's Day card, a photograph, and a book of poetry all sent to Dr. Ortega by a former resident physician. These items were later used in a proceeding before a hearing officer of the California State Personnel Board to impeach the credibility of the former resident, who testified on Dr. Ortega's behalf. The investigators also seized billing documentation of one of Dr. Ortega's private patients under the California Medicaid program. The investigators did not otherwise separate Dr. Ortega's property from state property because, as one investigator testified, "[t]rying to sort State from non-State, it was too much to do, so I gave it

up and boxed it up." App. 62. Thus, no formal inventory of the property in the office was ever made. Instead, all the papers in Dr. Ortega's office were merely placed in boxes, and put in storage for Dr. Ortega to retrieve.

Dr. Ortega commenced this action against petitioners in Federal District Court under 42 U. S. C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment, the District Court granted petitioners' motion for summary judgment. The District Court, relying on *Chenkin* v. *Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F. Supp. 207 (SDNY 1979), concluded that the search was proper because there was a need to secure state property in the office. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, 764 F. 2d 703 (1985), concluding that Dr. Ortega had a reasonable expectation of privacy in his office. While the Hospital had a procedure for office inventories, these inventories were reserved for employees who were departing or were terminated. The Court of Appeals also concluded—albeit without explanation—that the search violated the Fourth Amendment. The Court of Appeals held that the record justified a grant of partial summary judgment for Dr. Ortega on the issue of liability for an unlawful search, and it remanded the case to the District Court for a determination of damages.

We granted certiorari, 474 U. S. 1018 (1985), and now reverse and remand.

II

The strictures of the Fourth Amendment, applied to the States through the Fourteenth Amendment, have been applied to the conduct of governmental officials in various civil activities. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 334–335 (1985). Thus, we have held in the past that the Fourth Amendment governs the conduct of school officials, see *ibid.*, building inspectors, see *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967), and Occupational Safety and Health

Act inspectors, see *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312–313 (1978). As we observed in *T. L. O.*, "[b]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' . . . it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" 469 U. S., at 335 (quoting *Marshall* v. *Barlow's, Inc.*, *supra*, at 312–313 and *Camara* v. *Municipal Court*, *supra*, at 530). Searches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Our cases establish that Dr. Ortega's Fourth Amendment rights are implicated only if the conduct of the Hospital officials at issue in this case infringed "an expectation of privacy that society is prepared to consider reasonable." *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984). We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver* v. *United States*, 466 U. S. 170, 178 (1984) (citations omitted).

Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the workplace context. The workplace includes those areas and items that are related to work and are generally within the employer's control. At a hospital, for

example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace. These areas remain part of the workplace context even if the employee has placed personal items in them, such as a photograph placed in a desk or a letter posted on an employee bulletin board.

Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address.

Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police. See *Mancusi* v. *DeForte*, 392 U. S. 364 (1968). As with the expectation of privacy in one's home, such an expectation in one's place of work is "based upon societal expectations that have deep roots in the history of the Amendment." *Oliver* v. *United States*, *supra*, at 178, n. 8. Thus, in *Mancusi* v. *DeForte*, *supra*, the Court held that a union employee who shared an office with other union employees had a privacy interest in the office sufficient to challenge successfully the warrantless search of that office:

> "It has long been settled that one has standing to object to a search of his office, as well as of his home. . . . [I]t seems clear that if DeForte had occupied a 'private' office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing. . . . In such a 'private' of-

> fice, DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors." 392 U. S., at 369.

Given the societal expectations of privacy in one's place of work expressed in both *Oliver* and *Mancusi*, we reject the contention made by the Solicitor General and petitioners that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. Indeed, in *Mancusi* itself, the Court suggested that the union employee did not have a reasonable expectation of privacy against his union supervisors. 392 U. S., at 369. The employee's expectation of privacy must be assessed in the context of the employment relation. An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office. We agree with JUSTICE SCALIA that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as em-

ployer," *post*, at 731, but some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Cf. *Katz* v. *United States*, 389 U. S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

The Court of Appeals concluded that Dr. Ortega had a reasonable expectation of privacy in his office, and five Members of this Court agree with that determination. See *post*, at 731–732 (SCALIA, J., concurring in judgment); *post*, at 732 (BLACKMUN, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ., dissenting). Because the record does not reveal the extent to which Hospital officials may have had work-related reasons to enter Dr. Ortega's office, we think the Court of Appeals should have remanded the matter to the District Court for its further determination. But regardless of any legitimate right of access the Hospital staff may have had to the office as such, we recognize that the undisputed evidence suggests that Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets. The undisputed evidence discloses that Dr. Ortega did not share his desk or file cabinets with any other employees. Dr. Ortega had occupied the office for 17 years and he kept materials in his office, which included personal correspondence, medical files, correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos. App. 14. The files on physicians in residency training were kept outside Dr. Ortega's office. *Id.*, at 21. Indeed, the only items found by the investigators were apparently personal items because, with the exception of the items seized for use in the administrative hearings, all the papers and effects found in the office were simply placed in boxes and made available to Dr. Ortega.

Id., at 58, 62. Finally, we note that there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets, *id.*, at 44, although the absence of such a policy does not create an expectation of privacy where it would not otherwise exist.

On the basis of this undisputed evidence, we accept the conclusion of the Court of Appeals that Dr. Ortega had a reasonable expectation of privacy at least in his desk and file cabinets. See *Gillard* v. *Schmidt*, 579 F. 2d 825, 829 (CA3 1978); *United States* v. *Speights*, 557 F. 2d 362 (CA3 1977); *United States* v. *Blok*, 88 U. S. App. D. C. 326, 188 F. 2d 1019 (1951).

III

Having determined that Dr. Ortega had a reasonable expectation of privacy in his office, the Court of Appeals simply concluded without discussion that the "search . . . was not a reasonable search under the fourth amendment." 764 F. 2d, at 707. But as we have stated in *T. L. O.*, "[t]o hold that the Fourth Amendment applies to searches conducted by [public employers] is only to begin the inquiry into the standards governing such searches. . . . [W]hat is reasonable depends on the context within which a search takes place." *New Jersey* v. *T. L. O.*, 469 U. S., at 337. Thus, we must determine the appropriate standard of reasonableness applicable to the search. A determination of the standard of reasonableness applicable to a particular class of searches requires "balanc-[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U. S. 696, 703 (1983); *Camara* v. *Municipal Court*, 387 U. S., at 536–537. In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of pri-

vacy against the government's need for supervision, control, and the efficient operation of the workplace.

"[I]t is settled . . . that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'" *Mancusi* v. *DeForte*, 392 U. S., at 370 (quoting *Camara* v. *Municipal Court*, *supra*, at 528–529). There are some circumstances, however, in which we have recognized that a warrant requirement is unsuitable. In particular, a warrant requirement is not appropriate when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court*, *supra*, at 533. Or, as JUSTICE BLACKMUN stated in *T. L. O.*, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 469 U. S., at 351 (concurring in judgment). In *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), for example, the Court explored the burdens a warrant requirement would impose on the Occupational Safety and Health Act regulatory scheme, and held that the warrant requirement was appropriate only after concluding that warrants would not "impose serious burdens on the inspection system or the courts, [would not] prevent inspections necessary to enforce the statute, or [would not] make them less effective." 436 U. S., at 316. In *New Jersey* v. *T. L. O.*, *supra*, we concluded that the warrant requirement was not suitable to the school environment, because such a requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

There is surprisingly little case law on the appropriate Fourth Amendment standard of reasonableness for a public employer's work-related search of its employee's offices, desks, or file cabinets. Generally, however, the lower courts have held that any "work-related" search by an em-

ployer satisfies the Fourth Amendment reasonableness requirement. See *United States* v. *Nasser*, 476 F. 2d 1111, 1123 (CA7 1973) ("work-related" searches and seizures are reasonable under the Fourth Amendment); *United States* v. *Collins*, 349 F. 2d 863, 868 (CA2 1965) (upholding search and seizure because conducted pursuant to "the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a Customs employee"). Others have suggested the use of a standard other than probable cause. See *United States* v. *Bunkers*, 521 F. 2d 1217 (CA9 1975) (work-related search of a locker tested under "reasonable cause" standard); *United States* v. *Blok*, *supra*, at 328, 188 F. 2d, at 1021 ("No doubt a search of [a desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use"). The only cases to imply that a warrant should be required involve searches that are not work related, see *Gillard* v. *Schmidt*, *supra*, at 829, n. 1, or searches for evidence of criminal misconduct, see *United States* v. *Kahan*, 350 F. Supp. 784 (SDNY 1972).

The legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial. Against these privacy interests, however, must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable. While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is

away from the office. Or, as is alleged to have been the case here, employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance.

In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable. In contrast to other circumstances in which we have required warrants, supervisors in offices such as at the Hospital are hardly in the business of investigating the violation of criminal laws. Rather, work-related searches are merely incident to the primary business of the agency. Under these circumstances, the imposition of a warrant requirement would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick* v. *Myers*, 461 U. S. 138, 143 (1983).

Whether probable cause is an inappropriate standard for public employer searches of their employees' offices presents a more difficult issue. For the most part, we have required that a search be based upon probable cause, but as we noted in *New Jersey* v. *T. L. O.*, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.'" 469 U. S., at 340 (quoting *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 277 (1973) (POWELL, J., concurring)). Thus, "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to

adopt such a standard." 469 U. S., at 341. We have concluded, for example, that the appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied. See *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 320; *Camara* v. *Municipal Court*, 387 U. S., at 538.

As an initial matter, it is important to recognize the plethora of contexts in which employers will have an occasion to intrude to some extent on an employee's expectation of privacy. Because the parties in this case have alleged that the search was either a noninvestigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance, we undertake to determine the appropriate Fourth Amendment standard of reasonableness *only* for these two types of employer intrusions and leave for another day inquiry into other circumstances.

The governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace. Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons. Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. See *Colorado* v. *Bertine*, 479 U. S. 367 (1987); *Illinois* v. *Lafayette*, 462 U. S. 640 (1983). To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons.

We come to a similar conclusion for searches conducted pursuant to an investigation of work-related employee misconduct. Even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." *New Jersey* v. *T. L. O.*, *supra*, at 351 (BLACKMUN, J., concurring in judgment). Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest. See 469 U. S., at 353 ("The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education"). Additionally, while law enforcement officials are expected to "schoo[l] themselves in the niceties of probable cause," *id.*, at 343, no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense. It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of

the probable cause standard. As JUSTICE BLACKMUN observed in *T. L. O.*, "[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *Id.*, at 353. We believe that this observation is an equally apt description of the public employer and supervisors at the Hospital, and we conclude that a reasonableness standard will permit regulation of the employer's conduct "according to the dictates of reason and common sense." *Id.*, at 343.

Balanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy interests of government employees in their place of work which, while not insubstantial, are far less than those found at home or in some other contexts. As with the building inspections in *Camara*, the employer intrusions at issue here "involve a relatively limited invasion" of employee privacy. 387 U. S., at 537. Government offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them at home.

In sum, we conclude that the "special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable," 469 U. S., at 351 (BLACKMUN, J., concurring in judgment), for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. A standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees. We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness

under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable:

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' *Terry* v. *Ohio*, 392 U. S., at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' *ibid.*" *New Jersey* v. *T. L. O.*, *supra*, at 341.

Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. Because petitioners had an "individualized suspicion" of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today. See *New Jersey* v. *T. L. O.*, *supra*, at 342, n. 8. The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." 469 U. S., at 342.

IV

In the procedural posture of this case, we do not attempt to determine whether the search of Dr. Ortega's office and the seizure of his personal belongings satisfy the standard of reasonableness we have articulated in this case. No evidentiary hearing was held in this case because the District Court acted on cross-motions for summary judgment, and granted petitioners summary judgment. The Court of Appeals, on the other hand, concluded that the record in this case justi-

fied granting partial summary judgment on liability to Dr. Ortega.

We believe that both the District Court and the Court of Appeals were in error because summary judgment was inappropriate. The parties were in dispute about the actual justification for the search, and the record was inadequate for a determination on motion for summary judgment of the reasonableness of the search and seizure. Petitioners have consistently attempted to justify the search and seizure as required to secure the state property in Dr. Ortega's office. Mr. Friday testified in a deposition that he had ordered members of the investigative team to "check Dr. Ortega's office out in order to separate the business files from any personal files in order to ascertain what was in his office." App. 50. He further testified that the search was initiated because he "wanted to make sure that we had our state property identified, and in order to provide Dr. Ortega with his property and get what we had out of there, in order to make sure our resident's files were protected, and that sort of stuff." *Id.*, at 51.

In their motion for summary judgment in the District Court, petitioners alleged that this search to secure property was reasonable as "part of the established hospital policy to inventory property within offices of departing, terminated or separated employees." Record Doc. No. 24, p. 9. The District Court apparently accepted this characterization of the search because it applied *Chenkin* v. *Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F. Supp. 207 (SDNY 1979), a case involving a Fourth Amendment challenge to an inspection *policy*. At the time of the search, however, Dr. Ortega had not been terminated, but rather was still on administrative leave, and the record does not reflect whether the Hospital had a policy of inventorying the property of investigated employees. Respondent, moreover, has consistently rejected petitioners' characterization of the search as motivated by a need to secure state property.

Instead, Dr. Ortega has contended that the intrusion was an investigatory search whose purpose was simply to discover evidence that would be of use in administrative proceedings. He has pointed to the fact that no inventory was ever taken of the property in the office, and that seized evidence was eventually used in the administrative proceedings. Additionally, Dr. O'Connor stated in a deposition that one purpose of the search was "to look for contractural *[sic]* and other kinds of documents that might have been related to the issues" involved in the investigation. App. 38.

Under these circumstances, the District Court was in error in granting petitioners summary judgment. There was a dispute of fact about the character of the search, and the District Court acted under the erroneous assumption that the search was conducted pursuant to a Hospital policy. Moreover, no findings were made as to the scope of the search that was undertaken.

The Court of Appeals concluded that Dr. Ortega was entitled to partial summary judgment on liability. It noted that the Hospital had no policy of inventorying the property of employees on administrative leave, but it did not consider whether the search was otherwise reasonable. Under the standard of reasonableness articulated in this case, however, the absence of a Hospital policy did not necessarily make the search unlawful. A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification. Indeed, petitioners have put forward evidence that they had such a reasonable belief; at the time of the search, petitioners knew that Dr. Ortega had removed the computer from the Hospital. The removal of the computer—together with the allegations of mismanagement of the residency program and sexual harassment—may have made the search reasonable at its inception under the standard we have put forth in this case. As with the

District Court order, therefore, the Court of Appeals conclusion that summary judgment was appropriate cannot stand.

On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope.*

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

Although I share the judgment that this case must be reversed and remanded, I disagree with the reason for the reversal given by the plurality opinion, and with the standard it prescribes for the Fourth Amendment inquiry.

To address the latter point first: The plurality opinion instructs the lower courts that existence of Fourth Amendment protection for a public employee's business office is to be assessed "on a case-by-case basis," in light of whether the office is "so open to fellow employees or the public that no expectation of privacy is reasonable." *Ante*, at 718. No clue is provided as to how open "so open" must be; much less

*We have no occasion in this case to reach the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items. Neither the District Court nor the Court of Appeals addressed this issue, and the *amicus curiae* brief filed on behalf of respondent did not discuss the legality of the seizure separate from that of the search. We also have no occasion in this case to address whether qualified immunity should protect petitioners from damages liability under § 1983. See *Davis* v. *Scherer*, 468 U. S. 183 (1984); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). The qualified immunity issue was not raised below and was not addressed by either the District Court or the Court of Appeals. Nor do we address the proper Fourth Amendment analysis for drug and alcohol testing of employees. Finally, we do not address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other nonwork-related statutory or regulatory standards.

is it suggested how police officers are to gather the facts necessary for this refined inquiry. As we observed in *Oliver* v. *United States*, 466 U. S. 170, 181 (1984), "[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." Even if I did not disagree with the plurality as to what result the proper legal standard should produce in the case before us, I would object to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field.

Whatever the plurality's standard means, however, it must be wrong if it leads to the conclusion on the present facts that if Hospital officials had extensive "work-related reasons to enter Dr. Ortega's office" no Fourth Amendment protection existed. *Ante*, at 718. It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded. I think we decided as much many years ago. In *Mancusi* v. *DeForte*, 392 U. S. 364 (1968), we held that a union employee had Fourth Amendment rights with regard to an office at union headquarters that he shared with two other employees, even though we acknowledged that those other employees, their personal or business guests, and (implicitly) "union higher-ups" could enter the office. *Id.*, at 369. Just as the secretary working for a corporation in an office frequently entered by the corporation's other employees is protected against unreasonable searches of that office by the government, so also is the government secretary working in an office frequently entered by other government employees. There is no reason why this

determination that a legitimate expectation of privacy exists should be affected by the fact that the government, rather than a private entity, is the employer. Constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.

I cannot agree, moreover, with the plurality's view that the reasonableness of the expectation of privacy (and thus the existence of Fourth Amendment protection) changes "when an intrusion is by a supervisor rather than a law enforcement official." *Ante*, at 717. The identity of the searcher (police v. employer) is relevant not to whether Fourth Amendment protections apply, but only to whether the search of a protected area is reasonable. Pursuant to traditional analysis the former question must be answered on a more "global" basis. Where, for example, a fireman enters a private dwelling in response to an alarm, we do not ask whether the occupant has a reasonable expectation of privacy (and hence Fourth Amendment protection) vis-à-vis firemen, but rather whether—given the fact that the Fourth Amendment covers private dwellings—intrusion for the purpose of extinguishing a fire is reasonable. Cf. *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978). A similar analysis is appropriate here.

I would hold, therefore, that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter. (The qualifier is necessary to cover such unusual situations as that in which the office is subject to unrestricted public access, so that it is "expose[d] to the public" and therefore "not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U. S. 347, 351 (1967).) Since it is unquestioned that the office here was assigned to Dr. Ortega, and since no special circumstances are suggested that would call for an exception to the ordinary rule, I would

agree with the District Court and the Court of Appeals that Fourth Amendment protections applied.

The case turns, therefore, on whether the Fourth Amendment was violated—*i. e.*, whether the governmental intrusion was reasonable. It is here that the government's status as employer, and the employment-related character of the search, become relevant. While as a general rule warrantless searches are *per se* unreasonable, we have recognized exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . ." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 351 (BLACKMUN, J., concurring in judgment). Such "special needs" are present in the context of government employment. The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the search did not have such a validating purpose, I agree with the plurality that the decision must be reversed and remanded.

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

The facts of this case are simple and straightforward. Dr. Ortega had an expectation of privacy in his office, desk, and file cabinets, which were the target of a search by petitioners that can be characterized only as investigatory in nature. Because there was no "special need," see *New Jersey* v. *T. L. O.*, 469 U. S. 325, 351 (1985) (opinion concurring in judgment), to dispense with the warrant and probable-cause requirements of the Fourth Amendment, I would evaluate the search by applying this traditional standard. Under that

standard, this search clearly violated Dr. Ortega's Fourth Amendment rights.

The problems in the plurality's opinion all arise from its failure or unwillingness to realize that the facts here are clear. The plurality, however, discovers what it feels is a factual dispute: the plurality is not certain whether the search was routine or investigatory. Accordingly, it concludes that a remand is the appropriate course of action. Despite the remand, the plurality assumes it must announce a standard concerning the reasonableness of a public employer's search of the workplace. Because the plurality treats the facts as in dispute, it formulates this standard at a distance from the situation presented by this case.

This does not seem to me to be the way to undertake Fourth Amendment analysis, especially in an area with which the Court is relatively unfamiliar.[1] Because this analysis, when conducted properly, is always fact specific to an extent, it is inappropriate that the plurality's formulation of a standard does not arise from a sustained consideration of a particular factual situation.[2] Moreover, given that *any* standard

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[1] Although there has been some development on these issues in federal courts, see *ante*, at 720–721, this Court has not yet squarely faced them.

[2] It is true that this Court has expressed concern about the workability of "'an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances.'" *Ante*, at 730 (SCALIA, J., concurring in judgment), quoting *Oliver* v. *United States*, 466 U. S. 170, 181 (1984). Given, however, the number and types of workplace searches by public employers that can be imagined—ranging all the way from the employer's routine entry for retrieval of a file to a planned investigatory search into an employee's suspected criminal misdeeds—development of a jurisprudence in this area might well require a case-by-case approach. See *California* v. *Carney*, 471 U. S. 386, 400 (1985) (STEVENS, J., dissenting) ("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication"); *New Jersey* v. *T. L. O.*, 469 U. S. 325, 366–367 (1985) (BRENNAN, J., concurring in part and dissenting in part) ("I would not think it necessary to develop a single standard to govern all school searches, any more than traditional Fourth Amendment law applies even the probable-cause standard

ultimately rests on judgments about factual situations, it is apparent that the plurality has assumed the existence of hypothetical facts from which its standard follows. These "assumed" facts are weighted in favor of the public employer,[3] and, as a result, the standard that emerges makes reasonable almost any workplace search by a public employer.

I

It is necessary to review briefly the factual record in this case because of the plurality's assertion, *ante*, at 728, that

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to *all* searches and seizures" (emphasis in original)). Under a case-by-case approach, a rule governing a particular type of workplace search, unlike the standard of the plurality here, should emerge from a concrete set of facts and possess the precision that only the exploration of "every aspect of a multifaced situation embracing conflicting and demanding interests" can produce. See *United States* v. *Fruehauf*, 365 U. S. 146, 157 (1961). The manner in which the plurality arrives at its standard, it seems to me, thus not only harms Dr. Ortega and other public employees, but also does a disservice to Fourth Amendment analysis.

[3] It could be argued that the plurality removes its analysis from the facts of this case in order to arrive at a result unfavorable to public employees, whose position members of the plurality do not look upon with much sympathy. As Justice Cardozo long ago explained, judges are never free from the feelings of the times or those emerging from their own personal lives:

"I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." B. Cardozo, The Nature of the Judicial Process 167 (1921).

It seems to me that whenever, as here, courts fail to concentrate on the facts of a case, these predilections inevitably surface, no longer held in check by the "discipline" of the facts, and shape, more than they ever should and even to an extent unknown to the judges themselves, any legal standard that is then articulated. This, I believe, is the central problem of the opinion of the plurality and, indeed, of the concurrence.

"[t]here was a dispute of fact about the character of the search." The plurality considers it to be either an inventory search to secure government property or an investigative search to gather evidence concerning Dr. Ortega's alleged misdeeds. *Ante*, at 727–728. It is difficult to comprehend how, on the facts of this case, the search in any way could be seen as one for inventory purposes. As the plurality concedes, the search could not have been made pursuant to the Hospital's policy of routinely inventorying state property in an office of a terminated employee, because at the time of the search Dr. Ortega was on administrative leave and had not been terminated. *Ante*, at 712–713.[4] Napa had no policy of inventorying the office of an employee placed on administrative leave. *Ante*, at 713.

The plurality, however, observes that the absence of the policy does not dispositively eliminate inventorying or securing state property as a possible purpose for conducting the search. *Ante*, at 728. As evidence suggesting such a purpose, the plurality points to petitioners' concern that Dr. Ortega may have removed from the Hospital's grounds a computer owned by the Hospital and to their desire to secure such items as files located in Dr. Ortega's office. See *ante*, at 727–728.

The record evidence demonstrates, however, that ensuring that the computer had not been removed from the Hospital was not a reason for the search. Mr. Friday, the leader of the "investigative team," stated that the alleged removal of the computer had nothing to do with the decision to enter Dr. Ortega's office. App. 59. Dr. O'Connor himself admitted that there was little connection between the entry and an at-

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[4] The plurality is correct in pointing out that the District Court erred in its conclusion that there was a Hospital policy that would have justified this search. *Ante*, at 728. This was not the only error on the District Court's part. That court also concluded that Dr. Ortega was notified of the search and could have participated in it, see App. 23, a conclusion at odds with the record, see *id.*, at 24, 40.

tempt by petitioners to ascertain the location of the computer. *Id.*, at 39. The search had the computer as its focus only insofar as the team was investigating practices dealing with its acquisition. *Id.*, at 32.

In deposition testimony, petitioners did suggest that the search was inventory in character insofar as they aimed to separate Dr. Ortega's personal property from Hospital property in the office. *Id.*, at 38, 40, 50. Such a suggestion, however, is overwhelmingly contradicted by other remarks of petitioners and particularly by the character of the search itself. Dr. O'Connor spoke of the individuals involved in the search as "investigators," see *id.*, at 37, and, even where he described the search as inventory in nature, he observed that it was aimed primarily at furthering investigative purposes. See, *e. g.*, *id.*, at 40 ("Basically what we were trying to do is to remove what was obviously State records or records that had to do with his program, his department, any of the materials that would be involved in running the residency program, around contracts, around the computer, around the areas that we were interested in investigating"). Moreover, as the plurality itself recognizes, *ante*, at 713–714, the "investigators" never made a formal inventory of what they found in Dr. Ortega's office. Rather, they rummaged through his belongings and seized highly personal items later used at a termination proceeding to impeach a witness favorable to him. *Ibid.* Furthermore, the search was conducted in the evening, App. 53, and it was undertaken only after the investigators had received legal advice, *id.*, at 51.

The search in question stemmed neither from a Hospital policy nor from a practice of routine entrances into Dr. Ortega's office. It was plainly exceptional and investigatory in nature. Accordingly, there is no significant factual dispute in this case.

II

Before examining the plurality's standard of reasonableness for workplace searches, I should like to state both my

agreement and disagreement with the plurality's discussion of a public employee's expectation of privacy. What is most important, of course, is that in this case the plurality acknowledges that Dr. Ortega had an expectation of privacy in his desk and file cabinets, *ante*, at 719, and that, as the plurality concedes, *ante*, at 718, the majority of this Court holds that he had a similar expectation in his office. With respect to the plurality's general comments, I am in complete agreement with its observation that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Ante*, at 717. Moreover, I would go along with the plurality's observation that, in certain situations, the "operational realities" of the workplace may remove some expectation of privacy on the part of the employee. *Ibid.* However, I am disturbed by the plurality's suggestion, see *ante*, at 717–718, that routine entries by visitors might completely remove this expectation.

First, this suggestion is contrary to the traditional protection that this Court has recognized the Fourth Amendment accords to offices. See *Oliver* v. *United States*, 466 U. S. 170, 178, n. 8 (1984) ("The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment"); *Hoffa* v. *United States*, 385 U. S. 293, 301 (1966) ("What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile"). The common understanding of an office is that it is a place where a worker receives an occasional business-related visitor. Thus, when the office has received traditional Fourth Amendment protection in our cases, it has been with the understanding that such routine visits occur there.

Moreover, as the plurality appears to recognize, see *ante*, at 717–718, the precise extent of an employee's expectation of privacy often turns on the nature of the search. This observation is in accordance with the principle that the Fourth Amendment may protect an individual's expectation of privacy in one context, even though this expectation may be unreasonable in another. See *New Jersey* v. *T. L. O.*, 469 U. S., at 339. See also *Lo–Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 329 (1979) (the opening of a retail store to the public does not mean that "it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees"). As JUSTICE SCALIA observes, "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Ante*, at 731. Thus, although an employee might well have no reasonable expectation of privacy with respect to an occasional visit by a fellow employee, he would have such an expectation as to an afterhours search of his locked office by an investigative team seeking materials to be used against him at a termination proceeding.[5]

[5] This common-sense notion that public employees have some expectation of privacy in the workplace, particularly with respect to private documents or papers kept there, was exemplified by recent remarks of the Attorney General. In responding to questions concerning the possibility of a search and seizure of papers and offices of Government employees in connection with an investigation into allegedly illegal diversion of funds to Central American recipients, he is reported to have stated: "I'm not sure we would have any opportunity or any legal right to get into those personal papers. . . . There was certainly no evidence of any criminality that would have supported a search warrant at that time. . . . I don't think public employees' private documents belong to the Government." N. Y. Times, Dec. 3, 1986, p. A11, col. 3.

Moreover, courts have recognized that a public employee has a legitimate expectation of privacy as to an employer's search and seizure at the workplace. See, *e. g.*, *Gillard* v. *Schmidt*, 579 F. 2d 825, 829 (CA3 1978) (search of desk); *United States* v. *McIntyre*, 582 F. 2d 1221, 1224 (CA9 1978) (monitoring conversations at office desk). But see *Williams* v. *Col-*

Finally and most importantly, the reality of work in modern time, whether done by public or private employees, reveals why a public employee's expectation of privacy in the workplace should be carefully safeguarded and not lightly set aside. It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work. See R. Kanter, Work and Family in the United States: A Critical Review and Agenda for Research and Policy 31–32 (1977); see also R. Bellah, R. Madsen, W. Sullivan, A. Swidler, & S. Tipton, Habits of the Heart: Individualism and Commitment in American Life 288–289 (1985) (a "less frantic concern for advancement and a reduction of working hours" would make it easier for both men and women to participate fully in working and family life). Consequently, an employee's private life must intersect with the workplace, for example, when the employee takes advantage of work or lunch breaks to make personal telephone calls, to attend to personal business, or to receive personal visitors in the office. As a result, the tidy distinctions (to which the plurality alludes, see *ante*, at 715–716) between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality.[6] Not all of an employee's pri-

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lins, 728 F. 2d 721, 728 (CA5 1984) (search of desk). In some cases, courts have decided that an employee had no such expectation with respect to a workplace search because an established regulation permitted the search. See *United States* v. *Speights*, 557 F. 2d 362, 364–365 (CA3 1977) (describing cases); *United States* v. *Donato*, 269 F. Supp. 921 (ED Pa.), aff'd, 379 F. 2d 288 (CA3 1967) (Government regulation notified employees that lockers in the United States Mint were not to be viewed by employees as private lockers). The question of such a search pursuant to regulations is not now before this Court.

[6] Perhaps the greatest sign of the disappearance of the distinction between work and private life is the fact that women—the traditional representatives of the private sphere and family life—have entered the

vate possessions will stay in his or her briefcase or handbag. Thus, the plurality's remark that the "employee may avoid exposing personal belongings at work by simply leaving them at home," *ante*, at 725, reveals on the part of the Members of the plurality a certain insensitivity to the "operational realities of the workplace," *ante*, at 717, they so value.[7]

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work force in increasing numbers. See BNA Special Report, Work & Family: A Changing Dynamic, 1, 3, 13–15 (1986). It is therein noted:

"The myth of 'separate worlds'—one of work and the other of family life—long harbored by employers, unions, and even workers themselves has been effectively laid to rest. Their inseparability is undeniable, particularly as two-earner families have become the norm where they once were the exception and as a distressing number of single parents are required to raise children on their own. The import of work-family conflicts—for the family, for the workplace, and, indeed, for the whole of society—will grow as these demographic and social transformations in the roles of men and women come to be more fully clarified and appreciated." *Id.*, at 217 (remarks of Professor Phyllis Moen).

As a result of this disappearance, moreover, the employee must attempt to maintain the difficult balance between work and personal life. *Id.*, at 227 (remarks of Barney Olmsted and Suzanne Smith).

[7] I am also troubled by the plurality's implication that a public employee is entitled to a lesser degree of privacy in the workplace because the public agency, not the employee, *owns* much of what constitutes the workplace. This implication emerges in the distinction the plurality draws between the workplace "context," which includes "the hallways, cafeteria, offices, desks, and file cabinets," and an employee's "closed personal luggage, a handbag, or a briefcase." *Ante*, at 715–716. This Court, however, has made it clear that privacy interests protected by the Fourth Amendment do not turn on ownership of particular premises. See, *e. g.*, *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978) ("[T]he protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Katz* v. *United States*, 389 U. S. 347, 353 (1967) (Fourth Amendment protects people and not simply "areas"). To be sure, the public employer's ownership of the premises is relevant in determining an employee's expectation of privacy, for often it is the main reason for the routine visits into an employee's office. The employee is assigned an office for work purposes; it is expected that the employee will receive work-related visitors and that the employer will main-

Dr. Ortega clearly had an expectation of privacy in his office, desk, and file cabinets, particularly with respect to the type of investigatory search involved here. In my view, when examining the facts of other cases involving searches of the workplace, courts should be careful to determine this expectation also in relation to the search in question.

III

A

At the outset of its analysis, the plurality observes that an appropriate standard of reasonableness to be applied to a public employer's search of the employee's workplace is arrived at from "balancing" the privacy interests of the employee against the public employer's interests justifying the intrusion. *Ante*, at 719–720. Under traditional Fourth Amendment jurisprudence, however, courts abandon the warrant and probable-cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . ." *New Jersey* v. *T. L. O.*, 469 U. S., at 351 (opinion concurring in judgment); see *United States* v. *Place*, 462 U. S. 696, 721–722, and n. 1 (1983) (opinion concurring in judgment). In sum, only when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a "balancing" test to formulate a standard of reasonableness for this context.

In *New Jersey* v. *T. L. O.*, *supra*, I faulted the Court for neglecting this "crucial step" in Fourth Amendment analysis. See 469 U. S., at 351. I agreed, however, with the *T. L. O.* Court's standard because of my conclusion that this step, had

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tain the office. This fact of ownership, however, like the routine visits, does not abrogate the employee's expectation of privacy.

it been taken, would have revealed that the case presented a situation of "special need." *Id.*, at 353. I recognized that discipline in this country's secondary schools was essential for the promotion of the overall goal of education, and that a teacher could not maintain this discipline if, every time a search was called for, the teacher would have to procure a warrant based on probable cause. *Id.*, at 352–353. Accordingly, I observed: "The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirements, and in applying a standard determined by balancing the relevant interests." *Id.*, at 353.

The plurality repeats here the *T. L. O.* Court's error in analysis. Although the plurality mentions the "special need" step, *ante*, at 720, it turns immediately to a balancing test to formulate its standard of reasonableness. This error is significant because, given the facts of this case, no "special need" exists here to justify dispensing with the warrant and probable-cause requirements. As observed above, the facts suggest that this was an investigatory search undertaken to obtain evidence of charges of mismanagement at a time when Dr. Ortega was on administrative leave and not permitted to enter the Hospital's grounds. There was no special practical need that might have justified dispensing with the warrant and probable-cause requirements. Without sacrificing their ultimate goal of maintaining an effective institution devoted to training and healing, to which the disciplining of Hospital employees contributed, petitioners could have taken any evidence of Dr. Ortega's alleged improprieties to a magistrate in order to obtain a warrant.

Furthermore, this seems to be exactly the kind of situation where a neutral magistrate's involvement would have been helpful in curtailing the infringement upon Dr. Ortega's privacy. See *United States* v. *United States District Court*,

407 U. S. 297, 317 (1972) ("The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech"). Petitioners would have been forced to articulate their exact reasons for the search and to specify the items in Dr. Ortega's office they sought, which would have prevented the general rummaging through the doctor's office, desk, and file cabinets. Thus, because no "special need" in this case demanded that the traditional warrant and probable-cause requirements be dispensed with, petitioners' failure to conduct the search in accordance with the traditional standard of reasonableness should end the analysis, and the judgment of the Court of Appeals should be affirmed.

B

Even were I to accept the proposition that this case presents a situation of "special need" calling for an exception to the warrant and probable-cause standard, I believe that the plurality's balancing of the public employer's and the employee's respective interests to arrive at a different standard is seriously flawed. Once again, the plurality fails to focus on the facts. Instead, it arrives at its conclusion on the basis of "assumed" facts. First, sweeping with a broad brush, the plurality announces a rule that dispenses with the warrant requirement in every public employer's search of an employee's office, desk, or file cabinets because it "would seriously disrupt the routine conduct of business and would be unduly burdensome." *Ante*, at 722. The plurality reasons that a government agency could not conduct its work in an efficient manner if an employer needed a warrant for every routine entry into an employee's office in search of a file or correspondence, or for every investigation of suspected employee misconduct. In addition, it argues that the warrant requirement, if imposed on an employer who would be unfamiliar with this procedure, would prove "unwieldy." *Ibid.*

The danger in formulating a standard on the basis of "assumed" facts becomes very clear at this stage of the plurality's opinion. Whenever the Court has arrived at a standard of reasonableness other than the warrant and probable-cause requirements, it has first found, through analysis of a factual situation, that there is a nexus between this other standard, the employee's privacy interests, and the government purposes to be served by the search. Put another way, the Court adopts a new standard only when it is satisfied that there is no alternative in the particular circumstances.[8] In *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968), the Court concluded that, as a practical matter, brief, on-the-spot stops of individuals by police officers need not be subject to a warrant. Still concerned, however, with the import of the warrant requirement, which provides the "neutral scrutiny of a judge," *id.*, at 21, the Court weighed in detail the law enforcement and the suspect's interests in the circumstances of the protective search. The resulting standard constituted the equivalent of the warrant: judging the officer's behavior from a reasonable or objective standard, *id.*, at 21, 27. In *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), on the other hand, the Court declined to abandon the warrant as a standard in the case of a municipal health inspection in light of the interests of the target of the health investigation and those of the government in enforcing health standards. *Id.*, at 532–533.

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[8] This part of the analysis is related to the "special need" step. Courts turn to the balancing test only when they conclude that the traditional warrant and probable-cause requirements are not a practical alternative. Through the balancing test, they then try to identify a standard of reasonableness, other than the traditional one, suitable for the circumstances. The warrant and probable-cause requirements, however, continue to serve as a model in the formulation of the new standard. It is conceivable, moreover, that a court, having initially decided that it is faced with a situation of "special need" that calls for balancing, may conclude after application of the balancing test that the traditional standard is a suitable one for the context after all.

A careful balancing with respect to the warrant requirement is absent from the plurality's opinion, an absence that is inevitable in light of the gulf between the plurality's analysis and any concrete factual setting. It is certainly correct that a public employer cannot be expected to obtain a warrant for every routine entry into an employee's workplace.[9] This situation, however, should not justify dispensing with a warrant in *all* searches by the employer. The warrant requirement is perfectly suited for many work-related searches, including the instant one.[10] Moreover, although the plurality abandons the warrant requirement, it does not explain what it will substitute or how the standard it adopts retains anything of the normal "neutral scrutiny of the judge."[11] In sum, the plurality's general result is preordained because, cut off from a particular factual setting, it cannot make the necessary distinctions among types of searches, or formulate an alternative to the warrant requirement that derives from a precise weighing of competing interests.

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[9] In some workplace investigations, the particular goals of the government agency coupled with a need for special employee discipline may justify dispensing with the warrant requirement. See, *e. g.*, *Security and Law Enforcement Employees, Dist. Council 82, American Federation of State, County and Municipal Employees, AFL–CIO* v. *Carey*, 737 F. 2d 187, 203–204 (CA2 1984) (government interest in maintaining security of a correctional facility justifies strip searches of correctional officers, in certain circumstances, in absence of a warrant).

[10] While the warrant requirement might be "unwieldy" for public employers if it was required for every workplace search, the plurality has failed to explain why, on the facts of this case, obtaining a warrant would have been burdensome for petitioners, even if one assumes that they were unfamiliar with this requirement. In fact, the opposite seems true. Moreover, contrary to the plurality's suggestion, see *ante*, at 722, the warrant requirement is not limited to the criminal context. See *Camara* v. *Municipal Court*, 387 U. S. 523, 530–531 (1967).

[11] The plurality adopts a "standard of reasonableness under all the circumstances." *Ante*, at 725–726. It fails completely to suggest how this standard captures any of the protection of the traditional warrant requirement; indeed, the standard appears to be simply an alternative to probable cause.

When the plurality turns to the balancing that will produce an alternative to probable cause, it states that it is limiting its analysis to the two situations arguably presented by the facts of this case—the "noninvestigatory work-related intrusion" (*i. e.*, inventory search) and the "investigatory search for evidence of suspected work-related employee misfeasance" (*i. e.*, investigatory search). *Ante*, at 723. This limitation, however, is illusory. The plurality describes these searches in such a broad fashion that it is difficult to imagine a search that would *not* fit into one or the other of the categories. Moreover, it proposes the *same* standard, one taken from *New Jersey* v. *T. L. O.*, for both inventory and investigatory searches. See *ante*, at 725–726. Therefore, in the context of remanding a case because the facts are unclear, the plurality is announcing a standard to apply to *all* public employer searches.

Moreover, the plurality also abandons any effort at careful balancing in arriving at its substitute for probable cause. Just as the elimination of the warrant requirement requires some nexus between its absence, the employee's privacy interests, and the government interests to be served by the search, so also does the formulation of a standard less than probable cause for a particular search demand a similar connection between these factors. See, *e. g.*, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975). The plurality's discussion of investigatory searches reveals no attempt to set forth the appropriate nexus.[12] It is certainly true, as the plurality observes, that a public employer has an interest in eliminating incompetence and work-related misconduct in order to enable the government agency to accomplish its tasks in an efficient manner. It is also conceivable that a public employee's privacy interests are somewhat limited in the workplace, although, as noted above, not to the extent suggested by the plurality. The plurality, however, fails to

[12] The same holds true for the plurality's discussion of inventory searches.

explain why the balancing of these interests *necessarily* leads to the standard borrowed from *New Jersey* v. *T. L. O.*, as opposed to other imaginable standards. Indeed, because the balancing is simply asserted rather than explicated,[13] the plurality never really justifies why probable cause, characterized by this Court as a "practical, nontechnical conception," *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949), would not protect adequately the public employer's interests in the situation presented by this case. See *New Jersey* v. *T. L. O.*, 469 U. S., at 363–364 (BRENNAN, J., concurring in part and dissenting in part).[14]

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[13] The plurality's attempt at explication consists of little more than a series of assertions: that the probable-cause requirement "would impose intolerable burdens on public employers"; that the delay caused by such a requirement would result in "tangible and often irreparable damage" to a government agency; and that public employers cannot be expected "to learn the subtleties of the probable cause standard." See *ante*, at 724–725. Such assertions cannot pass for careful balancing on the facts of this case, given that the search was conducted during Dr. Ortega's administrative leave from the Hospital, with the advice of counsel, and by an investigating party that included a security officer. My observation that a particular Fourth Amendment standard of reasonableness should be developed from a specific context bears repeating here.

[14] Even if I believed that this case were an appropriate vehicle for development of a standard on public-employer searches, I would fault the plurality for its failure to give much substance to the standard it has borrowed almost verbatim from *New Jersey* v. *T. L. O.* See *ante*, at 714–715. The *T. L. O.* Court described in some detail the substance of its test, which was tailored to the circumstances of the case before it and thus is not directly transferable from the halls of a high school to the offices of government. In any event, were I to apply the rather stark standard of reasonableness announced by the plurality, I would conclude that petitioners here did not satisfy it. Assuming, without deciding, that petitioners had an individualized suspicion that Dr. Ortega was mismanaging the psychiatric residency program, I believe the scope of the search was not reasonably related to this concern. If petitioners were truly in search of evidence of respondent's mismanagement, it is difficult to understand why they looked through the personal belongings of Dr. Ortega, a search that resulted in the seizure of a Valentine's Day card, a photograph, and a book of poetry, which could have no conceivable relation to the claimed purpose of the search. Although, in

IV

I have reviewed at too great length the plurality's opinion because the question of public employers' searches of their employees' workplaces, like any relatively unexplored area of Fourth Amendment law, demands careful analysis. These searches appear in various factual settings, some of which courts are only now beginning to face, and present different problems.[15] Accordingly, I believe that the Court should examine closely the practical realities of a particular situation and the interests implicated there before replacing the traditional warrant and probable-cause requirements with some other standard of reasonableness derived from a balancing test. The Fourth Amendment demands no less. By ignoring the specific facts of this case, and by announcing in the abstract a standard as to the reasonableness of an employer's workplace searches, the plurality undermines not only the Fourth Amendment rights of public employees but also any further analysis of the constitutionality of public employer searches.

I respectfully dissent.

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the plurality's view, the seizure of these items is not an issue in this case, see *ante*, at 729, n., I would think that this seizure is relevant to determining the reasonableness of the scope of the search. Accordingly, under the plurality's own standard, this search was unreasonable.

[15] One example is the Fourth Amendment problem associated with drug and alcohol testing of employees. See, *e. g.*, *Shoemaker* v. *Handel*, 795 F. 2d 1136, 1141–1143 (CA3) (administrative-search exception extended to warrantless breath and urine testing of jockeys, given the heavily regulated nature of the horse-racing industry), cert. denied, 479 U. S. 986 (1986); *National Treasury Employees Union* v. *Von Raab*, 649 F. Supp. 380 (ED La. 1986) (wide-scale urinalysis of United States Customs Service employees without probable cause or reasonable suspicion struck down as violative of the Fourth Amendment).

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 748 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 2 THROUGH MARCH 30, 1987

Appeals Dismissed

No. 86–1135. CORY *v.* VIRGINIA. Appeal from Ct. App. Va. dismissed for want of substantial federal question.

No. 86–1175. THOMPSON *v.* STEPHENS, CHIEF JUSTICE, KENTUCKY SUPREME COURT, ET AL. Appeal from Sup. Ct. Ky. dismissed for want of jurisdiction.

No. 86–5829. KISSNER *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Reported below: 390 N. W. 2d 58.

No. 86–6156. PETERS *v.* MCCUTCHEON ET AL. Appeal from D. C. S. C. dismissed for want of jurisdiction.

No. 86–6320. ZERMAN *v.* WOLOFSKY ET AL. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 86–839. BEHNING ET UX. *v.* CAMELBACK SKI CORP. Ct. App. Md. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Asahi Metal Industry Co.* v. *Superior Court of California*, *ante*, p. 102. Reported below: 307 Md. 270, 513 A. 2d 874.

No. 86–1050. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* MILLER ET AL. C. A. 11th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pennsylvania* v. *Ritchie*, *ante*, p. 39. Reported below: 798 F. 2d 426.

*Miscellaneous Orders**

No. — — ——. HACKER *v.* UNITED STATES;

No. — — ——. HENRY *v.* MINNESOTA PUBLIC UTILITIES COMMISSION; and

No. — — ——. STEVENS ET AL. *v.* BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA. Motions to direct the Clerk to file the petitions for writs of certiorari out of time denied.

No. A–597 (86–6367). IN RE GRAY. Super. Ct. D. C. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–568. IN RE DISBARMENT OF MOUNTAIN. Disbarment entered. [For earlier order herein, see 478 U. S. 1037.]

No. D–594. IN RE DISBARMENT OF CERAME. Disbarment entered. [For earlier order herein, see 479 U. S. 1003.]

No. D–608. IN RE DISBARMENT OF SHARE. It is ordered that Benjamin D. Share, of Harrisburg, 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–609. IN RE DISBARMENT OF CONNOLLY. It is ordered that Daniel Joseph Connolly, of Concord, N. H., 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–610. IN RE DISBARMENT OF LOPEZ. It is ordered that Vincent Cabrera Lopez, 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–611. IN RE DISBARMENT OF BRICKLE. It is ordered that Thomas C. Brickle, of Fond du Lac, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable

*For the Court's orders prescribing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims, see *post*, p. 955; and amendments to the Federal Rules of Evidence, see *post*, p. 1025.

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of city of Alamogordo, N. M., et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. [For earlier order herein, see, *e. g.*, 479 U. S. 1078.]

No. 106, Orig. ILLINOIS *v.* KENTUCKY. It is ordered that the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 479 U. S. 879.]

No. 84–1602. ANDERSON ET AL. *v.* LIBERTY LOBBY, INC., ET AL., 477 U. S. 242. Motion of respondents to retax costs denied. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 86–44. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. [Certiorari granted, 479 U. S. 812.] Motion of Stephen Null for leave to file a brief as *amicus curiae* out of time denied.

No. 86–246. SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* SHUMAN. C. A. 9th Cir. [Certiorari granted, 479 U. S. 948.] Motions of Center for Constitutional Rights et al. and Johnny Harris et al. for leave to file briefs as *amici curiae* granted.

No. 86–281. RAY *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 479 U. S. 960.] Further consideration of motion of the Solicitor General to vacate judgment deferred to hearing of case on the merits.

No. 86–509. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GILLIARD ET AL.; and

No. 86–564. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL. *v.* GILLIARD ET AL. D. C. W. D. N. C. [Probable jurisdiction noted, 479 U. S. 1004.] Motion of the Solicitor General for divided argument granted.

No. 86–595. UNITED STATES *v.* FAUSTO. C. A. Fed. Cir. Motion of respondent to amend the question presented denied. Motion of respondent to file a brief *pro se* granted. Motion of respondent to present oral argument *pro se* denied. John M. Nannes, Esquire, of Washington, D. C., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 86–935. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* PUBLIC EMPLOYMENT RELATIONS BOARD ET AL. Appeal from Ct. App. Cal., 1st App. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 86–1145. PATRICK *v.* BURGET ET AL. C. A. 9th Cir. Motion of Joint Commission on Accreditation of Hospitals et al. for leave to file a brief as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE BLACKMUN took no part in the consideration or decision of these orders.

No. 86–6296. LAMBERT *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. C. A. 6th Cir. Motion of petitioner to consolidate this case with No. 86–327, *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs* [certiorari granted, 479 U. S. 1029], denied.

Probable Jurisdiction Noted or Postponed

No. 86–1042. CITY OF LAKEWOOD *v.* PLAIN DEALER PUBLISHING CO. Appeal from C. A. 6th Cir. Probable jurisdiction noted. Reported below: 794 F. 2d 1139.

No. 86–753. PENNELL ET AL. *v.* CITY OF SAN JOSE ET AL. Appeal from Sup. Ct. Cal. Motions of California Association of Realtors, Pacific Legal Foundation, and California Apartment Association for leave to file briefs as *amici curiae* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 42 Cal. 3d 365, 721 P. 2d 1111.

Certiorari Granted

No. 86–714. WESTFALL ET AL. *v.* ERWIN ET UX. C. A. 11th Cir. Certiorari granted. Reported below: 785 F. 2d 1551.

No. 86–939. ETSI PIPELINE PROJECT *v.* MISSOURI ET AL.; and No. 86–941. HODEL, SECRETARY OF THE INTERIOR, ET AL. *v.* MISSOURI ET AL. C. A. 8th Cir. Motion of petitioner in No. 86–939 to substitute ETSI Pipeline Project as petitioner in place of Energy Transportation Systems Inc. granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 787 F. 2d 270.

Certiorari Denied. (See also No. 86–6320, *supra.*)

No. 85–6828. KNIGHT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 139 Ill. App. 3d 188, 486 N. E. 2d 1356.

No. 86–562. THOMPSON ET AL. *v.* KENNICKELL. C. A. D. C. Cir. Certiorari denied. Reported below: 254 U. S. App. D. C. 348, 797 F. 2d 1015.

No. 86–603. ABELS ET AL. *v.* MONROE COUNTY EDUCATION ASSN. Ct. App. Ind. Certiorari denied. Reported below: 489 N. E. 2d 533.

No. 86–611. CATERINO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 794 F. 2d 1.

No. 86–887. PASSAGE ET AL. *v.* PRUDENTIAL-BACHE SECURITIES, INC., ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 223 Mont. 60, 727 P. 2d 1298.

No. 86–904. TRAINER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 800 F. 2d 1086.

No. 86–922. RAND ET AL. *v.* ANACONDA-ERICSSON, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 86–977. THOMAS *v.* RHODES. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 701 S. W. 2d 943.

No. 86–985. GOLETA WATER DISTRICT ET AL. *v.* MCMILLAN ET UX.; and

No. 86–1150. MCMILLAN ET UX. *v.* GOLETA WATER DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1453.

No. 86–1014. ARACE BROTHERS ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–1062. DREYER *v.* ARCO CHEMICAL CO. C. A. 3d Cir. Certiorari denied. Reported below: 801 F. 2d 651.

No. 86–1074. EASTMAN ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 471.

No. 86–1077. BATTERY WORLD, INC., ET AL. *v.* EXIDE CORP. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 86–1129. EVANS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 703.

No. 86–1133. TENNECO OIL CO. *v.* KERN OIL & REFINING CO. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 1380.

No. 86–1137. PERLMAN *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 801 F. 2d 262.

No. 86–1147. LAWNDALE MEDICAL SUPPLY, INC., ET AL. *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF THE STATE OF ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 144 Ill. App. 3d 1172, 510 N. E. 2d 1329.

No. 86–1148. HOGAN *v.* MYRTLE SPRINGS REVERTED INDEPENDENT SCHOOL DISTRICT ET AL. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 705 S. W. 2d 707.

No. 86–1156. RHODEN *v.* LITTLES. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1418.

No. 86–1167. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 800 F. 2d 704.

No. 86–1169. ROSANO *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 800 F. 2d 1126.

No. 86–1173. ELIAS *v.* ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied. Reported below: 114 Ill. 2d 321, 499 N. E. 2d 1327.

No. 86–1203. PITTS *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 789.

No. 86–1212. WHITEHEAD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 803 F. 2d 1184.

No. 86–1241. RUDELL ET AL. *v.* COMPREHENSIVE ACCOUNTING CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 802 F. 2d 926.

No. 86–1244. GOLDEN *v.* DUPNIK, SHERIFF, PIMA COUNTY, ARIZONA (ARIZONA, REAL PARTY IN INTEREST). Ct. App. Ariz. Certiorari denied. Reported below: 151 Ariz. 227, 726 P. 2d 1096.

No. 86–1249. KARLIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 785 F. 2d 90.

No. 86–1254. SAUSSY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 849.

No. 86–1264. MAULL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 806 F. 2d 1340.

No. 86–1268. STELLY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE (two cases). C. A. 5th Cir. Certiorari denied. Reported below: 804 F. 2d 868 (first case); 804 F. 2d 872 (second case).

No. 86–1275. DICKIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 802 F. 2d 453.

No. 86–5579. LOGAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 117 Ill. App. 3d 753, 453 N. E. 2d 1317.

No. 86–5827. BUENO-HERNANDEZ *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 724 P. 2d 1132.

No. 86–5861. MUNGO *v.* DREWES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 394.

No. 86–5926. GRESCHNER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 802 F. 2d 373.

No. 86–5964. NELSON *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 795 F. 2d 636.

No. 86–5986. MATARESE *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTION FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 98.

No. 86–5987. RODRIGUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 803 F. 2d 318.

No. 86–5992. COLEMAN *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–5993. CUEVAS *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 586.

No. 86–6062. STRAUDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 802 F. 2d 778.

No. 86–6076. COURTNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 1068.

No. 86–6125. THOMPSON *v.* OLSON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 798 F. 2d 552.

No. 86–6154. TOWNSEND *v.* FOLTZ, ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1036.

No. 86–6160. HAINES *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY AT SOLEDAD. C. A. 9th Cir. Certiorari denied. Reported below: 801 F. 2d 399.

No. 86–6164. DIXON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 86–6166. GARCIA *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–6167. AL-JAAMI *v.* HARRISON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 456.

No. 86-6168. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 266.

No. 86-6173. TODD *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 86-6176. WALTER *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 802 F. 2d 453.

No. 86-6177. SMALL *v.* BARKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 395.

No. 86-6187. OLIVERI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 61.

No. 86-6192. GIAVASIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1037.

No. 86-6218. JONES *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC CLASSIFICATION CENTER AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 805 F. 2d 1125.

No. 86-6229. COMBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 203.

No. 86-6244. HOWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 801 F. 2d 400.

No. 86-6250. ANDREWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 1515.

No. 86-6259. MCCUBBINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 797 F. 2d 979.

No. 86-6317. MCNEILL *v.* SCULLY, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 802 F. 2d 443.

No. 86-6329. BROWN *v.* GEARINGER, SUPERINTENDENT, MEN'S CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1042.

No. 86-832. BOLDEN, WARDEN *v.* MERLO. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 801 F. 2d 252.

No. 86-1064. CUOMO, GOVERNOR OF NEW YORK, ET AL. *v.* KOEHLER, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 2d Cir. Motion of inmate respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 803 F. 2d 46.

No. 86-1159. TCI CABLEVISION, INC., ET AL. *v.* CENTRAL TELECOMMUNICATIONS, INC. C. A. 8th Cir. Motion of Media Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 800 F. 2d 711.

No. 86-5867. CALHOUN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 306 Md. 692, 511 A. 2d 461.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Maryland's capital sentencing statute provides that, "[i]f [the sentencing jury] finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death." Md. Ann. Code, Art. 27, § 413(h)(2) (1957). The trial court's jury instruction in this case similarly stated: "If you find that the mitigating factors do not by a preponderance of the evidence outweigh the aggravating factors, then you mark that accordingly and proceed to Section 4 and enter a sentence of death." 306 Md. 692, 698, 511 A. 2d 461, 464 (1986). Once again the Maryland Court of Appeals has reviewed the statute and jury instruction and has concluded that defendant was not assigned the burden of proof during his sentencing proceeding, even though neither the statute nor the instruction otherwise expressly addressed the placement of this burden.

> "[I]t is plain that any rational juror would understand the language of § 413(h) and [this instruction] as placing the burden of persuasion on the accused. Indeed, I cannot imagine any other way to read the statute that does not completely ignore its words. No fair-minded juror could have understood from these instructions that the burden was upon the State to

prove by a preponderance of the evidence that aggravating circumstances must outweigh mitigating circumstances before a sentence of death could be returned." *Huffington* v. *Maryland*, 478 U. S. 1023, 1027 (1986) (MARSHALL, J., dissenting from denial of certiorari).

I adhere to my belief that the Maryland statute, as written, and as applied, unconstitutionally places the burden of proof on capital defendants at the sentencing phase of their trials. I would grant the petition for certiorari.

No. 86–5965. MORGAN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 255 U. S. App. D. C. 231, 801 F. 2d 445.

No. 86–5991. MULLIGAN *v.* KEMP, WARDEN. C. A. 11th Cir.; and

No. 86–6094. TUCKER *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: No. 86–5991, 771 F. 2d 1436; No. 86–6094, 802 F. 2d 1293.

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. 86–6204. MCMURTREY *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 86–6227. THOMAS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: No. 86-6204, 151 Ariz. 105, 726 P. 2d 202; No. 86–6227, 495 So. 2d 172.

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. 85–7163. LOCKHART *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 479 U. S. 1030. Petition for rehearing denied.

No. 86–359. CASTRO GONZALEZ *v.* PUERTO RICO ET AL., 479 U. S. 1024;

No. 86–710. SLADE *v.* UNITED STATES OF MEXICO, 479 U. S. 1032;

No. 86–726. BAKER *v.* LOS ANGELES HERALD EXAMINER ET AL., 479 U. S. 1032;

No. 86–745. VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., 479 U. S. 1064;

No. 86–918. CITY AND COUNTY OF SAN FRANCISCO ET AL. *v.* CHRISTIAN SCIENCE READING ROOM JOINTLY MAINTAINED ET AL., 479 U. S. 1066;

No. 86–5510. FELDMAN *v.* UNITED STATES, 479 U. S. 1067;

No. 86–5632. SCINTO *v.* UNITED STATES, 479 U. S. 1037;

No. 86–5724. TAUVAR *v.* BAR HARBOR CONGREGATION OF JEHOVAH'S WITNESSES, INC., ET AL., 479 U. S. 1038;

No. 86–5735. HUBBARD *v.* ONION, 479 U. S. 1038;

No. 86–5757. ROYAL *v.* EXXON U. S. A. CHEMICAL DEPARTMENT, 479 U. S. 1038;

No. 86–5882. HARRISON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, 479 U. S. 1042; and

No. 86–5978. MCDONALD *v.* ALABAMA, 479 U. S. 1061. Petitions for rehearing denied.

No. 86–5809. POINDEXTER *v.* FEDERAL BUREAU OF INVESTIGATION, 479 U. S. 1047. Petition for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

MARCH 9, 1987

Appeals Dismissed

No. 86–1178. DIPPEL *v.* TACO BELL CORP. Appeal from Ct. App. Mo., Eastern Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 716 S. W. 2d 342.

No. 86–1198. CHEVRON U. S. A. INC. *v.* LOR, INC., ET AL. Appeal from Ct. App. La., 1st Cir., dismissed for want of substantial federal question. Reported below: 489 So. 2d 1326.

No. 86–6266. MIDDLETON *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 79 Ore. App. 794, 720 P. 2d 1310.

Certiorari Granted—Vacated and Remanded

No. 86–5699. GORMAN *v.* MARYLAND. Ct. Sp. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). Reported below: 66 Md. App. 804.

*Miscellaneous Orders**

No. — — ——. EVANS *v.* FOLTZ, WARDEN; and

No. — — ——. DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 639, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Motions to direct the Clerk to file the petitions for writs of certiorari out of time denied.

No. A–535. LEWINGDON ET AL. *v.* CELESTE ET AL. C. A. 6th Cir. Application for certificate of probable cause, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–610. IN RE GRACEY. C. A. 3d Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–633. GRAHAM, AS EXECUTOR OF THE ESTATE OF GRAHAM *v.* TELEDYNE-CONTINENTAL MOTORS, A DIVISION OF TELEDYNE INDUSTRIES, INC., ET AL. C. A. 9th Cir. Application for recall and stay of mandate and injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE BRENNAN and JUSTICE STEVENS would grant the application.

No. D–578. IN RE DISBARMENT OF ALKER. Disbarment entered. [For earlier order herein, see 479 U. S. 912.]

No. D–596. IN RE DISBARMENT OF KRAMER. Disbarment entered. [For earlier order herein, see 479 U. S. 1025.]

No. D–612. IN RE DISBARMENT OF BING. It is ordered that James Bing, of New York, N. Y., be suspended from the practice

*For the Court's order prescribing amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1043.

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–613. IN RE DISBARMENT OF SASSOWER. It is ordered that George Sassower, of White Plains, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–614. IN RE DISBARMENT OF BRIGGS. It is ordered that William Leon Briggs, of Fort Wayne, Ind., 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–615. IN RE DISBARMENT OF ABRAHAMS. It is ordered that Maurice Meier Abrahams, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–616. IN RE DISBARMENT OF DECIOUS. It is ordered that Kit Conelly Decious, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 85–1835. CALIFORNIA *v.* ROONEY. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 479 U. S. 881.] Motion of respondent for divided argument denied.

No. 86–44. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* MCMAHON ET AL. C. A. 2d Cir. [Certiorari granted, 479 U. S. 812.] Motion of Carvel Gordon Dillard for leave to file a brief as *amicus curiae* out of time denied.

No. 86–246. SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* SHUMAN. C. A. 9th Cir. [Certiorari granted, 479 U. S. 948.] Motion of respondent for divided argument denied.

No. 86–492. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP.

C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Motion of Joan S. Tozer et al. for leave to file a brief as *amici curiae* granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 86–497. AGENCY HOLDING CORP. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC.; and

No. 86–531. CROWN LIFE INSURANCE CO. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 479 U. S. 983.] Motions of A. J. Cunningham Packing Corp. et al. and HMK Corp. for leave to file briefs as *amici curiae* granted.

No. 86–1383. NEW YORK LAND CO. ET AL. *v.* REPUBLIC OF THE PHILIPPINES. C. A. 2d Cir. Application of respondent for an extension of time within which to file a brief in opposition to the petition for writ of certiorari, presented to JUSTICE MARSHALL, and by him referred to the Court, is granted and the time is extended to and including April 24, 1987. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. 86–5020. BOOTH *v.* MARYLAND. Ct. App. Md. [Certiorari granted, 479 U. S. 882.] Motion of Sunny Von Bulow National Victim Advocacy Center, Inc., et al. for leave to file a brief as *amici curiae* out of time denied.

No. 86–6207. IN RE HAMM. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 85–1765. BANKERS LIFE & CASUALTY CO. *v.* CRENSHAW. Appeal from Sup. Ct. Miss. Probable jurisdiction noted. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 483 So. 2d 254.

Certiorari Granted

No. 86–787. HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF FEIOCK *v.* FEIOCK. Ct. App. Cal., 4th App. Dist. Certiorari granted. Reported below: 180 Cal. App. 3d 649, 225 Cal. Rptr. 748.

No. 86–957. LILJEBERG *v.* HEALTH SERVICES ACQUISITION CORP. C. A. 5th Cir. Certiorari granted. Reported below: 796 F. 2d 796.

No. 86–622. TRAYNOR *v.* TURNAGE, ADMINISTRATOR, VETERANS' ADMINISTRATION, ET AL. C. A. 2d Cir.; and

No. 86–737. MCKELVEY *v.* TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE SCALIA took no part in the consideration or decision of these petitions. Reported below: No. 86–622, 791 F. 2d 226; No. 86–737, 253 U. S. App. D. C. 126, 792 F. 2d 194.

No. 86–946. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, ET AL. *v.* SMITH; and

No. 86–947. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, ET AL. *v.* BLACK. Sup. Ct. Ore. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 86–946, 301 Ore. 209, 721 P. 2d 445; No. 86–947, 301 Ore. 221, 721 P. 2d 451.

No. 86–995. MURRAY *v.* UNITED STATES; and

No. 86–1016. CARTER *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted in No. 86–995 limited to Question I presented by the petition. Certiorari granted in No. 86–1016 limited to Question II presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 803 F. 2d 20.

Certiorari Denied. (See also No. 86–1178, *supra.*)

No. 85–359. COUNTY OF WAYNE ET AL. *v.* MARCHESE. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 181.

No. 85–1048. VIPPOLIS ET AL. *v.* VILLAGE OF HAVERSTRAW, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 2d 40.

No. 85–1192. CITY OF SHEPHERDSVILLE, KENTUCKY, ET AL. *v.* RYMER. C. A. 6th Cir. Certiorari denied. Reported below: 775 F. 2d 756.

No. 85–1485. WALKER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 26 Ohio App. 3d 29, 498 N. E. 2d 191.

No. 85–1585. CITY OF BORGER, TEXAS, ET AL. *v.* GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE

OF GRANDSTAFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 161.

No. 85–6886. JACKSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 22 Ohio St. 3d 281, 490 N. E. 2d 893.

No. 85–7052. WHITE *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 2d 338.

No. 86–554. STEWART ET AL. *v.* NEW PRAIRIE CLASSROOM TEACHERS ASSN. Ct. App. Ind. Certiorari denied. Reported below: 487 N. E. 2d 1324.

No. 86–828. SOUTHWESTERN SHEET METAL WORKS, INC. *v.* SEMCO MANUFACTURING, INC. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1144.

No. 86–878. HOBSON *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 8 Conn. App. 13, 511 A. 2d 348.

No. 86–880. HUMPHREY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 759 F. 2d 743.

No. 86–909. JACKSON ET AL. *v.* PEOPLE'S REPUBLIC OF CHINA. C. A. 11th Cir. Certiorari denied. Reported below: 794 F. 2d 1490.

No. 86–926. ELING ET AL. *v.* JONES, MINNESOTA CHIEF PUBLIC DEFENDER. C. A. 8th Cir. Certiorari denied. Reported below: 797 F. 2d 697.

No. 86–979. DORSEY ET AL. *v.* HOWARD. C. A. 11th Cir. Certiorari denied. Reported below: 802 F. 2d 1398.

No. 86–989. WARD, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. *v.* OLIVIERI ET AL.; and

No. 86–1177. OLIVIERI ET AL. *v.* WARD, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 602.

No. 86–991. COOMBS, NATURAL MOTHER OF CHRISTOPHER J. *v.* MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 505 A. 2d 795.

No. 86–998. JAPAN AIR LINES CO., LTD., ET AL. *v.* DOLE, SECRETARY OF TRANSPORTATION. C. A. D. C. Cir. Certiorari

denied. Reported below: 255 U. S. App. D. C. 269, 801 F. 2d 483.

No. 86–1000. WHEELER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 86–1004. TECHNOGRAPH LIQUIDATING TRUST *v.* GENERAL MOTORS CORP. C. A. Fed. Cir. Certiorari denied.

No. 86–1012. RUTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 479.

No. 86–1043. GONZALEZ *v.* SHELL OIL CO. C. A. 11th Cir. Certiorari denied. Reported below: 797 F. 2d 980.

No. 86–1092. CITY OF CAPE GIRARDEAU, MISSOURI *v.* WESTBOROUGH MALL, INC., ET AL.; and

No. 86–1166. MAY DEPARTMENT STORES CO. ET AL. *v.* WESTBOROUGH MALL, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 330.

No. 86–1154. LETTERMAN BROTHERS ENERGY PROGRAM 1980-2 ET AL. *v.* BANCTEXAS DALLAS, N. A. C. A. 5th Cir. Certiorari denied. Reported below: 799 F. 2d 967.

No. 86–1157. COUNTY OF SUFFOLK *v.* GRASECK. C. A. 2d Cir. Certiorari denied. Reported below: 803 F. 2d 1265.

No. 86–1164. RAYNER ET AL. *v.* CLENDENING. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 1410.

No. 86–1165. GOOSTREE *v.* MONTGOMERY COUNTY QUARTERLY COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 796 F. 2d 854.

No. 86–1176. LIPPO, DBA WALDEN-WOODFIELD SERVICE STATION *v.* MOBIL OIL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 802 F. 2d 975.

No. 86–1179. TECHNOGRAPH LIQUIDATING TRUST *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied.

No. 86–1180. RICHARD *v.* SHERRIER. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 391.

No. 86–1181. KEENER ET AL. *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari

denied. Reported below: 255 U. S. App. D. C. 148, 800 F. 2d 1173.

No. 86–1183. FOWLER *v.* CITY OF LOUISVILLE, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 719.

No. 86–1190. FRAVER ET AL. *v.* NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 675.

No. 86–1197. GIDEON *v.* RIVERSIDE COMMUNITY COLLEGE DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1145.

No. 86–1208. CHAPPELL *v.* GTE PRODUCTS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 261.

No. 86–1235. GLUKLICK ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 801 F. 2d 834.

No. 86–1308. BAIANI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 803 F. 2d 715.

No. 86–1313. SHAPIRO *v.* ROSA. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 86–5629. JONES *v.* SMITH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 1.

No. 86–5701. GRIFFIN *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 22.

No. 86–5702. HALCZYCZAK ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 25 Ohio St. 3d 301, 496 N. E. 2d 925.

No. 86–5775. HERSHIPS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–5837. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 86–5872. ROSENTHAL *v.* UNITED STATES;
No. 86–5917. STEWART *v.* UNITED STATES; and
No. 86–6143. JUNKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 793 F. 2d 1214 and 801 F. 2d 378.

No. 86–5880. LEMMONS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–5889. BOYD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 86–5900. ATWELL *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 800 F. 2d 502.

No. 86–5930. GRANADO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 792 F. 2d 91.

No. 86–5952. TRUNZO *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 86–5974. OWENS *v.* QUINLAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 86–6009. GREGG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 803 F. 2d 568.

No. 86–6057. ROJAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 392.

No. 86–6067. NUNLEY *v.* JOHNSON, ATTORNEY GENERAL OF OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 86–6179. MATTHEWS *v.* SCULLY, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 86–6180. BURNS *v.* TRICKEY. C. A. 8th Cir. Certiorari denied.

No. 86–6184. ROSARIO *v.* THOMAS. C. A. 7th Cir. Certiorari denied.

No. 86–6185. VINCENT *v.* BROWN, JUDGE. Ct. App. La., 1st Cir. Certiorari denied.

No. 86–6190. CRAIG *v.* FLEMING ET AL. C. A. 3d Cir. Certiorari denied.

No. 86–6196. HUMPHREY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 263.

No. 86-6200. STRANGE *v.* BROWN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-6206. MAHDAVI *v.* SHIRANI. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86-6210. OLIVER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 795 F. 2d 1524.

No. 86-6215. CAZARES *v.* ROCKWELL INTERNATIONAL CORP. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 263.

No. 86-6219. KOENIG *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 802 F. 2d 464.

No. 86-6225. SHIPLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 608.

No. 86-6226. SIGLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 803 F. 2d 716.

No. 86-6230. DREW *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 790.

No. 86-6236. STANTON *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied.

No. 86-6237. SAAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 392.

No. 86-6238. ZULU, AKA ROBINSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 994.

No. 86-6246. HANNER *v.* MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-6249. HALL *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 804 F. 2d 79.

No. 86-6252. GUNDERSON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 135 Wis. 2d 544, 401 N. W. 2d 28.

No. 86–6256. HENRY *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 790.

No. 86–6262. MCMICHAEL *v.* ROUSE, SUPERINTENDENT, LANCASTER CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1041.

No. 86–6264. WORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 806 F. 2d 658.

No. 86–6265. PEREZ-SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 806 F. 2d 7.

No. 86–6277. LANCASTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 69 N. Y. 2d 20, 503 N. E. 2d 990.

No. 86–6280. ALLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 804 F. 2d 244.

No. 86–6290. FREEMAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 1290.

No. 86–6310. MENDEZ-ORTIZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 76.

No. 86–6335. JACKSON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 457.

No. 86–6342. CAPOTE-MONTERREY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 996.

No. 85–1813. CITY OF RENSSELAER, NEW YORK, ET AL. *v.* FIACCO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 783 F. 2d 319.

No. 86–776. U S WEST, INC. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 254 U. S. App. D. C. 415, 797 F. 2d 1082.

No. 86–1126. UNITED CHURCH OF THE MEDICAL CENTER ET AL. *v.* ILLINOIS MEDICAL CENTER COMMISSION. App. Ct.

Ill., 1st Dist. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 142 Ill. App. 3d 498, 491 N. E. 2d 1327.

No. 86–1153. FBK REALTY CORP. *v.* CROTTY, COMMISSIONER, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motion of Associated Builders & Owners of Greater New York Inc. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 115 App. Div. 2d 1015, 495 N. Y. S. 2d 878.

No. 86–5307. WILLIAMS *v.* OHIO. Sup. Ct. Ohio; and

No. 86–6015. BRADLEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 86–5307, 23 Ohio St. 3d 16, 490 N. E. 2d 906; No. 86–6015, 494 So. 2d 772.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentences in these cases.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting in No. 86–5307.

In this case, the Ohio Supreme Court rejected petitioner's claim that a statutory aggravating factor that repeats an element of the crime is unconstitutional because it fails to narrow the class of persons eligible for the death penalty. This decision is consistent with *Wingo* v. *Blackburn*, 783 F. 2d 1046, 1051 (CA5 1986), cert. pending, No. 86–5026, but in conflict with *Collins* v. *Lockhart*, 754 F. 2d 258, 263–264 (CA8), cert. denied, 474 U. S. 1013 (1985). I would grant certiorari to resolve this conflict.

JUSTICE MARSHALL, dissenting.

In these cases, petitioners' death sentences were founded on statutory aggravating factors that repeat elements of the underlying capital offenses. For reasons stated in *Wiley* v. *Mississippi*, 479 U. S. 906 (1986) (MARSHALL, J., dissenting from denial of certiorari), I would grant the petitions for review.

No. 86–5953. SCOTT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 26 Ohio St. 3d 92, 497 N. E. 2d 55.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was convicted and sentenced to death by a jury that heard the trial judge indicate that, on the basis of newspaper accounts he had read, he believed petitioner was involved in the crime. Because the judge's statement deprived petitioner of a fair trial, I would grant certiorari in this case.

During *voir dire*, the trial judge stated to the jury:

> "Not only was Mr. Scott—at least from the newspaper reports that I think that I had read—was involved in this, there were three other . . . individuals who . . . ." 26 Ohio St. 3d 92, 95, 497 N. E. 2d 55, 59 (1986).

Defense counsel interrupted to object to this comment on petitioner's involvement in the crime. He subsequently made a motion for a mistrial, in which the prosecutor joined. The trial court denied the motion, but delivered a cautionary instruction admonishing the jury to base its verdict only on the evidence introduced at trial. The judge also told the jury, "you must not take any impression from anything I have done or said as to what your decision should be." App. to Pet. for Cert. 26–27.

The Ohio Supreme Court attempted to excuse the remark. The court insisted that "[t]he judge's comment did not concern [petitioner's] guilt or innocence, but, rather, noted the fact that the news media had reported [petitioner's] involvement with the crime." 26 Ohio St. 3d, at 96, 497 N. E. 2d, at 59. This is a ludicrous reading of the statement. How the jury could reasonably have interpreted and applied the comment determines whether it should be considered prejudicial. See, *e. g.*, *Sandstrom* v. *Montana*, 442 U. S. 510, 516–519 (1979). In this case, the jury could reasonably take the comment at face value, namely, as a statement that, based on what he had read in the newspapers, the judge believed petitioner was a participant in the crime. Before the jury had even heard any of the evidence, the judge had effectively become a witness against petitioner. See *United States* v. *Murdock*, 290 U. S. 389, 393 (1933).

Moreover, even under the Ohio Supreme Court's dubious interpretation, the judge's comment deprived petitioner of a fair trial. The only legitimate judicial references to pretrial publicity would have been inquiries about exposure to pretrial publicity or warn-

ings against it. Instead, the judge actually reported to the jurors the media's conclusion that petitioner was guilty. That the source of this prejudicial publicity was the trial judge magnifies, rather than eliminates, the problem. The jury could reasonably assume that, since the judge had read about the crime, it was acceptable for them to do so as well.

The Ohio Supreme Court relied on the cautionary instruction given to the prospective jurors, maintaining that it "minimize[d] any prejudicial effect this comment may have had . . . ." 26 Ohio St. 3d, at 96, 497 N. E. 2d, at 59. This reliance is misplaced. Because "the influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest word or intimation is received with deference, and may prove controlling," *Starr* v. *United States*, 153 U. S. 614, 626 (1894), some errors are so fundamental that no instruction can undo the damage they cause. See *Quercia* v. *United States*, 289 U. S. 466, 472 (1933). A comment on petitioner's guilt is certainly such a fundamental error; it is "most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Ibid.* Moreover, any reference to extrajudicial evidence by the trial judge destroys the fundamental premise of any trial—that the ultimate decision rests solely upon evidence presented by the parties within the confines of the rules of evidence.

The remedy for this extraordinary error was close at hand. No witness had yet been sworn. The panel of prospective jurors might have been discharged and a new venire called without difficulty. Nonetheless, the trial judge plunged ahead and petitioner was tried by a jury exposed to comments that overwhelmed the presumption of innocence. Because we cannot tolerate such interference with petitioner's right to a fair trial in a capital case, I would grant the petition for certiorari.

In addition, petitioner's death sentence was founded on a statutory aggravating circumstance that repeats an element of the underlying capital offense. As in No. 86–5307, *Williams* v. *Ohio*, and No. 86–6015, *Bradley* v. *Alabama*, I would grant review for reasons stated in my dissent from denial of certiorari in *Wiley* v. *Mississippi*, 479 U. S. 906 (1986).

No. 86-6082. DUHAMEL *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6101. BARNES *v.* OHIO. Sup. Ct. Ohio;
No. 86-6129. ELLIS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6171. O'NEAL *v.* MISSOURI. Sup. Ct. Mo.; and
No. 86-6201. NEELLEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 86-6082, 717 S. W. 2d 80; No. 86-6101, 25 Ohio St. 3d 203, 495 N. E. 2d 922; No. 86-6129, 726 S. W. 2d 39; No. 86-6171, 718 S. W. 2d 498; No. 86-6201, 494 So. 2d 697.

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. 86-6285. PIROVOLOS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner to consolidate case with No. 86-6009, *Gregg* v. *United States*, *supra*, denied. Certiorari before judgment denied.

Rehearing Denied

No. 86-631. CITY OF WATSEKA ET AL. *v.* ILLINOIS PUBLIC ACTION COUNCIL ET AL., 479 U. S. 1048;
No. 86-860. WALKER *v.* ACTION INDUSTRIES, INC., ET AL., 479 U. S. 1065;
No. 86-5654. BARR *v.* UNITED STATES, 479 U. S. 1055;
No. 86-5799. IN RE JOHL, 479 U. S. 1028; and
No. 86-5816. JAMES *v.* GEORGIA, 479 U. S. 1040. Petitions for rehearing denied.

MARCH 23, 1987

Affirmed on Appeal

No. 86-1125. WILKINSON, ATTORNEY GENERAL OF THE STATE OF UTAH *v.* JONES ET AL. Affirmed on appeal from C. A. 10th Cir. THE CHIEF JUSTICE and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 800 F. 2d 989.

Appeals Dismissed

No. 86-1252. O'KELLEY ET AL. *v.* HOSPITAL AUTHORITY OF GWINNETT COUNTY, DBA GWINNETT AMBULANCE SERVICE,

ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 256 Ga. 373, 349 S. E. 2d 382.

No. 86–1272. STICH *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY, ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–6228. MACKIE *v.* OLSEN, DISTRICT JUDGE, ET AL. Appeal from Sup. Ct. Mont. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1300. REARDON *v.* UNITED STATES POSTAL SERVICE ET AL. Appeal from D. C. N. J. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 86–997. PENNSYLVANIA *v.* LUTZ. Sup. Ct. Pa. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Dunn*, *ante*, p. 294. Reported below: 512 Pa. 192, 516 A. 2d 339.

No. 86–1007. UNITED STATES *v.* MESSINA BUILDERS & CONTRACTORS CO. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jersey Shore State Bank* v. *United States*, 479 U. S. 442 (1987). Reported below: 801 F. 2d 1029.

Certiorari Granted—Reversed. (See No. 86-5504, *ante*, p. 522; and No. 86-5530, *ante*, p. 527.)

Miscellaneous Orders

No. — – ——. DAWSON ET AL. *v.* LENNON, WARDEN, ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–626. KAVANAGH *v.* COVEN. Sup. Ct. N. Y., New York County. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–651. MCDONALD WELDING & MACHINE CO., INC., ET AL. *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. 6th Cir.

Application to vacate stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–600. IN RE DISBARMENT OF TUCKER. Robert L. Tucker, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 12, 1987 [479 U. S. 1026], is hereby discharged.

No. D–617. IN RE DISBARMENT OF CASLER. It is ordered that William Franklin Casler, of Saint Petersburg, Fla., 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–618. IN RE DISBARMENT OF WHITTEN. It is ordered that David Rock Whitten, of Wilmington, N. C., 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–619. IN RE DISBARMENT OF STOKES. It is ordered that Rhodes Cherry Stokes, of Greenville, N. C., 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. 85–2068. RANKIN ET AL. *v.* MCPHERSON. C. A. 5th Cir. [Certiorari granted, 479 U. S. 913.] Motion of the Solicitor General to permit Glen D. Nager, Esquire, to present oral argument *pro hac vice* granted.

No. 86–228. KUNGYS *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 479 U. S. 947.] Motions of World Jewish Congress and Anti-Defamation League of B'nai B'rith et al. for leave to file briefs as *amici curiae* granted.

No. 86–246. SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* SHUMAN. C. A. 9th Cir. [Certiorari granted, 479 U. S. 948.] Motion of N. Patrick Flanagan III, Esquire, to withdraw as counsel and to substitute M. Daniel Markoff, Esquire, granted.

No. 86–357. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SCHEINER, SECRETARY, DEPARTMENT OF REVENUE OF PENN-

SYLVANIA, ET AL. Sup. Ct. Pa. [Probable jurisdiction noted, 479 U. S. 947.] Motion of Canadian Trucking Association for leave to file a brief as *amicus curiae* granted.

No. 86–495. K MART CORP. *v.* CARTIER, INC., ET AL.;
No. 86–624. 47TH STREET PHOTO, INC. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.; and
No. 86–625. UNITED STATES ET AL. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL. C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motion of the Solicitor General for divided argument granted.

No. 86–781. KANSAS GAS & ELECTRIC CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL.; and
No. 86–793. KANSAS CITY POWER & LIGHT CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Sup. Ct. Kan. [Probable jurisdiction noted, 479 U. S. 1082.] Motion of appellants to dispense with printing the joint appendix granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 86–877. UNITED STATES *v.* OWENS. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1084.] Motion for appointment of counsel granted, and it is ordered that Allan Ides, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 86–964. THOMPSON *v.* THOMPSON, AKA CLAY. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1063.] Motion of Sacramento County, California, et al. for leave to file a brief as *amici curiae* granted.

No. 86–1102. MANUFACTURERS ASSOCIATION OF TRI-COUNTY ET AL. *v.* KNEPPER 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. 86–6169. THOMPSON *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 479 U. S. 1084.] Motion for appointment of counsel granted, and it is ordered that Harry F. Tepker, Jr., Esquire, of Norman, Okla., be appointed to serve as counsel for petitioner in this case.

Certiorari Granted

No. 86–751. ARKANSAS BEST CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari granted. Reported below: 800 F. 2d 215.

No. 86–1128. IMMIGRATION AND NATURALIZATION SERVICE *v.* ABUDU. C. A. 9th Cir. Certiorari granted. Reported below: 802 F. 2d 1096.

Certiorari Denied. (See also Nos. 86–1272 and 86–6228, *supra.*)

No. 86–388. IMMIGRATION AND NATURALIZATION SERVICE *v.* GUEVARA FLORES. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1242.

No. 86–784. CROSS ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 792 F. 2d 849.

No. 86–876. STAR-KIST FOODS, INC. *v.* COUNTY OF LOS ANGELES ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 42 Cal. 3d 1, 719 P. 2d 987.

No. 86–913. HEINEMANN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 796 F. 2d 451.

No. 86–932. NIELSEN *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 727 P. 2d 188.

No. 86–996. MCKENZIE COUNTY SOCIAL SERVICES BOARD ET AL. *v.* V. G. Sup. Ct. N. D. Certiorari denied. Reported below: 392 N. W. 2d 399.

No. 86–1015. TROXLER HOSIERY CO., INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 F. 2d 723.

No. 86–1020. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 802 F. 2d 466.

No. 86–1023. BLUE CROSS ASSN. ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 793 F. 2d 491.

No. 86–1032. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* WHEAT. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 621.

No. 86–1033. JAFFE ET AL. *v.* GRANT, TRUSTEE IN BANKRUPTCY FOR CONTINENTAL SOUTHEAST LAND CORP. AND AS RECEIVER. C. A. 11th Cir. Certiorari denied. Reported below: 793 F. 2d 1182.

No. 86–1040. SCOTT *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 297.

No. 86–1045. WHORTON ET AL. *v.* SURTRAN TAXICABS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 159.

No. 86–1051. MONTELEONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 804 F. 2d 1004.

No. 86–1060. HEIMBACH ET AL. *v.* VILLAGE OF LYONS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 802 F. 2d 443.

No. 86–1061. TRIBUNE CO. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 2d 1438.

No. 86–1063. RAFSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 803 F. 2d 105.

No. 86–1068. DUNCAN ET UX. *v.* GEORGIA; and
No. 86–1081. VAN NICE ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 180 Ga. App. 112, 348 S. E. 2d 515.

No. 86–1098. DUNN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 802 F. 2d 646.

No. 86–1104. LESHOURE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 143 Ill. App. 3d 839, 493 N. E. 2d 687.

No. 86–1105. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 712.

No. 86–1110. ENTERPRISE TOOLS, INC., ET AL. *v.* EXPORT-IMPORT BANK OF THE UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 799 F. 2d 437.

No. 86–1162. MCCALLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1181.

No. 86–1168. MITCHELL *v.* GREINER. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 721.

No. 86–1184. BATEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 183 Cal. App. 3d 1281, 228 Cal. Rptr. 787.

No. 86–1185. KETTELSON *v.* MCI TELECOMMUNICATIONS CORP. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 144 Ill. App. 3d 1181, 510 N. E. 2d 1334.

No. 86–1192. KERR *v.* EL PASO TIMES, INC. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 706 S. W. 2d 797.

No. 86–1194. FEGURGUR *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 1470.

No. 86–1202. WILSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1204. CITY OF BATON ROUGE ET AL. *v.* ACHORD ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 489 So. 2d 1373.

No. 86–1209. POLUR *v.* NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 915, 489 N. E. 2d 773.

No. 86–1214. KNIGHT *v.* U. S. FIRE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 2d 9.

No. 86–1215. MISSOURI PACIFIC RAILROAD CO. *v.* MALDONADO. C. A. 5th Cir. Certiorari denied. Reported below: 798 F. 2d 764.

No. 86–1216. REDIEHS EXPRESS, INC. *v.* MAPLE ET AL. Ct. App. Ind. Certiorari denied. Reported below: 491 N. E. 2d 1006.

No. 86–1221. HARNETT *v.* BILLMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 800 F. 2d 1308.

No. 86–1222. COUNTY OF PIERCE ET AL. *v.* KRAUS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 793 F. 2d 1105.

No. 86–1223. PENNSYLVANIA *v.* POTTS. Super. Ct. Pa. Certiorari denied. Reported below: 345 Pa. Super. 621, 496 A. 2d 853.

No. 86–1225. KRAUSE *v.* KIM ET AL. Ct. App. Minn. Certiorari denied.

No. 86–1227. BAVISOTTO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 120 App. Div. 2d 985, 502 N. Y. S. 2d 867.

No. 86–1228. MORALES *v.* MACK TRUCKS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 253.

No. 86–1230. HODGES ET AL. *v.* EVISEA MARITIME CO., S. A. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 678.

No. 86–1231. MCCOURT *v.* MCCOURT ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 122 App. Div. 2d 539, 504 N. Y. S. 2d 906.

No. 86–1233. KUNTZ *v.* WINTERS NATIONAL BANK & TRUST CO. ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 86–1237. BAY AREA RAPID TRANSIT SYSTEM *v.* PAPERLESS ACCOUNTING, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 804 F. 2d 659.

No. 86–1243. GOLDEN *v.* GOLDEN. Ct. App. Ariz. Certiorari denied.

No. 86–1245. HUGHES *v.* LOUISIANA STATE BOARD OF DENTISTRY. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 490 So. 2d 1097.

No. 86–1246. OLD ORCHARD BRANDS, INC., ET AL. *v.* MICHIGAN DEPARTMENT OF AGRICULTURE ET AL. Ct. App. Mich. Certiorari denied. Reported below: 152 Mich. App. 274, 393 N. W. 2d 608.

No. 86–1250. TERRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 722 S. W. 2d 408.

No. 86–1251. ASSOCIATED FILM DISTRIBUTION CORP. ET AL. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 369.

No. 86–1253. FLEMING *v.* GRIEVANCE COMMITTEE COUNCIL OF COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 86–1255. OLYMPIA EQUIPMENT LEASING CO. ET AL. *v.* WESTERN UNION TELEGRAPH CO. C. A. 7th Cir. Certiorari denied. Reported below: 797 F. 2d 370.

No. 86–1256. JONES ET AL. *v.* CLARK EQUIPMENT CO. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 878.

No. 86–1258. HAGEMANN *v.* AMERICAN SAVINGS & LOAN ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1252.

No. 86–1259. SPRATT *v.* COUNTY OF KENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 203.

No. 86–1262. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION *v.* FITZGERALD ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 798 F. 2d 461.

No. 86–1265. GRASS ET AL. *v.* CREDITO MEXICANO, S. A. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 220.

No. 86–1266. KILKENNY, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARMION *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 853.

No. 86–1267. ARDREY ET AL. *v.* UNITED PARCEL SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 798 F. 2d 679.

No. 86–1269. NEAL, ADMINISTRATOR OF THE ESTATE OF STROH *v.* MIDWESTERN DISTRIBUTION, INC. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 266.

No. 86–1271. RUIZ ET AL. *v.* PEOPLE EXPRESS AIRLINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 1508.

No. 86–1273. CUMBIE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 497 So. 2d 855.

No. 86–1276. CITY OF WILMINGTON *v.* WILMINGTON STEVEDORES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 801 F. 2d 152.

No. 86–1279. CINCINNATI FIREFIGHTERS UNION, LOCAL UNION NO. 48 *v.* YOUNGBLOOD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 804 F. 2d 360.

No. 86–1282. BROOKSIDE LIMITED PARTNERSHIP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 255.

No. 86–1285. JODELE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 797 F. 2d 978.

No. 86–1293. MALICK *v.* SANDIA CORP. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 263.

No. 86–1299. SYRE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 513 Pa. 1, 518 A. 2d 535.

No. 86–1309. APONTE CARATINE *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 802 F. 2d 441.

No. 86–1319. VAN SANT *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 805 F. 2d 141.

No. 86–1320. SWIFT TEXTILES, INC. *v.* WATKINS MOTOR LINES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 2d 697.

No. 86–1321. ALPHIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 809 F. 2d 236.

No. 86–1325. CHESNEY ET UX. *v.* SPRAGGINS. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86–1326. STEELEY ET AL. *v.* BURTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 803 F. 2d 1184.

No. 86–1335. BARNETTE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 1558.

No. 86–1347. SHELL OIL CO. *v.* PIAMCO, INC. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 2d 262.

No. 86–1352. MONTGOMERY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 513 Pa. 138, 518 A. 2d 1197.

No. 86–1356. LEA *v.* MYERS, JUDGE, MARION COUNTY MUNICIPAL COURT, ET AL. C. A. 7th Cir. Certiorari denied.

No. 86–1394. MARK A., AS PARENT AND NEXT FRIEND OF ALLEAH A. *v.* GRANT WOOD AREA EDUCATION AGENCY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 795 F. 2d 52.

No. 86–5600. BOWDEN *v.* PULLEY. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 764.

No. 86–5862. AMHAZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 802 F. 2d 443.

No. 86–5866. KING *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC CLASSIFICATION CENTER AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 86–5915. MEYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 246.

No. 86–5920. MCNEIL *v.* RICE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 451.

No. 86–5923. PINION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 976.

No. 86–5940. SCOTT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 86–5943. SPENCER *v.* DEPARTMENT OF HUMAN RESOURCES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 171.

No. 86–6050. REASONOVER *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 714 S. W. 2d 706.

No. 86–6134. MEADOWS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 28 Ohio St. 3d 43 and 354, 503 N. E. 2d 697.

No. 86–6145. CARPENTER *v.* LEONARD. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 2d 931.

No. 86–6199. WEBSTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 86-6212. MOORE *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 202.

No. 86-6214. WESTFALL *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 806 F. 2d 258.

No. 86-6231. CLIFTON *v.* COOK, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 200.

No. 86-6232. WHITE *v.* OHIO. Ct. App. Ohio, Gallia County. Certiorari denied.

No. 86-6239. MARTIN *v.* LEWIS ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-6240. JACKMAN *v.* REES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 720.

No. 86-6242. GRAVES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 86-6245. BENEDICT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 115 App. Div. 2d 795, 495 N. Y. S. 2d 735.

No. 86-6254. COLLATT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 497 So. 2d 1001.

No. 86-6257. COLE *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 837.

No. 86-6258. DITSCH *v.* BUCKLEY. C. A. 1st Cir. Certiorari denied.

No. 86-6260. MAGEE *v.* BORG, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 86-6267. SATTERWHITE *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 994.

No. 86-6268. STARKES *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-6271. BERTRAM *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86-6274. HAEFNER *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 145.

No. 86-6276. CURTIS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 141 Ill. App. 3d 827, 491 N. E. 2d 134.

No. 86-6278. GILREATH *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 802 F. 2d 465.

No. 86-6281. CARTEE *v.* NIX, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 803 F. 2d 296.

No. 86-6282. SCHANDELMEIER *v.* CUNNINGHAM, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 1518.

No. 86-6283. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 585.

No. 86-6286. SAMPLE *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 725.

No. 86-6287. TEDDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 1437.

No. 86-6288. MATHIS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 86-6292. COVINGTON *v.* SCROGGY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1033.

No. 86-6301. ORTEGA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86-6302. MULLEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 122 App. Div. 2d 300, 504 N. Y. S. 2d 270.

No. 86-6304. RASHED *v.* DELAWARE COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 254.

No. 86-6306. WARNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 146 Ill. App. 3d 370, 496 N. E. 2d 1010.

No. 86-6308. SHERWOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 264.

No. 86-6311. RANDOLPH *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1181.

No. 86-6313. MONTEIRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1165.

No. 86-6315. SELLNER *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 2d 394.

No. 86-6316. MOORE *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-6318. THOMPSON *v.* SOUTHEASTERN TOYOTA ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 494 So. 2d 624.

No. 86-6324. TYSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 54.

No. 86-6341. HILL *v.* LYNAUGH, INTERIM DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 803 F. 2d 715.

No. 86-6343. HIMES ET UX. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 458.

No. 86-6345. MONTGOMERY *v.* INTERNAL REVENUE SERVICE. C. A. 7th Cir. Certiorari denied.

No. 86-6347. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 178.

No. 86-6379. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 808 F. 2d 836.

No. 86-6388. HURST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1409.

No. 86-6409. BULLEN *v.* DEREGO ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 68 Haw. 587, 724 P. 2d 106.

No. 86-6418. WHITLEY *v.* LECUREUX, SUPERINTENDENT, KINROSS CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 608.

No. 85-1864. RANDALL BOOK CORP. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 64 Md. App. 589, 497 A. 2d 1174.

No. 85-6272. DEPUTY *v.* DELAWARE. Sup. Ct. Del.;
No. 86-6003. MCCOY *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6013. BURDINE *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6108. WILKERSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6121. GRIFFIN *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 86-6195. CAPE *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 86-6222. BREWER *v.* INDIANA. Sup. Ct. Ind.;
No. 86-6243. HUBBARD *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 86-6247. KORNAHRENS *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 86-6365. HARRIS *v.* WASHINGTON. Sup. Ct. Wash.; and
No. 86-6380. PARKER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 85-6272, 500 A. 2d 581; No. 86-6003, 713 S. W. 2d 940; No. 86-6013, 719 S. W. 2d 309; No. 86-6108, 726 S. W. 2d 542; No. 86-6121, 511 Pa. 553, 515 A. 2d 865; No. 86-6222, 496 N. E. 2d 371; No. 86-6243, 500 So. 2d 1204; No. 86-6247, 290 S. C. 281, 350 S. E. 2d 180; No. 86-6365, 106 Wash. 2d 784, 725 P. 2d 975; No. 86-6380, 256 Ga. 543, 350 S. E. 2d 570.

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. 86-980. KELLY *v.* WAUCONDA PARK DISTRICT. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 801 F. 2d 269.

No. 86-1006. MARATHON OIL CO. *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of American Petroleum Institute for leave

to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition. Reported below: 807 F. 2d 759.

No. 86-1057. DRUMMOND CO., INC. *v.* HODEL, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 254 U. S. App. D. C. 212, 796 F. 2d 503.

No. 86-1260. MAJOR LEAGUE BASEBALL PLAYERS ASSN. ET AL. *v.* BALTIMORE ORIOLES, INC., ET AL. C. A. 7th Cir. Motions of National Football League Players Association et al. and Associated Actors & Artistes of America, AFL-CIO, for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 805 F. 2d 663.

No. 86-6055. MURPHY *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 801 F. 2d 205.

No. 86-6371 (A-655). SHAHID *v.* TEXAS. Ct. App. Tex., 14th Dist. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 86-558. YAMAMOTO *v.* KLENSKE ET AL., 479 U. S. 1064;
No. 86-814. WHITE MOUNTAIN APACHE TRIBE ET AL. *v.* ARIZONA STATE TRANSPORTATION BOARD ET AL., 479 U. S. 1060;
No. 86-827. JAIN *v.* ITT GRINNELL CORP., 479 U. S. 1065;
No. 86-5647. BERCAW *v.* MANDAK, JUDGE, 479 U. S. 992;
No. 86-5681. KOVACS *v.* MERIT SYSTEMS PROTECTION BOARD, 479 U. S. 1038;
No. 86-5901. FUGITT *v.* GEORGIA, 479 U. S. 1070;
No. 86-5939. THOMAS *v.* LINCOLN UNIVERSITY, 479 U. S. 1068;
No. 86-5973. SELLNER *v.* PANAGOULIS ET AL., 479 U. S. 1069;
No. 86-6037. SELLNER *v.* PANAGOULIS ET AL., 479 U. S. 1069; and
No. 86-6128. JACKSON *v.* NEWSOME, WARDEN, 479 U. S. 1099. Petitions for rehearing denied.

No. 85-685. ESCHLER ET AL. *v.* BOEING CO., 474 U. S. 1082. Motion for leave to file petition for rehearing denied.

MARCH 24, 1987

Dismissal Under Rule 53

No. 86–1328. SPARKS *v.* KANSAS ET AL. Ct. App. Kan. Certiorari dismissed under this Court's Rule 53. Reported below: 11 Kan. App. 2d xxxiii, 761 P. 2d 325.

Certiorari Granted—Reversed and Remanded. (See No. 85–1200, *ante*, p. 572.)

Certiorari Granted—Vacated and Remanded. (See No. 85–1608, *ante*, at 555.)

MARCH 30, 1987

Dismissal Under Rule 53

No. 86–1377. ANCOR HOLDINGS, N. V. *v.* REPUBLIC OF THE PHILIPPINES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 806 F. 2d 344.

Appeals Dismissed

No. 86–701. COOPER *v.* EUGENE SCHOOL DISTRICT NO. 4J ET AL. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 301 Ore. 358, 723 P. 2d 298.

No. 86–1286. K MART CORP. *v.* IDAHO STATE TAX COMMISSION. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 111 Idaho 719, 727 P. 2d 1147.

No. 86–1291. MONTANO *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 801 F. 2d 394.

Certiorari Granted—Vacated and Remanded

No. 85–1099. ADKINS *v.* CHESAPEAKE & OHIO RAILWAY CO. ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated,

and case remanded for further consideration in light of *Atchison, T. & S. F. R. Co.* v. *Buell, ante*, p. 557.

No. 86-303. HODEL, SECRETARY OF THE INTERIOR, ET AL. *v.* TRIBAL VILLAGE OF AKUTAN ET AL.; and

No. 86-304. AMOCO PRODUCTION CO. ET AL. *v.* TRIBAL VILLAGE OF AKUTAN ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Amoco Production Co.* v. *Gambell, ante*, p. 531. Reported below: 792 F. 2d 1376.

No. 86-6059. PATTERSON *v.* AIKEN, WARDEN, ET AL. Ct. Common Pleas of York County, S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Truesdale* v. *Aiken, ante*, p. 527.

No. 86-6071. KOON *v.* AIKEN, WARDEN. Ct. Common Pleas of Aiken County, S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Truesdale* v. *Aiken, ante*, p. 527.

*Miscellaneous Orders**

No. D-586. IN RE DISBARMENT OF SELIGMAN. Disbarment entered. [For earlier order herein, see 479 U. S. 927.]

No. D-598. IN RE DISBARMENT OF GORIN. Disbarment entered. [For earlier order herein, see 479 U. S. 1026.]

No. D-603. IN RE DISBARMENT OF WEINSOFF. Disbarment entered. [For earlier order herein, see 479 U. S. 1051.]

No. D-620. IN RE DISBARMENT OF DECELLO. It is ordered that Anthony V. DeCello, of Pittsburgh, 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-621. IN RE DISBARMENT OF FOLAN. It is ordered that Thomas J. Folan, of Pittsburgh, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40

*For the Court's order prescribing amendments to the Bankruptcy Rules, see *post*, p. 1079.

days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–622. IN RE DISBARMENT OF PASTERNAK. It is ordered that Barton A. Pasternak, 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. D–623. IN RE DISBARMENT OF CONNELL. It is ordered that Jerome F. Connell, of Pasadena, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85–673. HARTIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL. C. A. 7th Cir. [Probable jurisdiction postponed, 479 U. S. 881.] Oral argument in this case, set for Wednesday, April 1, 1987, is deferred to a later date. Number 85–6725, *Bourjaily* v. *United States* [certiorari granted, 479 U. S. 881], will be argued in its stead.

No. 85–2079. LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA ET AL. *v.* ADVANCED LIGHTWEIGHT CONCRETE CO., INC. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1083.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 86–327. MULLINS COAL CO., INC. OF VIRGINIA, ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Motion of National Coal Association for leave to file a brief as *amicus curiae* granted.

No. 86–422. CARPENTER ET AL. *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, 479 U. S. 1016.] Motion of petitioners for divided argument denied.

No. 86–964. THOMPSON *v.* THOMPSON, AKA CLAY. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1063.] Motion of Women's Legal Defense Fund et al. for leave to file a brief as *amici curiae* granted.

No. 86–6298. IN RE GILLETTE. Petition for writ of mandamus denied.

Certiorari Granted

No. 86–1278. HUSTLER MAGAZINE, INC., ET AL. *v.* FALWELL. C. A. 4th Cir. Motions of Richmond Newspapers, Inc., et al. and Reporters Committee for Freedom of the Press for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 797 F. 2d 1270.

No. 86–6060. YATES *v.* AIKEN, WARDEN, ET AL. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 290 S. C. 231, 349 S. E. 2d 84.

No. 86–6109. MATHEWS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question I presented by the petition. Reported below: 803 F. 2d 325.

Certiorari Denied. (See also Nos. 86–1286 and 86–1291, *supra.*)

No. 85–1702. NORFOLK & WESTERN RAILWAY CO. *v.* LANCASTER. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 807.

No. 86–898. PREWITT *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 792 F. 2d 1119.

No. 86–923. TOYOTA OF BERKELEY *v.* AUTOMOBILE SALESMEN'S UNION, LOCAL 1095, UNITED FOOD & COMMERCIAL WORKERS UNION. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 598.

No. 86–925. BARNES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 801 F. 2d 984.

No. 86–952. FIERRO *v.* BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied. Reported below: 798 F. 2d 1351.

No. 86–1026. SCHIFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 108.

No. 86–1071. ALASKA *v.* LYNG, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 797 F. 2d 1479.

No. 86–1089. MERKT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 794 F. 2d 950.

No. 86–1106. BECK *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 471.

No. 86–1205. KARASH, AS GUARDIAN AD LITEM FOR LOWE, A MINOR *v.* COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 183 Cal. App. 3d 515, 228 Cal. Rptr. 139.

No. 86–1270. APRILE ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 720 S. W. 2d 932.

No. 86–1274. ARTHUR ANDERSEN & CO. *v.* RUDOLPH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 800 F. 2d 1040.

No. 86–1280. TENNESSEE *v.* HERRINGTON, SECRETARY OF ENERGY. C. A. 6th Cir. Certiorari denied. Reported below: 806 F. 2d 642.

No. 86–1290. WILSON, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILSON, ET AL. *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 10th Cir. Certiorari denied. Reported below: 803 F. 2d 563.

No. 86–1292. CHUIDIAN *v.* SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY (PHILIPPINE EXPORT & FOREIGN LOAN GUARANTEE CORP., REAL PARTY IN INTEREST). Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 86–1296. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* UNITED AIR LINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 802 F. 2d 886.

No. 86–1301. CHEEK *v.* BECK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 805 F. 2d 1038.

No. 86–1303. LUBBEHUSEN ET AL. *v.* INDIANA ET AL. Ct. App. Ind. Certiorari denied. Reported below: 496 N. E. 2d 139.

No. 86–1305. CITY OF IRVINE *v.* COUNTY OF ORANGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 799 F. 2d 535.

No. 86–1306. ILLINOIS *v.* WISEMAN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 146 Ill. App. 3d 1165, 511 N. E. 2d 442.

No. 86–1307. WINDON THIRD OIL & GAS DRILLING PARTNERSHIP ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 805 F. 2d 342.

No. 86–1310. KUSTINA *v.* CITY OF SEATTLE. C. A. 9th Cir. Certiorari denied. Reported below: 810 F. 2d 205.

No. 86–1314. HUBBARD *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 789.

No. 86–1315. CLOUGH ET AL. *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 788.

No. 86–1317. 49ER CHEVROLET, INC., ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 1463.

No. 86–1318. MONOCLONAL ANTIBODIES, INC. *v.* HYBRITECH, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 1367.

No. 86–1323. SCHWANDER ET UX. *v.* CORDOVA. C. A. 9th Cir. Certiorari denied.

No. 86–1324. HARDIN *v.* MCMASTER. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 260.

No. 86–1337. BURNS ET AL. *v.* CHISUM INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 259.

No. 86–1341. CONNECTICUT PERFORMING ARTS FOUNDATION, INC. *v.* BROWN, TAX COMMISSIONER OF THE STATE OF CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 801 F. 2d 566.

No. 86–1362. LODI ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 802 F. 2d 466.

No. 86–1384. BAKER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 226.

No. 86–1389. MYSLAKOWSKI, INDIVIDUALLY AND AS NEXT FRIEND OF MYSLAKOWSKI, A MINOR, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 806 F. 2d 94.

No. 86–1395. BROOKS ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied.

No. 86–5979. MORGAN *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 798 F. 2d 1162.

No. 86–6032. GELB *v.* ROYAL GLOBE INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 798 F. 2d 38.

No. 86–6034. WORSLEY *v.* ROGERS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 804 F. 2d 678.

No. 86–6044. JONES *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1034.

No. 86–6063. THOMAS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 68 N. Y. 2d 194, 500 N. E. 2d 293.

No. 86–6090. PASSMAN *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 797 F. 2d 1335.

No. 86–6120. JONES *v.* WILSON, SECRETARY, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1034.

No. 86–6297. HITCHCOCK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 86–6307. WILCHER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 145 Ill. App. 3d 309, 495 N. E. 2d 1001.

No. 86–6321. SHAW *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 403.

No. 86–6323. VELILLA *v.* UNITED TECHNOLOGIES CORP., HAMILTON STANDARD DIVISION, ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 201 Conn. 815, 518 A. 2d 73.

No. 86-6325. PERRY *v.* GRESK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 805 F. 2d 1038.

No. 86-6327. HOOVER *v.* GARFIELD HEIGHTS MUNICIPAL COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 802 F. 2d 168.

No. 86-6328. BEEZLEY *v.* FREMONT INDEMNITY CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 530.

No. 86-6332. DUNHAM *v.* TAR HEEL CONTAINER CORP. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1181.

No. 86-6333. PERRY *v.* ASTRIKE ET AL. Ct. App. Ind. Certiorari denied. Reported below: 495 N. E. 2d 560.

No. 86-6338. JACKSON *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-6339. CARLOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 535.

No. 86-6340. ADAMS ET AL. *v.* DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, HUNT CORRECTIONAL CENTER. Sup. Ct. La. Certiorari denied. Reported below: 494 So. 2d 334.

No. 86-6344. REED *v.* CARLSON. C. A. D. C. Cir. Certiorari denied.

No. 86-6348. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 804 F. 2d 1251.

No. 86-6349. MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 1372.

No. 86-6352. SAMMONS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 86-6353. MUNFORD *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 86-6354. WILEY *v.* CARPENTER. C. A. 5th Cir. Certiorari denied.

No. 86-6368. CARLOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 535.

No. 86-6385. LAMBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 1068.

No. 86-6386. GOLDHAMMER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 512 Pa. 587, 517 A. 2d 1280.

No. 86-6389. FERRIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 807 F. 2d 269.

No. 86-6399. KNOST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1409.

No. 86-6400. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 412.

No. 86-6403. ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 178.

No. 86-6404. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 2d 57.

No. 86-6405. MATUSAVAGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1136.

No. 86-6411. WAGNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1409.

No. 86-6412. MUSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 178.

No. 86-6413. STEPHENS *v.* UNITED STATES; and
No. 86-6414. PATTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86-6415. SWIERSKI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 610.

No. 86-6419. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 811 F. 2d 1506.

No. 86-6432. BOURGEOIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 810 F. 2d 1161.

No. 86-6435. ADKINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 801 F. 2d 397.

No. 86-857. BURLINGTON NORTHERN RAILROAD CO. *v.* GULATI. Sup. Ct. Minn. Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 390 N. W. 2d 743.

No. 86-999. NEW YORK ET AL. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 255 U. S. App. D. C. 398, 802 F. 2d 474.

No. 86-1070. MOUNTAIN STATES LEGAL FOUNDATION ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 799 F. 2d 1423.

No. 86-1171. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* DORMAN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 798 F. 2d 1358.

No. 86-6035. SMITH *v.* PENNSYLVANIA. Sup. Ct. Pa.;

No. 86-6087. ALBRECHT *v.* PENNSYLVANIA. Sup. Ct. Pa.;

No. 86-6203. POPE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;

No. 86-6293. HALL *v.* ILLINOIS. Sup. Ct. Ill.;

No. 86-6294. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill.;

No. 86-6309. WHITLEY *v.* BAIR, WARDEN. C. A. 4th Cir.; and

No. 86-6479. JOHNSON *v.* THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: No. 86-6035, 511 Pa. 343, 513 A. 2d 1371; No. 86-6087, 510 Pa. 603, 511 A. 2d 764; No. 86-6203, 496 So. 2d 798; No. 86-6293, 114 Ill. 2d 376, 499 N. E. 2d 1335; No. 86-6294, 114 Ill. 2d 170, 499 N. E. 2d 1355; No. 86-6309, 802 F. 2d 1487; No. 86-6479, 806 F. 2d 1243.

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. 86–6370. RAITPORT *v.* IBM ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 805 F. 2d 391.

Rehearing Denied

No. 86–5982. FALCON *v.* UNITED STATES, 479 U. S. 1094;

No. 86–5989. WILSON *v.* DENTON ET AL., 479 U. S. 1095;

No. 86–6078. LEAL *v.* DAHLBERG, SUPERINTENDENT, OHIO STATE REFORMATORY, 479 U. S. 1097; and

No. 86–6119. JONES *v.* HOWARD ET AL., 479 U. S. 1099. Petitions for rehearing denied.

No. 86–6074. GORMONG *v.* CLEVELAND ELECTRIC COMPANY OF GEORGIA, INC., 479 U. S. 1103. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

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 March 2, 1987, 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. 954. The Judicial Conference Report referred to in that letter is 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, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, and 471 U. S. 1153.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 2, 1987

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 various amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules amendments is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 2, 1987

ORDERED:

1. That the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims be, and they hereby are, amended by including therein amendments to Civil Rules 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 23.1, 24, 25, 26, 27, 28, 30, 31, 32, 34, 35, 36, 37, 38, 41, 43, 44, 44.1, 45, 46, 49, 50, 51, 53, 54, 55, 56, 60, 62, 63, 65, 65.1, 68, 69, 71, 71A, 73, 75, 77, 78, 81, and to the Supplemental Rules for Certain Admiralty and Maritime Claims, Rules B, C, E, and F, as hereinafter set forth:

[See *infra*, pp. 957–1022.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims shall take effect on August 1, 1987.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments 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.

. . . . .

(b) Same: form.—The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

. . . . .

(d) Summons and complaint: person to be served.—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:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent

authorized by appointment or by law to receive service of process.

. . . . .

(e) Summons: 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, or of a notice, or of 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, or of a notice, or of 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 such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's 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.

. . . . .

(i) Alternative provisions for service in a foreign country.

(1) Manner.—When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a cor-

poration or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

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Rule 5. Service and filing of pleadings and other papers.

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(b) Same: how made.—Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

. . . . .

(e) Filing with the court defined.—The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the

judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 6. Time.

. . . . .

(e) Additional time after service by mail.—Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Rule 8. General rules of pleading.

(a) Claims for relief.—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials.—A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraph or may generally deny all the averments except such designated averments or paragraphs as

the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

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(e) Pleading to be concise and direct; consistency.

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(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

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Rule 9. Pleading special matters.

(a) Capacity.—It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

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Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 12. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on pleadings.

(a) When presented.—A defendant shall serve an answer within 20 days after the service of the summons and com-

plaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How presented.—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim

for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

. . . . . .

(e) Motion for more definite statement.—If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike.—Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses in motion.—A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

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Rule 13. Counterclaim and cross-claim.

(a) Compulsory counterclaims.—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

. . . . .

(e) Counterclaim maturing or acquired after pleading.—A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted counterclaim.—When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

. . . . .

Rule 14. Third-Party practice.

(a) When defendant may bring in third party.—At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon no-

tice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) When plaintiff may bring in third party.—When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Admiralty and maritime claims.—When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly

or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Rule 15. Amended and supplemental pleadings.

(a) Amendments.—A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to conform to the evidence.—When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of

the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation back of amendments.—Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental pleadings.—Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

* * * * *

Rule 16. Pretrial conferences; scheduling; management.

. . . . .

(f) Sanctions.—If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2) (B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 17. Parties plaintiff and defendant; capacity.

(a) Real party in interest.—Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to sue or be sued.—The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individ-

ual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C., Sections 754 and 959(a).

(c) Infants or incompetent persons.—Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

. . . . . .

Rule 18. Joinder of claims and remedies.

(a) Joinder of claims.—A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

(b) Joinder of remedies; fraudulent conveyances.—Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may

state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.

Rule 19. Joinder of persons needed for just adjudication.

(a) Persons to be joined if feasible.—A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible.—If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff

will have an adequate remedy if the action is dismissed for nonjoinder.

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Rule 20. Permissive joinder of parties.

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(b) Separate trials.—The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

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Rule 22. Interpleader.

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

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Rule 23. Class actions.

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(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

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(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

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Rule 23.1. Derivative actions by shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rule 24. Intervention.

(a) Intervention of right.—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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Rule 25. Substitution of parties.

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(b) Incompetency.—If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.

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(d) Public officers; death or separation from office.

(1) When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.

Rule 26. General provisions governing discovery.

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(b) Discovery scope and limits.—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

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(3) Trial preparation: materials.—Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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(e) Supplementation of responses.—A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is ex-

pected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

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(f) Discovery conference.—At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

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(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

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(g) Signing of discovery requests, responses, and objections.—Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and

that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

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Rule 27. Depositions before action or pending appeal.

(a) Before action.

(1) Petition.—A person who desires to perpetuate own testimony or that of another person testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order

authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

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(b) Pending appeal.—If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

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Rule 28. Persons before whom depositions may be taken.

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(b) In foreign countries.—In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commis-

sion or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

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Rule 30. Depositions upon oral examination.

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(b) Notice of examination: general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the

person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

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(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

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(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to the deponent.

(c) Examination and cross-examination; record of examination; oath; objections.—Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall

be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

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(e) Submission to witness; changes; signing.—When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and filing by officer; exhibits; copies; notice of filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or

send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

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(g) Failure to attend or to serve subpoena; expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

Rule 31. Depositions upon written questions.

(a) Serving questions; notice.—After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to take responses and prepare record.—A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

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Rule 32. Use of depositions in court proceedings.

(a) Use of depositions.—At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

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(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

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Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) Scope.—Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

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Rule 35. Physical and mental examination of persons.

(a) Order for examination.—When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requestor a copy of a detailed written report of the examining physician setting out the physician's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude the physician's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every

other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

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Rule 36. Requests for admission.

(a) Request for admission.—A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not

give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of admission.—Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Rule 37. Failure to make or cooperate in discovery: sanctions.

(a) Motion for order compelling discovery.—A party, upon reasonable notice to other parties and all persons af-

fected thereby, may apply for an order compelling discovery as follows:

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(2) Motion.—If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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(b) Failure to comply with order.

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(2) Sanctions by court in which action is pending.—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . . .

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

. . . . .

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit.—If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a

request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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(g) Failure to participate in the framing of a discovery plan.—If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 38. Jury trial of right.

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(c) Same: specification of issues.—In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver.—The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

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Rule 41. Dismissal of actions.

(a) Voluntary dismissal: effect thereof.

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(2) By order of court.—Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal: effect thereof.—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

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Rule 43. Taking of testimony.

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(f) Interpreters.—The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

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Rule 44. Proof of official record.

(a) Authentication.

(1) Domestic.—An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

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Rule 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including

testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Rule 45. Subpoena.

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(c) Service.—A subpoena may be served by the marshal, by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

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(f) Contempt.—Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.

Rule 46. Exceptions unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

Rule 49. Special verdicts and interrogatories.

(a) Special verdicts.—The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categori-

cal or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

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Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

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(b) Motion for judgment notwithstanding the verdict.— Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no

verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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(d) Same: denial of motion.—If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

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Rule 51. Instructions to jury: objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 53. Masters.

(a) Appointment and compensation.—The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or

subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate is designated to serve as a master pursuant to Title 28, U. S. C. Section 636(b)(2). The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

. . . . .

(c) Powers.—The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings.—When a reference is made, the clerk shall forthwith furnish the master with a copy of the

order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses.—The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of accounts.—When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and filing.—The master shall prepare a report upon the matters submitted to the master by the

order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

. . . . .

(3) In jury actions.—In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

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(5) Draft report.—Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

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Rule 54. Judgments; costs.

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(c) Demand for judgment.—A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

. . . . .

Rule 55. Default.

(a) Entry.—When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment.—Judgment by default may be entered as follows:

(1) By the clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the court.—In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

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(e) Judgment against the United States.—No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Rule 56. Summary judgment.

(a) For claimant.—A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For defending party.—A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

. . . . .

(e) Form of affidavits; further testimony; defense required.—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When affidavits are unavailable.—Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith.—Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 60. Relief from judgment or order.

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(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does

not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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Rule 62. Stay of proceedings to enforce a judgment.

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(f) Stay according to state law.—In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

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Rule 63. Disability of a judge.

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that such other judge cannot perform those duties because such other judge did not preside at the trial or for any other reason, such other judge may in such other judge's discretion grant a new trial.

Rule 65. Injunctions.

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(b) Temporary restraining order; notice; hearing; duration.—A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court

shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

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Rule 65.1. Security: proceedings against sureties.

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Rule 68. Offer of judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be deter-

mined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 69. Execution.

(a) In general.—Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) Against certain public officers.—When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U. S. C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U. S. C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

Rule 71. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

Rule 71A. Condemnation of property.

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(d) Process.

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(2) Same; form.—Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) Service of notice.

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(ii) Service by publication.—Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located,

once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

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(e) Appearance or answer.—If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested.

Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) Amendment of pleadings.—Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired,

but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) Substitution of parties.—If a defendant dies or becomes incompetent or transfers an interest after the defendant's joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

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(j) Deposit and its distribution.—The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.

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Rule 73. Magistrates; trial by consent and appeal options.

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(b) Consent.—When a magistrate has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate of civil jurisdiction over the case, as authorized by Title 28, U. S. C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

No district judge, magistrate, or other court official shall attempt to persuade or induce a party to consent to a reference of a civil matter to a magistrate under this rule, nor shall a district judge or magistrate be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate.

The district judge, for good cause shown on the judge's motion, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate under this subdivision.

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Rule 75. Proceedings on appeal from magistrate to district judge under Rule 73(d).

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(b) Record on appeal.

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(2) Transcript.—Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as the appellant deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which the appellant intends to present on the appeal. If the appellee deems a transcript of other parts of the pro-

ceedings to be necessary, within 10 days after the service of the statement of the appellant, the appellee shall serve on the appellant and file with the court a designation of additional parts to be included. The appellant shall promptly make arrangements for the inclusion of all such parts unless the magistrate, upon motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.

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(c) Time for filing briefs.—Unless a local rule or court order otherwise provides, the following time limits for filing briefs shall apply.

(1) The appellant shall serve and file the appellant's brief within 20 days after the filing of the transcript, statement of the case, or statement of the evidence.

(2) The appellee shall serve and file the appellee's brief within 20 days after service of the brief of the appellant.

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(4) If the appellee has filed a cross-appeal, the appellee may file a reply brief limited to the issues on the cross-appeal within 10 days after service of the reply brief of the appellant.

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Rule 77. District courts and clerks.

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(c) Clerk's office and orders by clerk.—The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor

Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.

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Rule 78. Motion day.

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

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Rule 81. Applicability in general.

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(c) Removed actions.—These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is

served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

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AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule B. Attachment and garnishment: special provisions.

(1) When available; complaint, affidavit, judicial authorization, and process.—With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) Notice to defendant.—No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to the defendant a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) Answer.

(a) By garnishee.—The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) By defendant.—The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

Rule C. Actions in rem: special provisions.

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(3) Judicial authorization and process.—Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting pa-

pers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

. . . . .

(6) Claim and answer; interrogatories.—The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering

the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

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Rule E. Actions in rem and quasi in rem: general provisions.

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(2) Complaint; security.

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(b) Security for costs.—Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against the party by any interlocutory order or by the final judgment, or on appeal by any appellate court.

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(4) Execution of process; marshal's return; custody of property; procedures for release.

. . . . .

(b) Tangible property.—If tangible property is to be attached or arrested, the marshal shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant

clearance to such vessel until notified by the marshal or a deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible property.—If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

. . . . .

(5) Release of property.

. . . . .

(c) Release by consent or stipulation; order of court or clerk; costs.—Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

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(9) Disposition of property; sales.

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(b) Interlocutory sales.—If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) Sales, proceeds.—All sales of property shall be made by the marshal or a deputy marshal, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

Rule F. Limitation of liability.

(1) Time for filing complaint; security.—Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved

security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint.—The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims against owner; injunction.—Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against

the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to claimants.—Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and answer.—Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be given claimants.—Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one),

(c) the nature of the claim, *i.e.*, whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

. . . . .

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on March 2, 1987, pursuant to 28 U. S. C. § 2076, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1024. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2076, such an amendment does not take effect until so reported to Congress and until the expiration of 180 days thereafter, and if Congress disapproves an amendment so reported it does not take effect. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such an amendment.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of an amendment to the Federal Rules of Evidence, see 441 U. S. 1005.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 2, 1987

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 various amendments to the Federal Rules of Evidence which have been adopted by the Supreme Court pursuant to Section 2076 of Title 28, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 2, 1987

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Rules 101, 104, 106, 404, 405, 411, 602, 603, 604, 606, 607, 608, 609, 610, 611, 612, 613, 615, 701, 703, 705, 706, 801, 803, 804, 806, 902, 1004, 1007, and 1101, as hereinafter set forth:

[See *infra*, pp. 1027–1039.]

2. That the foregoing changes in the Federal Rules of Evidence shall take effect on October 1, 1987.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing changes in the rules of evidence in accordance with the provisions of Section 2076 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 101. Scope.

These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrates, to the extent and with the exceptions stated in Rule 1101.

Rule 104. Preliminary questions.

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(c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused.—The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

. . . . .

Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

. . . . .

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of proving character.

. . . . .

(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has

personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Rule 606. Competency of juror as witness.

(a) At the trial.—A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of character and conduct of witness.

. . . . .

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by evidence of conviction of crime.

(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

. . . . .

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation.

. . . . . .

(c) Leading questions.—Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing used to refresh memory.

Except as otherwise provided in criminal proceedings by section 3500 of title l8, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

. . . . . .

Rule 613. Prior statements of witnesses.

(a) Examining witness concerning prior statement.—In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 80l(d)(2).

Rule 615. Exclusion of witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

. . . . .

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court appointed experts.

(a) Appointment.—The court may on its own motion or on the motion of any party enter an order to show cause why ex-

pert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

. . . . .

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

. . . . .

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) the party's own state-

ment in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . . .

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

. . . . .

(18) Learned treatises.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.—Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

. . . . .

(21) Reputation as to character.—Reputation of a person's character among associates or in the community.

. . . . .

(24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. Hearsay exceptions; declarant unavailable.

(a) Definition of unavailability.—"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivisions (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . . .

(2) Statement under belief of impending death.—In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declar-

ant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

. . . . .

(5) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2),(C),(D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

. . . . . .

(2) Domestic public documents not under seal.—A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents.—A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

. . . . . .

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

. . . . . .

(3) Original in possession of opponent.—At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

. . . . . .

Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Rule 1101. Applicability of rules.

(a) Courts and magistrates.—These Rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States Courts of Appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrates.

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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 March 9, 1987, 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 *post*, p. 1042. The Judicial Conference Report referred to in that letter is 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, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, and 471 U. S. 1167.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 9, 1987

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 various amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Sections 3771 and 3772 of Title 18, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 9, 1987

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 4, 5, 5.1, 6, 7, 10, 11, 12, 12.1, 12.2, 15, 16, 17, 17.1, 20, 21, 24, 25, 26.2, 30, 32, 32.1, 33, 38, 40, 41, 42, 43, 44, 45, 46, 49, and 51, as hereinafter set forth:

[See *infra*, pp. 1045–1075.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on August 1, 1987 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases 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 Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4. Arrest warrant or summons upon complaint.

. . . . . .

(c) Form.

(1) Warrant.—The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

. . . . . .

(d) Execution or service; and return.

. . . . . .

(3) Manner.—The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) Return.—The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

Rule 5. Initial appearance before the magistrate.

. . . . .

(c) Offenses not triable by the United States magistrate.—If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate shall also inform the defendant of the right to a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district

court. If the defendant waives preliminary examination, the magistrate shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

Rule 5.1. Preliminary examination.

(a) Probable cause finding.—If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

. . . . . .

(c) Records.—After concluding the proceeding the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall

promptly make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

Rule 6. The grand jury.

(a) Summoning grand juries.

(1) Generally.—The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(2) Alternate jurors.—The court may direct that alternate jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which

they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors.

. . . . . .

(c) Foreperson and deputy foreperson.—The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

. . . . . .

(f) Finding and return of indictment.—An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate in writing forthwith.

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Rule 7. The indictment and the information.

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(b) Waiver of indictment.—An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in open court prosecution by indictment.

(c) Nature and contents.

(1) In general.—The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

. . . . .

(3) Harmless error.—Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

. . . . .

Rule 10. Arraignment.

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

Rule 11. Pleas.

(a) Alternatives.

. . . . .

(2) Conditional pleas.—With the approval of the court and the consent of the government, a defendant

may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

. . . . . .

(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 the defendant of, and determine that the defendant understands, the following:

. . . . . .

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a 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 the defendant 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 the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary.—The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or

threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea agreement procedure.

. . . . . .

(2) Notice of such agreement.—If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

. . . . . .

(4) Rejection of a plea agreement.—If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

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Rule 12. Pleadings and motions before trial; defenses and objections.

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(h) Effect of determination.—If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

. . . . .

Rule 12.1. Notice of alibi.

(a) Notice by defendant.—Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

(b) Disclosure of information and witness.—Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) Continuing duty to disclose.—If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information fur-

nished under subdivision (a) or (b), the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness.

(d) Failure to comply.—Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

. . . . . .

Rule 12.2. Notice of insanity defense or expert testimony of defendant's mental condition.

(a) Defense of insanity.—If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert testimony of defendant's mental condition.—If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

. . . . . .

(d) Failure to comply.—If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

. . . . . .

Rule 15. Depositions.

(a) When taken.—Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of taking.—The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not

in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of expenses.—Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How taken.—Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use.—At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require

the offering of all of it which is relevant to the part offered and any party may offer other parts.

. . . . . .

Rule 16. Discovery and inspection.

(a) Disclosure of evidence by the government.

(1) Information subject to disclosure.

(A) Statement of defendant.—Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) Defendant's prior record.—Upon request of the defendant, the government shall furnish to the

defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and tangible objects.—Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

. . . . .

(b) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

. . . . .

(B) Reports of examinations and tests.—If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(2) Information not subject to disclosure.—Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

. . . . .

(c) Continuing duty to disclose.—If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

. . . . .

Rule 17. Subpoena.

(a) For attendance of witnesses; form; issuance.—A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before that magistrate, but it need not be under the seal of the court.

. . . . .

(d) Service.—A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1

day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

. . . . . .

(g) Contempt.—Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

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Rule 17.1. Pretrial conference.

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Rule 20. Transfer from the district for plea and sentence.

(a) Indictment or information pending.—A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or

information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.

(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 that defendant may state in writing a wish 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 that defendant was arrested, held, or present, subject to the approval 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.

(c) Effect of not guilty plea.—If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.

(d) Juveniles.—A juvenile (as defined in 18 U. S. C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.

Rule 21. Transfer from the district for trial.

(a) For prejudice in the district.—The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) Transfer in other cases.—For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

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Rule 24. Trial jurors.

(a) Examination.—The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

. . . . .

Rule 25. Judge; disability.

(a) During trial.—If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

(b) After verdict or finding of guilt.—If by reason of absence, death, sickness or other disability the judge before

whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.

Rule 26.2. Production of statements of witnesses.

(a) Motion for production.—After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

. . . . . .

(c) Production of excised statement.—If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

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(f) Definition.—As used in this rule, a "statement" of a witness means.

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;

. . . . .

Rule 30. Instructions.

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 32. Sentence and judgment.

(a) Sentence.

(1) *Imposition of sentence.*—Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and the defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

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(c) Presentence investigation.

. . . . .

(3) *Disclosure.*

(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should

not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

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Rule 32.1. Revocation or modification of probation.

(a) Revocation of probation.

(1) Preliminary hearing.—Whenever a probationer is held in custody on the ground that the probationer has

violated a condition of probation, the probationer shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U. S. C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation of probation;

(B) an opportunity to appear at the hearing and present evidence in the probationer's own behalf;

(C) upon request, the opportunity to question witnesses against the probationer unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of the probationer's right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the probationer shall be held for a revocation hearing. The probationer may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2) Revocation hearing.—The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against the probationer;

(C) an opportunity to appear and to present evidence in the probationer's own behalf;

(D) the opportunity to question adverse witnesses; and

(E) notice of the probationer's right to be represented by counsel.

(b) Modification of probation.—A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon the probationer's request or the court's own motion is favorable to the probationer, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the probationer for the purposes of this rule.

Rule 33. New trial.

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Rule 38. Stay of execution, and relief pending review.

(a) Stay of execution.

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(2) *Imprisonment.*—A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of the appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where an appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of an appeal to the court of appeals.

(3) *Fine.*—A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.

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Rule 40. Commitment to another district.

(a) Appearance before federal magistrate.—If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof.

. . . . .

(d) Arrest of probationer.—If a person is arrested for a violation of probation in a district other than the district having probation jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

. . . . .

(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 the magistrate is the person named in the warrant.

(e) Arrest for failure to appear.—If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested shall be taken without unnecessary delay before the nearest available federal magistrate. Upon production of the warrant or a certified copy thereof and upon a finding that the person before the magistrate is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

(f) Release or detention.—If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate amends the release or detention decision or alters the conditions of release, the magistrate shall set forth the reasons therefor in writing.

Rule 41. Search and seizure.

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(c) Issuance and contents.

(1) Warrant upon affidavit.—A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If

the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

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(e) Motion for return of property.—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the dis-

trict of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

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Rule 42. Criminal contempt.

(a) Summary disposition.—A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon notice and hearing.—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Rule 43. Presence of the defendant.

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(b) Continued presence not required.—The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

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Rule 44. Right to and assignment of counsel.

(a) Right to assigned counsel.—Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate or the court through appeal, unless that defendant waives such appointment.

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(c) Joint representation.—Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Rule 45. Time.

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(e) Additional time after service by mail.—Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.

Rule 46. Release from custody.

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(b) Release during trial.—A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure such person's presence during the trial or to assure that such person's conduct will not obstruct the orderly and expeditious progress of the trial.

. . . . .

(d) Justification of sureties.—Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.

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(g) Supervision of detention pending trial.—The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.

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Rule 49. Service and filing of papers.

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(b) Service: how made.—Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

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Rule 51. Exceptions unnecessary.

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

AMENDMENTS TO BANKRUPTCY RULES

The following amendments to the Bankruptcy Rules were prescribed by the Supreme Court of the United States on March 30, 1987, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1078. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, 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 Bankruptcy Rules and amendments thereto, see, *e. g.*, 461 U. S. 973 and 471 U. S. 1147.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 30, 1987

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 various amendments to the Bankruptcy Rules which have been adopted by the Supreme Court pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 30, 1987

ORDERED:

1. That the Bankruptcy Rules be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1001, 1002, 1003, 1005, 1006, 1007, 1009, 1010, 1011, 1012, 1014, 1015, 1017, 1018, 1019, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 3002, 3003, 3004, 3005, 3009, 3010, 3011, 3012, 3016, 3017, 3018, 3019, 3020, 3022, 4001, 4002, 4003, 4004, 4005, 4006, 4007, 5001, 5003, 5004, 5005, 5007, 5008, 5010, 5011, 6002, 6004, 6006, 6007, 7001, 7004, 7008, 7012, 7013, 7019, 7070, 7087, 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8008, 8009, 8013, 8014, 8015, 8016, 8018, 8019, 9001, 9002, 9003, 9006, 9007, 9010, 9011, 9012, 9013, 9014, 9015, 9016, 9018, 9019, 9020, 9021, 9022, 9027, 9028, 9029, 9030, 9033, X–1002, X–1004, X–1006, X–1008, X–1009, X–1010, as hereinafter set forth:

[See *infra*, pp. 1081–1171.]

2. That the foregoing changes in the Bankruptcy Rules shall take effect on August 1, 1987 and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Bankruptcy Rules in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO BANKRUPTCY RULES

Rule 1001. Scope of rules and forms; short title.

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Bankruptcy Rules and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.

PART I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

Rule 1002. Commencement of case.

A petition commencing a case under the Code shall be filed with the clerk.

Rule 1003. Involuntary petition.

(a) Transferor or transferee of claim.—A transferor or transferee of a claim shall annex to the original and each copy of the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security, or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under chapter 7 or for reorganization under chapter 11 shall not be a qualified petitioner.

(b) Joinder of petitioners after filing.—If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file

with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

Rule 1005. Caption of petition.

The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the name, social security number and employer's tax identification number of the debtor and all other names used by the debtor within six years before filing the petition. If the petition is not filed by the debtor, it shall include all names used by the debtor which are known to petitioners.

Rule 1006. Filing fee.

(a) General requirement.—Every petition shall be accompanied by the prescribed filing fee except as provided in subdivision (b) of this rule.

(b) Payment of filing fee in installments.

(1) Application for permission to pay filing fee in installments.—A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments. The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) Action on application.—Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any install-

ment, provided the last installment is paid not later than 180 days after filing the petition.

(3) Postponement of attorney's fees.—The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney or any other person who renders services to the debtor in connection with the case.

Rule 1007. Lists, schedules and statements; time limits.

(a) List of creditors and equity security holders.

(1) Voluntary case.—In a voluntary case, the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities or a Chapter 13 Statement.

(2) Involuntary case.—In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the name and address of each creditor unless a schedule of liabilities has been filed.

(3) Equity security holders.—In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 15 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.

(4) Extension of time.—Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to any trustee, committee appointed under the Code, or other party as the court may direct.

(b) Schedules and statements required.

(1) The debtor in a chapter 7 liquidation case or chapter 11 reorganization case, unless the court orders otherwise, shall file with the court schedules of assets and liabilities, prepared as prescribed by Official Form No. 6, a schedule of current income and expenditures, prepared as prescribed by Official Form No. 6A, if appropriate, a statement of financial affairs, prepared as prescribed by Official Form No. 7 or No. 8,

whichever is appropriate, and a statement of executory contracts.

(2) The debtor in a chapter 13 individual's debt adjustment case, unless the court orders otherwise, shall file with the court a Chapter 13 Statement conforming to Official Form No. 10 and, if the debtor is engaged in business, a statement of financial affairs prepared as prescribed by Official Form No. 8. The budget included in the Chapter 13 Statement shall constitute the schedule of current income and current expenditures.

(3) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(2) of the Code, prepared as prescribed by Official Form No. 8A. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

(c) Time limits.—The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements previously filed in a pending chapter 7 case shall be deemed filed in a superseding case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to any committee, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to any committee, trustee, or other party as the court may direct.

(d) List of 20 largest creditors in Chapter 9 municipality case or Chapter 11 reorganization case.—In addition to the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list contain-

ing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by Official Form No. 9. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under § 303(h) of the Code.

(e) List in Chapter 9 municipality cases.—The list required by subdivision (a) of this rule shall be filed by the debtor in a chapter 9 municipality case within such time as the court shall fix. If a proposed plan requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition is filed, the debtor shall also file with the court a list showing the name and address of each known holder of title, legal or equitable, to real property adversely affected. On motion for cause shown, the court may modify the requirements of this subdivision and subdivision (a) of this rule.

(f) [Abrogated].

(g) Partnership and partners.—The general partners of a debtor partnership shall prepare and file the schedules of the assets and liabilities, schedule of current income and expenditures, statement of financial affairs, and statement of executory contracts of the partnership. The court may order any general partner to file a statement of personal assets and liabilities with the court within such time as the court may fix.

(h) Interests acquired or arising after petition.—If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 10 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental

schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11 or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 13 case.

(i) Disclosure of list of security holders.—After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list.

(j) Impounding of lists.—On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.

(k) Preparation of list, schedules, or statements on default of debtor.—If a list, schedule, or statement, other than a statement of intention, is not prepared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.

Rule 1009. Amendments of voluntary petitions, lists, schedules and statements.

(a) General right to amend.—A voluntary petition, list, schedule, statement of financial affairs, statement of executory contracts, or Chapter 13 Statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a

party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, statement of financial affairs, statement of executory contracts, or Chapter 13 Statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

(b) Statement of intention.—The statement of intention may be amended by the debtor at any time before the expiration of the period provided in § 521(2)(B) of the Code. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby.

Rule 1010. Service of involuntary petition and summons; petition commencing ancillary case.

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on such other parties as the court may direct. The summons shall conform to Official Form No. 13 and a copy shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order the summons and petition to be served by mailing copies to the party's last known address, and by not less than one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(f) and Rule 4(g) and (h) F. R. Civ. P. apply when service is made or attempted under this rule.

Rule 1011. Responsive pleading or motion in involuntary and ancillary cases.

(a) Who may contest petition.—The debtor named in an involuntary petition or a party in interest to a petition commencing a case ancillary to a foreign proceeding may contest the petition. In the case of a petition against a partnership

under Rule 1004(b), a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

(b) Defenses and objections; when presented.—Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F. R. Civ. P. and shall be filed and served within 20 days after service of the summons, except that if service is made by publication on a party or partner not residing or found within the state in which the court sits, the court shall prescribe the time for filing and serving the response.

(c) Effect of motion.—Service of a motion under Rule 12(b) F. R. Civ. P. shall extend the time for filing and serving a responsive pleading as permitted by Rule 12(a) F. R. Civ. P.

(d) Claims against petitioners.—A claim against a petitioning creditor may not be asserted in the answer except for the purpose of defeating the petition.

(e) Other pleadings.—No other pleadings shall be permitted, except that the court may order a reply to an answer and prescribe the time for filing and service.

Rule 1012. [Abrogated].

Rule 1014. Dismissal and change of venue.

(a) Dismissal and transfer of cases.

(1) Cases filed in proper district.—If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners and other entities as directed by the court, the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) Cases filed in improper district.—If a petition is filed in an improper district, on timely motion of a party in interest and after hearing on notice to the petitioners and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

(b) Procedure when petitions involving the same debtor or related debtors are filed in different courts.—If petitions commencing cases under the Code are filed in different districts by or against (1) the same debtor, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the first petition is filed and after hearing on notice to the petitioners and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed. Except as otherwise ordered by the court in the district in which the first petition is filed, the proceedings on the other petitions shall be stayed by the courts in which they have been filed until the determination is made.

Rule 1015. Consolidation or joint administration of cases pending in same court.

(a) Cases involving same debtor.—If two or more petitions are pending in the same court by or against the same debtor, the court may order consolidation of the cases.

(b) Cases involving two or more related debtors.—If a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of a husband and wife shall, if one spouse has elected the exemptions under § 522(b)(1) of the Code and the other has elected the exemptions under § 522(b)(2), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elect the same exemptions within the time fixed by the court, they

will be deemed to have elected the exemptions provided by § 522(b)(1).

(c) Expediting and protective orders.—When an order for consolidation or joint administration of a joint case or two or more cases is entered pursuant to this rule, while protecting the rights of the parties under the Code, the court may enter orders as may tend to avoid unnecessary costs and delay.

Rule 1017. Dismissal of case; suspension.

(a) Voluntary dismissal; dismissal for want of prosecution.—Except as provided in §§ 707(b) and 1307(b) of the Code, a petition shall not be dismissed on motion of the petitioner or for want of prosecution or other cause or by consent of the parties prior to a hearing on notice to all creditors as provided in Rule 2002(a). For such notice the debtor shall file a list of all creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the preparing and filing by the debtor or other entity.

(b) Dismissal for failure to pay filing fee.

(1) For failure to pay any installment of the filing fee, the court may after hearing on notice to the debtor and the trustee dismiss the petition.

(2) If the petition is dismissed or the case closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner provided in Rule 2002.

(c) Suspension.—A petition shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to a hearing on notice as provided in Rule 2002(a).

(d) Procedure for dismissal or conversion.—A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§ 706(a), 707(b), 1112(a), or 1307(a) or (b), is governed by Rule 9014. Conversion or dismissal pursuant to §§ 706(a), 1112(a), or 1307(b) shall be on motion filed and

served as required by Rule 9013. A chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to § 1307(a).

(e) Dismissal of individual debtor's Chapter 7 case for substantial abuse.—An individual debtor's case under chapter 7 may be dismissed for substantial abuse only after a hearing on notice to the debtor and the trustee and such other parties in interest as the court directs. The notice shall advise the debtor of all matters which the court will consider at the hearing.

Rule 1018. Contested involuntary petitions; contested petitions commencing ancillary cases; proceedings to vacate order for relief; applicability of rules in Part VII governing adversary proceedings.

The following rules in Part VII apply to all proceedings relating to a contested involuntary petition, to proceedings relating to a contested petition commencing a case ancillary to a foreign proceeding, and to all proceedings to vacate an order for relief: Rules 7005, 7008–7010, 7015, 7016, 7024–7026, 7028–7037, 7052, 7054, 7056, and 7062, except as otherwise provided in Part I of these rules and unless the court otherwise directs. The court may direct that other rules in Part VII shall also apply. For the purposes of this rule a reference in the Part VII rules to adversary proceedings shall be read as a reference to proceedings relating to a contested involuntary petition, or contested ancillary petition, or proceedings to vacate an order for relief. Reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

Rule 1019. Conversion of Chapter 11 reorganization case or Chapter 13 individual's debt adjustment case to Chapter 7 liquidation case.

When a chapter 11 or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) Filing of lists, inventories, schedules, statements.

(A) Lists, inventories, schedules, statements of financial affairs, and statements of executory contracts theretofore

filed shall be deemed to be filed in the chapter 7 case, unless the court directs otherwise. If they have not been previously filed, the debtor shall comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the date of the entry of the order directing that the case continue under chapter 7.

(B) The statement of intention, if required, shall be filed within 30 days following entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. An extension of time may be granted for cause only on motion made before the time has expired. Notice of an extension shall be given to any committee, trustee, or other party as the court may direct.

(2) Notice of order of conversion.—Within 20 days after entry of the order converting the case to a chapter 7 case, notice of the order shall be given to any trustee in the superseded case and to all creditors in the manner provided by Rule 2002 and shall be included in the notice of the meeting of creditors.

(3) New filing periods.—A new time period for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence pursuant to Rules 3002, 4004, or 4007, provided that a new time period shall not commence if a chapter 7 case had been converted to a chapter 11 or 13 case and thereafter reconverted to a chapter 7 case and the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

(4) Claims filed in superseded case.—All claims actually filed by a creditor in the superseded case shall be deemed filed in the chapter 7 case.

(5) Turnover of records and property.—After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11 or 13 case shall, forthwith, unless otherwise ordered,

turn over to the chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession or trustee.

(6) Filing final report and schedule of postpetition debts.—Each debtor in possession or trustee in the superseded case shall file with the court a final report and account within 30 days following the entry of the order of conversion, unless the court directs otherwise. The report shall include a schedule of unpaid debts incurred after commencement of the chapter 11 case. A chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case. If the conversion order is entered after confirmation of a plan, the debtor shall file with the court (A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts entered into or assumed after the filing of the original petition but before entry of the conversion order.

(7) Filing of postpetition claims; notice.—On the filing of the schedule of unpaid debts, the court shall order that written notice be given to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed within 60 days from the entry of the order, pursuant to Rule 3001(a)–(d). The court shall fix the time for filing claims arising from debts not so scheduled or arising from rejection of executory contracts under §§ 348(c) and 365(d) of the Code.

(8) Extension of time to file claims against surplus.—Any extension of time for the filing of claims against a surplus granted pursuant to Rule 3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (7) of this rule, and notice shall be given as provided in Rule 2002.

PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 2001. Appointment of interim trustee before order for relief in a Chapter 7 liquidation case.

(a) Appointment.—At any time following the commencement of an involuntary liquidation case and before an order for relief, the court on written motion of a party in interest may appoint an interim trustee under § 303(g) of the Code. The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors and other parties in interest as the court may designate.

(b) Bond of movant.—An interim trustee may not be appointed under this rule unless the movant furnishes a bond in an amount approved by the court, conditioned to indemnify the debtor for costs, attorney's fee, expenses, and damages allowable under § 303(i) of the Code.

(c) Order of appointment.—The order appointing the interim trustee shall state the reason the appointment is necessary and shall specify the trustee's duties.

(d) Turnover and report.—Following qualification of the trustee selected under § 702 of the Code, the interim trustee, unless otherwise ordered, shall (1) forthwith deliver to the trustee all the records and property of the estate in possession or subject to control of the interim trustee and, (2) within 30 days thereafter file a final report and account.

Rule 2002. Notices to creditors, equity security holders, and United States.

(a) Twenty-day notices to parties in interest.—Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of (1) the meeting of creditors pursuant to § 341 of the Code; (2) a proposed use, sale, or lease of property of the estate other than in the ordinary

course of business, unless the court for cause shown shortens the time or directs another method of giving notice; (3) the hearing on approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent; (4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6); (5) in a chapter 7 liquidation and a chapter 11 reorganization case, the hearing on the dismissal or conversion of a case to another chapter; (6) the time fixed to accept or reject a proposed modification of a plan; (7) hearings on all applications for compensation or reimbursement of expenses totalling in excess of $500; and (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c).

(b) Twenty-five-day notices to parties in interest.—Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of (1) the time fixed for filing objections and the hearing to consider approval of a disclosure statement; and (2) the time fixed for filing objections and the hearing to consider confirmation of a plan.

(c) Content of notice.

(1) Proposed use, sale, or lease of property.—Subject to Rule 6004 the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property.

(2) Notice of hearing on compensation.—The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision (a)(7) of this rule shall identify the applicant and the amounts requested.

(d) Notice to equity security holders.—In a chapter 11 reorganization case, unless otherwise ordered by the court, the clerk, or some other person as the court may direct, shall in

the manner and form directed by the court give notice to all equity security holders of (1) the order for relief; (2) any meeting of equity security holders ordered by the court pursuant to § 341 of the Code; (3) the hearing on the proposed sale of all or substantially all of the debtor's assets; (4) the hearing on the dismissal or conversion of a case to another chapter; (5) the time fixed for filing objections to and the hearing to consider approval of a disclosure statement; (6) the time fixed for filing objections to and the hearing to consider confirmation of a plan; and (7) the time fixed to accept or reject a proposed modification of a plan.

(e) Notice of no dividend.—In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.

(f) Other notices.—Except as provided in subdivision (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of (1) the order for relief; (2) dismissal of the case; (3) the time allowed for filing claims pursuant to Rule 3002; (4) the entry of an order directing that the case be converted to a case under a different chapter; (5) the time fixed for filing a complaint objecting to the debtor's discharge pursuant to § 727 of the Code as provided in Rule 4004; (6) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4007; (7) the waiver, denial, or revocation of a discharge as provided in Rule 4006; (8) entry of an order confirming a chapter 9 or 11 plan; and (9) a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $250. Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017(c) shall be given in accordance with Rule 3017(d).

(g) Addresses of notices.—All notices required to be mailed under this rule to a creditor, equity security holder, or

indenture trustee shall be addressed as such entity or an authorized agent may direct in a request filed with the court; otherwise, to the address shown in the list of creditors or the schedule whichever is filed later. If a different address is stated in a proof of claim duly filed, that address shall be used unless a notice of no dividend has been given.

(h) Notices to creditors whose claims are filed.—In a chapter 7 case, the court may, after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code, direct that all notices required by subdivision (a) of this rule, except clause (4) thereof, be mailed only to creditors whose claims have been filed and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 3002(c)(6).

(i) Notices to committees.—Copies of all notices required to be mailed under this rule shall be mailed to the committees appointed pursuant to the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a) (2), (3) and (7) of this rule be mailed only to the committees or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file with the clerk a request that all notices be mailed to them.

(j) Notices to the United States.—Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case to the Securities and Exchange Commission at Washington, D.C., and at any other place the Commission designates in writing filed with the court if the Commission has filed a notice of appearance in the case or has made a request in writing filed with the court; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.; (3) in a chapter 11 case to the District Director of Internal Revenue for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor be-

came indebted; or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.

(k) Notice by publication.—The court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice.

(l) Orders designating matter of notices.—The court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules.

(m) Caption.—The caption of every notice given under this rule shall comply with Rule 1005.

(n) In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors notice by mail of the order for relief within 20 days from the date thereof.

Rule 2003. Meeting of creditors or equity security holders.

(a) Date and place.—The court shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the court may set a later time for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the court within the district convenient for the parties in interest. If the court designates a place for the meeting which is not regularly staffed by a clerk who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.

(b) Order of meeting.

(1) Meeting of creditors.—The clerk shall preside at the meeting of creditors unless (1) the court designates a different person, or (2) the creditors who may vote for a trustee under § 702(a) of the Code and who hold a majority in amount of claims that vote designate a presiding officer. In a chap-

ter 11 reorganization case, if a chairperson has been selected by a creditors' committee appointed pursuant to § 1102(a)(1), the chairperson or the chairperson's designee shall preside. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a trustee or of a creditors' committee. The presiding officer shall have the authority to administer oaths. When a trustee is elected, the creditors may recommend the amount of the trustee's bond to be fixed by the court.

(2) Meeting of equity security holders.—If the court orders a meeting of equity security holders pursuant to § 341(b) of the Code, the clerk shall preside unless the holders of equity security interests present at the meeting who hold a majority in amount of the interests at the meeting designate a presiding officer.

(3) Right to vote.—In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face. If the court orders an election of a separate trustee for a general partner's estate under Rule 2009(e)(1), a creditor of the partnership may file a proof of claim or writing evidencing a right to vote for that trustee notwithstanding that a trustee for the partnership has previously qualified. Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may, after such notice and hearing as it may direct, temporarily allow it for that purpose in an amount that seems proper to the court.

(c) Minutes and record of meeting.—Minutes of the meeting of creditors or equity security holders shall be prepared by the presiding officer. Any examination under oath shall be recorded verbatim by electronic sound recording equipment or other means of recording.

(d) Report to the court.—The presiding officer shall transmit to the court the name and address of any person elected

trustee or entity elected a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting, the interim trustee shall serve as trustee in the case.

(e) Adjournment.—The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time without further written notice.

Rule 2004. Examination.

(a) Examination on motion.—On motion of any party in interest, the court may order the examination of any entity.

(b) Scope of examination.—The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In an individual's debt adjustment case under chapter 13 or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

(c) Compelling attendance and production of documentary evidence.—The attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

(d) Time and place of examination of debtor.—The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it

designates, whether within or without the district wherein the case is pending.

(e) Mileage.—An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

Rule 2005. Apprehension and removal of debtor to compel attendance for examination.

(a) Order to compel attendance for examination.—On motion of any party in interest supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal, or some other officer authorized by law, an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.

(b) Removal.—Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the

order, the debtor may be taken into custody under the order and removed in accordance with the following rules:

(1) If taken at a place less than 100 miles from the place of issue of the order, the debtor shall be brought forthwith before the court that issued the order.

(2) If taken at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest United States magistrate, bankruptcy judge, or district judge. If, after hearing, the magistrate, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate, bankruptcy judge, or district judge shall issue an order of removal and the person in custody shall be released on conditions assuring prompt appearance before the court which issued the order to compel the attendance.

(c) Conditions of release.—In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18, U. S. C., § 3146(a) and (b).

Rule 2006. Solicitation and voting of proxies in Chapter 7 liquidation cases.

(a) Applicability.—This rule applies only in a liquidation case pending under chapter 7 of the Code.

(b) Definitions.

(1) Proxy.—A proxy is a written power of attorney authorizing any entity to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of the estate.

(2) Solicitation of proxy.—The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent the owner, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the debtor.

(c) Authorized solicitation.

(1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over $500 or the 100 creditors having the largest claims had at least five days notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition.

(2) A proxy may be solicited only in writing.

(d) Solicitation not authorized.—This rule does not permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any custodian; (3) by the interim trustee or by or on behalf of any entity not qualified to vote under § 702(a) of the Code; (4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.

(e) Data required from holders of multiple proxies.—At any time before the voting commences at any meeting of creditors pursuant to Rule 2003, or at any other time as the court may direct, a holder of two or more proxies shall file with the clerk a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and delivery of each proxy, including:

(1) a copy of the solicitation;

(2) identification of the solicitor, the forwarder, if the forwarder is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the debtor

and with each other. If the solicitor, forwarder, or proxyholder is an association, there shall also be included a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. If the solicitor, forwarder, or proxyholder is a committee of creditors, the statement shall also set forth the date and place the committee was organized, that the committee was organized in accordance with clause (B) or (C) of paragraph (c)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority;

(3) a statement that no consideration has been paid or promised by the proxyholder for the proxy;

(4) a statement as to whether there is any agreement and, if so, the particulars thereof, between the proxyholder and any other entity for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any entity, other than a member or regular associate of the proxyholder's law firm, which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(5) if the proxy was solicited by an entity other than the proxyholder, or forwarded to the holder by an entity who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the solicitor or forwarder that no consideration has been paid or promised for the proxy, and whether there is any agreement, and, if so, the particulars thereof, between the solicitor or forwarder and any other entity for the payment of any consideration in connection with voting the proxy, or for sharing compensation with any entity, other than a member or regular associate of the solicitor's or forwarder's law firm which may be allowed the trustee or any entity for services rendered in the case, or

for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on the member's claim.

(f) Enforcement of restrictions on solicitation.—On motion of any party in interest or on its own initiative, the court may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After notice and a hearing the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other appropriate action.

Rule 2007. Appointment of creditors' committee organized before commencement of the case.

(a) Appointment.—In a chapter 9 municipality or chapter 11 reorganization case, on application of a party in interest and after notice as the court may direct, the court may appoint as the committee of unsecured creditors required by § 1102(a) of the Code, members of a committee selected before the commencement of the case in accordance with subdivision (b) of this rule.

(b) Selection of members of committee.—The court may find that a committee selected by unsecured creditors before the commencement of a chapter 9 or chapter 11 case satisfies the requirements of § 1102(b)(1) of the Code if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over $1,000 or the 100 unsecured creditors having the largest claims had at least five days notice in writing, and of which meeting written minutes reporting the names of the creditors

present or represented and voting and the amounts of their claims were kept and are available for inspection;

(2) all proxies voted at the meeting for the elected committee were solicited pursuant to Rule 2006 and the lists and statements required by subdivision (e) thereof have been filed with the court; and

(3) the organization of the committee was in all other respects fair and proper.

Rule 2008. Notice to trustee of selection.

The clerk shall immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee's bond. A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as trustee in a chapter 7 or chapter 13 case that does not notify the court in writing of rejection of the office within five days after receipt of notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court in writing of acceptance of the office within five days after receipt of notice of selection or shall be deemed to have rejected the office.

Rule 2009. Trustees for estates when joint administration ordered.

(a) Election of single trustee for estates being jointly administered.—If the court orders a joint administration of two or more estates pursuant to Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered.

(b) Right of creditors to elect separate trustee.—Notwithstanding entry of an order for joint administration pursuant to Rule 1015(b) the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code.

(c) Appointment of trustees for estates being jointly administered.

(1) Chapter 7 liquidation cases.—The court may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases.

(2) Chapter 11 reorganization cases.—If a trustee is ordered, the court may appoint one or more trustees for estates being jointly administered in chapter 11 cases.

(3) Chapter 13 individual's debt adjustment cases.—The court may appoint one or more trustees for estates being jointly administered in chapter 13 cases.

(d) Potential conflicts of interest.—On a showing that creditors or equity security holders of the different estates will be prejudiced by conflicts of interest of a common trustee, the court shall order separate trustees for estates being jointly administered.

(e) Trustees for partnership and partners' individual estates.—Notwithstanding the foregoing provisions of this rule, the trustee of a partnership estate may also be the trustee of the individual estate of any general partner if the estates are being jointly administered unless the court, for cause shown, either (1) permits the creditors of a general partner to elect a separate trustee or (2) appoints a separate trustee for the individual estate.

(f) Separate accounts.—The trustee or trustees of estates being jointly administered shall keep separate accounts of the property and distribution of each estate.

Rule 2010. Qualification by trustee; proceeding on bond.

(a) Blanket bond.—The court may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case.

(b) Evidence of qualification.—A certified copy of the order approving the trustee's bond shall constitute conclusive evidence of qualification.

(c) Proceeding on bond.—A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.

Rule 2012. Substitution of trustee or successor trustee; accounting.

(a) Trustee.—A trustee appointed in a Chapter 11 case is substituted automatically for the debtor in possession as a party in any pending action, proceeding, or matter.

(b) Successor trustee.—When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code (1) the successor is automatically substituted as a party in any pending action, proceeding, or matter; and (2) within the time fixed by the court, the successor trustee shall prepare and file with the court an accounting of the prior administration of the estate.

Rule 2013. Limitation on appointment or employment of trustees, examiners, appraisers and auctioneers.

(a) Limitation on appointments.—Appointments of trustees and examiners and employment of appraisers and auctioneers shall be made so that the annual aggregate compensation of any person shall not be disproportionate or excessive, giving proper regard to geographic constraints.

(b) Record to be kept.—The clerk shall maintain a public record listing fees awarded by the court (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professionals employed by trustees, and (2) to examiners appointed by the court. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee awarded. The record shall be maintained chronologically and shall be kept current and open to examination by the public without charge.

(c) Summary of record.—At the close of each annual period, the clerk shall prepare a summary of the public record by individual or firm name, to reflect total fees awarded during the preceding year. The summary shall be open to examination by the public without charge.

Rule 2014. Employment of professional persons.

(a) Application for an order of employment.—An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327 or § 1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants.

(b) Services rendered by member or associate of firm of attorneys or accountants.—If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2015. Duty of trustee or debtor in possession to keep records, make reports, and give notice of case.

(a) Trustee or debtor in possession.—A trustee or debtor in possession shall (1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; (3) file the reports and summaries required by § 704(8) of the Code within the times fixed by the court and which shall include a statement, if payments are made to em-

ployees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited; (4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; (5) in every county in which real property of the debtor is located file a notice of or a copy of the petition, without schedules, in the office where a transfer of real property may be recorded to perfect such transfer; (6) within 30 days after the date of the order confirming a plan or within such other time as the court may fix, file a report with the court concerning the action taken by the trustee or debtor in possession and the progress made in the consummation of the plan and file further reports as the court may direct until the plan has been consummated; (7) after consummation of a plan, file an application for a final decree showing that the plan has been consummated, and the names and addresses, if known, of the holders of claims or interests which have not been surrendered or released in accordance with the provisions of the plan and the nature and amounts of claims or interests, and other facts as may be necessary to enable the court to pass on the provisions to be included in the final decree.

(b) Chapter 13 trustee and debtor.

(1) Business cases.—In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (1)–(4) of subdivision (a) of this rule.

(2) Nonbusiness cases.—In a chapter 13 individual's debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the duties prescribed by clause (2) of subdivision (a) of this rule.

(c) Transmission of reports.—In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be mailed to the creditors, equity security holders, and indenture trustees. The court may also direct the publication of summaries of any such reports.

Rule 2016. Compensation for services rendered and reimbursement of expenses.

(a) Application for compensation or reimbursement.—An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity.

(b) Disclosure of compensation paid or promised to attorney for debtor.—Every attorney for a debtor, whether or not the attorney applies for compensation, shall file with the court within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329

of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed within 15 days after any payment or agreement not previously disclosed.

Rule 2017. Examination of debtor's transactions with debtor's attorney.

(a) Payment or transfer to attorney before commencement of case.—On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor, to an attorney for services rendered or to be rendered is excessive.

(b) Payment or transfer to attorney after commencement of case.—On motion by the debtor or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after the commencement of a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

Rule 2018. Intervention; right to be heard.

(a) Permissive intervention.—In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

(b) Intervention by attorney general of a state.—In a chapter 7, 11, or 13 case, the Attorney General of a State may appear and be heard on behalf of consumer creditors if the court

determines the appearance is in the public interest, but the Attorney General may not appeal from any judgment, order, or decree in the case.

(c) Chapter 9 municipality case.—The Secretary of the Treasury of the United States may, or if requested by the court shall, intervene in a chapter 9 case. Representatives of the state in which the debtor is located may intervene in a chapter 9 case with respect to matters specified by the court.

(d) Labor unions.—In a chapter 9 or 11 case, a labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees. A labor union or employees' association which exercises its right to be heard under this subdivision shall not be entitled to appeal any judgment, order, or decree relating to the plan, unless otherwise permitted by law.

(e) Service on entities covered by this rule.—The court may enter orders governing the service of notice and papers on entities permitted to intervene or be heard pursuant to this rule.

Rule 2019. Representation of creditors and equity security holders in Chapter 9 municipality and Chapter 11 reorganization cases.

(a) Data required.—In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement with the clerk setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance,

directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(b) Failure to comply; effect.—On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by an entity or committee who has not complied with this rule or with § 1125(b) of the Code.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3002. Filing proof of claim or interest.

(a) Necessity for filing.—An unsecured creditor or an equity security holder must file a proof of claim or interest in

accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(4), 3003, 3004 and 3005.

(b) Place of filing.—A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) Time for filing.—In a chapter 7 liquidation or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

(1) On motion of the United States, a state, or subdivision thereof before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the United States, a state, or subdivision thereof.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may

grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.

Rule 3003. Filing proof of claim or equity security interest in Chapter 9 municipality or Chapter 11 reorganization cases.

(a) Applicability of rule.—This rule applies in chapter 9 and 11 cases.

(b) Schedule of liabilities and list of equity security holders.

(1) Schedule of liabilities.—The schedule of liabilities filed pursuant to § 521(1) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.

(2) List of equity security holders.—The list of equity security holders filed pursuant to Rule 1007(a)(3) shall constitute prima facie evidence of the validity and amount of the equity security interests and it shall not be necessary for the holders of such interests to file a proof of interest.

(c) Filing proof of claim.

(1) Who may file.—Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) Who must file.—Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing.—The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

(4) Effect of filing claim.—A proof of claim or interest executed and filed in accordance with this subdivision shall

supersede any scheduling of that claim or interest pursuant to § 521(1) of the Code.

(5) Filing by indenture trustee.—An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.

(d) Proof of right to record status.—For the purposes of Rules 3017, 3018 and 3021 and for receiving notices, an entity who is not the record holder of a security may file a statement setting forth facts which entitle that entity to be treated as the record holder. An objection to the statement may be filed by any party in interest.

Rule 3004. Filing of claims by debtor or trustee.

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee.

Rule 3005. Filing of claim, acceptance, or rejection by guarantor, surety, indorser, or other codebtor.

(a) Filing of claim.—If a creditor has not filed a proof of claim pursuant to Rule 3002 or 3003(c), an entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c) whichever is applicable, execute and file a proof of claim in the name of the creditor, if known, or if unknown, in the entity's own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. A proof of claim filed by a creditor pursuant to Rule 3002 or 3003(c) shall

supersede the proof of claim filed pursuant to the first sentence of this subdivision.

(b) Filing of acceptance or rejection; substitution of creditor.—An entity which has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in the entity's own name but if the creditor files a proof of claim within the time permitted by Rule 3003(c) or files a notice with the court prior to confirmation of a plan of the creditor's intention to act in the creditor's own behalf, the creditor shall be substituted for the obligor with respect to that claim.

Rule 3009. Declaration and payment of dividends in Chapter 7 liquidation cases.

In chapter 7 cases, dividends to creditors shall be paid as promptly as practicable in the amounts and at the times as ordered by the court. Dividend checks shall be made payable and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other entity and shall be mailed to the other entity.

Rule 3010. Small dividends and payments in Chapter 7 liquidation and Chapter 13 individual's debt adjustment cases.

(a) Chapter 7 cases.—In a chapter 7 case no dividend in an amount less than $5 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Any dividend not distributed to a creditor shall be treated in the same manner as unclaimed funds as provided in § 347 of the Code.

(b) Chapter 13 cases.—In a chapter 13 case no payment in an amount less than $15 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision

shall accumulate and shall be paid whenever the accumulation aggregates $15. Any funds remaining shall be distributed with the final payment.

Rule 3011. Unclaimed funds in Chapter 7 liquidation and Chapter 13 individual's debt adjustment cases.

The trustee shall file with the clerk a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.

Rule 3012. Valuation of security.

The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

Rule 3016. Filing of plan and disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(a) Time for filing plan.—A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code, may file a plan at any time before the conclusion of the hearing on the disclosure statement or thereafter with leave of court.

(b) Identification of plan.—Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

(c) Disclosure statement.—In a chapter 9 or 11 case, a disclosure statement pursuant to § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

Rule 3017. Court consideration of disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(a) Hearing on disclosure statement and objections thereto.—Following the filing of a disclosure statement as

provided in Rule 3016(c), the court shall hold a hearing on not less than 25 days notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider such statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and such other entity as may be designated by the court, at any time prior to approval of the disclosure statement or by such earlier date as the court may fix.

(b) Determination on disclosure statement.—Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) Dates fixed for voting on plan and confirmation.—On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) Transmission and notice to creditors and equity security holders.—On approval of a disclosure statement, the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; (4) notice of any date fixed for the hearing on confirmation; and (5) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, a form of ballot conforming to Official Form No. 30 shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or only a summary of the plan

is transmitted, the opinion of the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement was entered.

Rule 3018. Acceptance or rejection of plans.

(a) Persons entitled to accept or reject plan; time for acceptance or rejection.—A plan may be accepted or rejected by the following entities within the time fixed by the court pursuant to Rule 3017: (1) any creditor whose claim is deemed allowed pursuant to § 502 of the Code or has been allowed by the court; (2) subject to subdivision (b) of this rule, any creditor who is a security holder of record at the date the order approving the disclosure statement is entered whose claim has not been disallowed; and, (3) an equity security holder of record at the date the order approving the disclosure statement is entered whose interest has not been disallowed. For cause shown and within the time fixed for acceptance or rejection of a plan, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

(b) Acceptances or rejections obtained before petition.—Acceptances or rejections of a plan may be obtained before the commencement of a case under the Code and may be filed with the court on behalf of (1) the holder of a claim or interest which is deemed allowed pursuant to § 502 of the Code or allowed by the court; (2) a creditor who is a security holder of record at the date specified in the solicitation for the purposes of such solicitation and whose claim has not been disallowed; and (3) an equity security holder of record at the date specified in the solicitation for the purposes of such solicita-

tion and whose interest has not been disallowed. A holder of a claim or interest who has accepted or rejected a plan before the commencement of the case under the Code shall not be deemed to have accepted or rejected the plan if the court finds after notice and hearing that the plan was not transmitted to substantially all impaired creditors and impaired equity security holders, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan, or that the solicitation was not in compliance with § 1126(b) of the Code.

(c) Form of acceptance or rejection.—An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to Official Form No. 30. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans transmitted and if acceptances are filed for more than one plan, the creditor or equity security holder may indicate a preference or preferences among the plans so accepted.

(d) Acceptance or rejection by partially secured creditor.—A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities.

Rule 3019. Modification of accepted plan before confirmation.

After a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Rule 3020. Deposit; confirmation of plan.

(a) Deposit.—In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.

(b) Objections to and hearing on confirmation.

(1) Objections.—Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

(2) Hearing.—The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(c) Order of confirmation.—The order of confirmation shall conform to Official Form No. 31 and notice of entry there of shall be mailed promptly as provided in Rule 2002(f) to the debtor, creditors, equity security holders and other parties in interest.

(d) Retained power.—Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

Rule 3022. Final decree.

After an estate is fully administered, including distribution of any deposit required by the plan, the court shall enter a final decree (1) discharging any trustee if not previously discharged and cancelling the trustee's bond; (2) making provision by way of injunction or otherwise as may be equitable; and (3) closing the case.

PART IV. THE DEBTOR: DUTIES AND BENEFITS

Rule 4001. Relief from automatic stay; use of cash collateral; obtaining credit; agreements.

(a) Relief from stay.

(1) Motion.—A motion for relief from an automatic stay provided by the Code shall be made in accordance with Rule 9014.

(2) Final hearing on stay.—The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing is commenced pursuant to § 362(e) unless before that time expires the court denies the motion for relief from the stay or, after notice and a hearing, orders the stay continued pending conclusion of the final hearing.

(3) Ex parte relief from stay.—Relief from a stay under § 362(a) may be granted without prior notice to the adverse party only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that event, the court shall proceed expeditiously to hear and determine the motion.

(b) Use of cash collateral.

(1) Motion; service.—A motion for authorization to use cash collateral shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee appointed under the Code

or its authorized agent, or, if no committee has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d) and on such other entities as the court may direct.

(2) Hearing.—The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 15 day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice.—Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(c) Obtaining credit.

(1) Motion; service.—A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Hearing.—The court may commence a final hearing on a motion for authority to obtain credit no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice.—Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(d) Agreement relating to relief from the automatic stay, providing adequate protection, use of cash collateral, and obtaining credit.

(1) Motion; service.—A motion for approval of an agreement to provide adequate protection, for the modification or termination of the stay provided for in § 362, for the use of cash collateral, or for approval of an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed pursuant to Rule 1007(d) and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Objection.—Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 15 days of the mailing of notice.

(3) Disposition; hearing.—If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

Rule 4002. Duties of debtor.

In addition to performing other duties prescribed by the Code and rules, the debtor shall (1) attend and submit to an examination at the times ordered by the court; (2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness; (3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal

or order if a schedule of property has not yet been filed pursuant to Rule 1007; (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate, and (5) file a statement of any change of the debtor's address.

Rule 4003. Exemptions.

(a) Claim of exemptions.—A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(b) Objections to claim of exemptions.—The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

(c) Burden of proof.—In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

(d) Avoidance by debtor of transfers of exempt property.—A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014.

Rule 4004. Grant or denial of discharge.

(a) Time for filing complaint objecting to discharge; notice of time fixed.—In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). In a chapter 11 reorganization case, such complaint shall be filed not later than the first date set for the hearing on confirma-

tion. Not less than 25 days notice of the time so fixed shall be given to all creditors as provided in Rule 2002(f) and to the trustee and the trustee's attorney.

(b) Extension of time.—On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time has expired.

(c) Grant of discharge.—In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge, the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, or (3) the debtor has filed a waiver under § 727(a)(10). Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within such period, the court may defer entry of the order to a date certain.

(d) Applicability of rules in Part VII.—A proceeding commenced by a complaint objecting to discharge is governed by Part VII of these rules.

(e) Order of discharge.—An order of discharge shall conform to Official Form No. 27.

(f) Registration in other districts.—An order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of that district. When so registered the order of discharge shall have the same effect as an order of the court of the district where registered.

(g) Notice of discharge.—The clerk shall promptly mail a copy of the final order of discharge to those specified in subdivision (a) of this rule.

Rule 4005. Burden of proof in objecting to discharge.

At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection.

Rule 4006. Notice of no discharge.

If an order is entered denying or revoking a discharge or if a waiver of discharge is filed, the clerk, after the order be-

comes final or the waiver is filed, shall promptly give notice thereof to all creditors in the manner provided in Rule 2002.

Rule 4007. Determination of dischargeability of a debt.

(a) Persons entitled to file complaint.—A debtor or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt.

(b) Time for commencing proceeding other than under § 523(C) of the code.—A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

(c) Time for filing complaint under § 523(C) in Chapter 7 liquidation and Chapter 11 reorganization cases; notice of time fixed.—A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

(d) Time for filing complaint under § 523(c) in Chapter 13 individual's debt adjustment cases; notice of time fixed.—On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to § 523(c) and shall give not less than 30 days notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest after hearing on notice the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

(e) Applicability of rules in Part VII.—A proceeding commenced by a complaint filed under this rule is governed by Part VII of these rules.

PART V. COURTS AND CLERKS

Rule 5001. Courts and clerks' offices.

(a) Courts always open.—The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.

(b) Trials and hearings; orders in chambers.—All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

(c) Clerk's office.—The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and the legal holidays listed in Rule 6(a) F. R. Civ. P.

Rule 5003. Records kept by the clerk.

(a) Bankruptcy dockets.—The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.

(b) Claims register.—The clerk shall keep in a claims register a list of claims filed in a case when it appears that there will be a distribution to unsecured creditors.

(c) Judgments and orders.—The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a correct copy of every final judgment or order affecting title to or lien on real property or for the recovery of money or property, and any other order which the court may direct to be kept. On request of the prevailing party, a correct copy of every judgment or order affecting title to or lien upon real or personal

property or for the recovery of money or property shall be kept and indexed with the civil judgments of the district court.

(d) Index of cases; certificate of search.—The clerk shall keep indices of all cases and adversary proceedings as prescribed by the Director of the Administrative Office of the United States Courts. On request, the clerk shall make a search of any index and papers in the clerk's custody and certify whether a case or proceeding has been filed in or transferred to the court or if a discharge has been entered in its records.

(e) Other books and records of the clerk.—The clerk shall also keep such other books and records as may be required by the Director of the Administrative Office of the United States Courts.

Rule 5004. Disqualification.

(a) Disqualification of judge.—A bankruptcy judge shall be governed by 28 U. S. C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstances arises or, if appropriate, shall be disqualified from presiding over the case.

(b) Disqualification of judge from allowing compensation.—A bankruptcy judge shall be disqualified from allowing compensation to a person who is a relative of the bankruptcy judge or with whom the judge is so connected as to render it improper for the judge to authorize such compensation.

Rule 5005. Filing of papers.

(a) Filing.—The proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U. S. C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk.

(b) Error in filing.—A paper intended to be filed but erroneously delivered to the trustee, the attorney for the trustee,

a bankruptcy judge, a district judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. In the interest of justice, the court may order that the paper shall be deemed filed as of the date of its original delivery.

Rule 5007. Record of proceedings and transcripts.

(a) Filing of record or transcript.—The reporter or operator of a recording device shall certify the original notes of testimony, tape recording, or other original record of the proceeding and promptly file them with the clerk. The person preparing any transcript shall promptly file a certified copy with the clerk.

(b) Transcript fees.—The fees for copies of transcripts shall be charged at rates prescribed by the Judicial Conference of the United States. No fee may be charged for the certified copy filed with the clerk.

(c) Admissibility of record in evidence.—A certified sound recording or a transcript of a proceeding shall be admissible as prima facie evidence to establish the record.

Rule 5008. Funds of the estate.

(a) Court approval required.—A deposit or investment for which a bond or deposit of securities is required under § 345(b) of the Code shall not be made until the court, on motion with such notice as the court directs, approves the bond or the deposit of securities.

(b) Report of deposit or investment.—Promptly after making the initial deposit or investment of the estate's funds and thereafter as the court may direct, the trustee shall file a report which identifies the depository or describes the investment and states the amount of any deposit or investment and whether any portion is insured or guaranteed by the United States or a department, agency, or instrumentality of the United States, or backed by the full faith and credit of the United States.

(c) Deposit of securities; agreement.—Securities accepted for deposit in lieu of a surety on a depository bond shall be

deposited in the custody of the Federal Reserve Bank or branch thereof designated by the court or in the custody of such other person as the court may direct. The securities shall be deposited conditioned on proper accounting for all money deposited or invested and for any return on any such money, prompt repayment of such money and return thereon, and faithful performance of the duties as a depository or entity with whom an investment is made. The entity depositing securities shall execute an agreement for the deposit of securities in favor of the United States which incorporates the foregoing conditions. Securities subject to such an agreement shall be subject to the order of the court.

(d) Action on bond or agreement for deposit of securities.—Proceedings on a bond given pursuant to § 345(b) of the Code or on an agreement for deposit of securities required by subdivision (c) of this rule shall be in the name of the United States for the use of the estate or any entity injured by a breach of the condition.

(e) Prohibition of deposits when adequacy of security doubtful.—No trustee or other person shall deposit or invest funds received or held as a fiduciary under the Code if there is reasonable cause to believe that the bond or the security therefor or the deposited securities are or may be inadequate in view of existing and expected deposits or investments.

(f) Reports required.—Depositories and entities with whom deposits or investments are made shall file reports as prescribed by regulations of the Director of the Administrative Office of the United States Courts.

(g) Deficiency in amount of bond or deposited securities.—Whenever the bond and any deposited securities do not or will not constitute adequate security because of existing and expected deposits or investments, the court shall require the depository or entity with whom an investment is made to increase the amount of the bond or the deposited securities within a fixed time. If within the time fixed the depository or entity with whom an investment is made fails to increase the amount of the bond or the deposited securities to an amount adequate for existing and expected deposits

or investments, the court shall order immediate payment of all money on deposit or invested with it, with all interest payable thereon.

(h) Relief from liability on bond.—A surety on a bond may move to be relieved from liability with respect to any subsequent default. If after hearing on notice to the depository or entity with whom the investment is made, to other sureties, to trustees and to other representatives of estates having money of the estate protected by the bond, the court determines that the motion may be granted without injury to any party in interest, the surety shall be relieved after a new bond or other appropriate security is submitted and approved.

(i) Combining of funds for deposit.—The court may authorize the deposit or investment of funds from more than one estate in a single account or investment instrument. The trustee shall maintain records identifying separately the money of each estate. The court shall require that a statement of account be filed at least quarterly.

Rule 5010. Reopening cases.

A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7 or 13 case a trustee shall be appointed unless the court determines that a trustee is not necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

Rule 5011. Withdrawal and abstention from hearing a proceeding.

(a) Withdrawal.—A motion for withdrawal of a case or proceeding shall be heard by a district judge.

(b) Abstention from hearing a proceeding.—Unless a district judge orders otherwise, a motion for abstention pursuant to 28 U. S. C. § 1334(c) shall be heard by the bankruptcy judge, who shall file a report and recommendation for disposition of the motion. The clerk shall serve forthwith a copy of the report and recommendation on the parties to the pro-

ceeding. Within 10 days of being served with a copy of the report and recommendation a party may serve and file with the clerk objections prepared in the manner provided in Rule 9033(b). Review of the report and recommendation by the district court shall be governed by Rule 9033.

(c) Effect of filing of motion for withdrawal or abstention.—The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U. S. C. § 1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. A motion for a stay ordinarily shall be presented first to the bankruptcy judge. A motion for a stay or relief from a stay filed in the district court shall state why it has not been presented to or obtained from the bankruptcy judge. Relief granted by the district judge shall be on such terms and conditions as the judge deems proper.

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 6002. Accounting by prior custodian of property of the estate.

(a) Accounting required.—Any custodian required by the Code to deliver property in the custodian's possession or control to the trustee shall promptly file a report and account with the court with respect to the property of the estate and the administration thereof.

(b) Examination of administration.—On the filing of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after hearing on notice the court shall determine the propriety of the administration, including the reasonableness of all disbursements.

Rule 6004. Use, sale, or lease of property.

(a) Notice of proposed use, sale, or lease of property.—Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be

given pursuant to Rule 2002(a)(2), (c)(1), and (i) and, if applicable, in accordance with § 363(b)(2) of the Code.

(b) Objection to proposal.—Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014.

(c) Sale free and clear of liens and other interests.—A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession or trustee.

(d) Sale of property under $2,500.—Notwithstanding subdivision (a) of this rule, when all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give a general notice of intent to sell such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court. An objection is governed by Rule 9014.

(e) Hearing.—If a timely objection is made pursuant to subdivision (b) or (d) of the rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.

(f) Conduct of sale not in the ordinary course of business.

(1) Public or private sale.—All sales not in the ordinary course of business may be by private sale or by public auction. Unless it is impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if

sold in bulk shall be filed with the clerk on completion of a sale. If the property is sold by an auctioneer, the auctioneer shall file the statement and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement.

(2) Execution of instruments.—After a sale in accordance with this rule the debtor, the trustee, or debtor in possession, as the case may be, shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser.

Rule 6006. Assumption, rejection and assignment of executory contracts.

(a) Proceeding to assume, reject, or assign.—A proceeding to assume, reject, or assign an executory contract, unexpired lease, or time share interest, other than as part of a plan, is governed by Rule 9014.

(b) Proceeding to require trustee to act.—A proceeding by a party to an executory contract, unexpired lease, or time share interest in a chapter 9 municipality case, chapter 11 reorganization case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract, lease, or time share interest is governed by Rule 9014.

(c) Hearing.—When a motion is made pursuant to subdivision (a) or (b) of this rule, the court shall set a hearing on notice to the other party to the contract and to other parties in interest as the court may direct.

Rule 6007. Abandonment or disposition of property.

(a) Notice of proposed abandonment or disposition; objections.—Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to all creditors, indenture trustees and committees appointed or elected pursuant to the Code. An objection may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court.

(b) Motion by party in interest.—A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

(c) Hearing.—If a timely objection is made as prescribed by subdivision (a) of this rule, or if a motion is made as prescribed by subdivision (b), the court shall set a hearing on notice to the entities as the court may direct.

PART VII. ADVERSARY PROCEEDINGS

Rule 7001. Scope of rules of Part VII.

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U. S. C. § 1452.

Rule 7004. Process; service of summons, complaint.

(a) Summons; service; proof of service.—Rule 4(a), (b), (c)(2)(C)(i), (d), (e) and (g)–(j) F. R. Civ. P. applies in adversary proceedings. Personal service pursuant to Rule 4(d) F. R. Civ. P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(b) Service by first class mail.—In addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) F. R. Civ.

P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, 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 defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint to the United States attorney for the district in which the action is brought and also the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to such officer or agency.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such defendant in the court of general jurisidiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in writing filed with the court and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(c) Service by publication.—If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(d) or (i) F. R. Civ. P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail postage prepaid, to the

party's last known address and by at least one publication in such manner and form as the court may direct.

(d) Nationwide service of process.—The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(e) Service on debtor and others in foreign country.—The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F. R. Civ. P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F. R. Civ. P.

(f) Summons: time limit for service.—If service is made pursuant to Rule 4(d)(1)–(6) F. R. Civ. P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

Rule 7008. General rules of pleading.

(a) Applicability of Rule 8 F. R. Civ. P.—Rule 8 F. R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not

consent to entry of final orders or judgment by the bankruptcy judge.

(b) Attorney's fees.—A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.

Rule 7012. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings.

(a) When presented.—If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 20 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of a more definite statement.

(b) Applicability of Rule 12(b)–(h) F. R. Civ. P.—Rule 12(b)–(h) F. R Civ. P. applies in adversary proceedings.—A responsive pleading shall admit or deny an allegation that the

proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

Rule 7013. Counterclaim and cross-claim.

Rule 13 F. R. Civ. P. applies in adversary proceedings, except that a party sued by a trustee or debtor in possession need not state as a counterclaim any claim that the party has against the debtor, the debtor's property, or the estate, unless the claim arose after the entry of an order for relief. A trustee or debtor in possession who fails to plead a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, may by leave of court amend the pleading, or commence a new adversary proceeding or separate action.

Rule 7019. Joinder of persons needed for just determination.

Rule 19 F. R. Civ. P. applies in adversary proceedings, except that (1) if an entity joined as a party raises the defense that the court lacks jurisdiction over the subject matter and the defense is sustained, the court shall dismiss such entity from the adversary proceeding and (2) if an entity joined as a party properly and timely raises the defense of improper venue, the court shall determine, as provided in 28 U. S. C. § 1412, whether that part of the proceeding involving the joined party shall be transferred to another district, or whether the entire adversary proceeding shall be transferred to another district.

Rule 7070. Judgment for specific acts; vesting title.

Rule 70 F. R. Civ. P. applies in adversary proceedings and the court may enter a judgment divesting the title of any party and vesting title in others whenever the real or personal property involved is within the jurisdiction of the court.

Rule 7087. Transfer of adversary proceeding.

On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U. S. C. § 1412, except as provided in Rule 7019(2).

Part VIII. Appeals to District Court or Bankruptcy Appellate Panel

Rule 8001. Manner of taking appeal; voluntary dismissal.

(a) Appeal as of right; how taken.—An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to Official Form No. 35, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

(b) Appeal by leave; how taken.—An appeal from an interlocutory judgment, order or decree of a bankruptcy judge as permitted by 28 U. S. C. § 158(a) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

(c) Voluntary dismissal.

(1) Before docketing.—If an appeal has not been docketed, the appeal may be dismissed by the bankruptcy judge on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(2) After docketing.—If an appeal has been docketed and the parties to the appeal sign and file with the clerk of the district court or the clerk of the bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or bankruptcy appellate panel.

(d) [Abrogated].

(e) Consent to appeal to bankruptcy appellate panel.—Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b) or within 30 days of the filing of the notice of appeal, whichever is later.

Rule 8002. Time for filing notice of appeal.

(a) Ten-day period.—The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(b) Effect of motion on time for appeal.—If a timely motion is filed by any party: (1) for judgment notwithstanding the verdict under Rule 9015; (2) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alter-

ation of the judgment would be required if the motion is granted; (3) under Rule 9023 to alter or amend the judgment; or (4) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed. No additional fees shall be required for such filing.

(c) Extension of time for appeal.—The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

Rule 8003. Leave to appeal.

(a) Content of motion; answer.—A motion for leave to appeal under 28 U. S. C. § 158(a) shall contain: (1) a statement of the facts necessary to an understanding of the questions to be presented by the appeal; (2) a statement of those questions and of the relief sought; (3) a statement of the reasons why an appeal should be granted; and (4) a copy of the judgment, order, or decree complained of and of any opinion or memorandum relating thereto. Within 10 days after service of the motion, an adverse party may file with the clerk an answer in opposition.

(b) Transmittal; determination of motion.—The clerk shall transmit the notice of appeal, the motion for leave to appeal and any answer thereto to the clerk of the district court

or the clerk of the bankruptcy appellate panel as soon as all parties have filed answers or the time for filing an answer has expired. The motion and answer shall be submitted without oral argument unless otherwise ordered.

(c) Appeal improperly taken regarded as a motion for leave to appeal.—If a required motion for leave to appeal is not filed, but a notice of appeal is timely filed, the district court or bankruptcy appellate panel may grant leave to appeal or direct that a motion for leave to appeal be filed. The district court or the bankruptcy appellate panel may also deny leave to appeal but in so doing shall consider the notice of appeal as a motion for leave to appeal. Unless an order directing that a motion for leave to appeal be filed provides otherwise, the motion shall be filed within 10 days of entry of the order.

Rule 8004. Service of the notice of appeal.

The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant or, if a party is not represented by counsel, to the party's last known address. Failure to serve notice shall not affect the validity of the appeal. The clerk shall note on each copy served the date of the filing of the notice of appeal and shall note in the docket the names of the parties to whom copies are mailed and the date of the mailing.

Rule 8005. Stay pending appeal.

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

Rule 8006. Record and issues on appeal.

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) or entry of an order granting leave to appeal the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within seven days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within seven days of service of the statement of the cross appellant, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall immediately after filing the designation deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrange-

ments for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8007. Completion and transmission of the record; docketing of the appeal.

(a) Duty of reporter to prepare and file transcript.—On receipt of a request for a transcript, the reporter shall acknowledge on the request the date it was received and the date on which the reporter expects to have the transcript completed and shall transmit the request, so endorsed, to the clerk or the clerk of the bankruptcy appellate panel. On completion of the transcript the reporter shall file it with the clerk and, if appropriate, notify the clerk of the bankruptcy appellate panel. If the transcript cannot be completed within 30 days of receipt of the request the reporter shall seek an extension of time from the clerk or the clerk of the bankruptcy appellate panel and the action of the clerk shall be entered in the docket and the parties notified. If the reporter does not file the transcript within the time allowed, the clerk or the clerk of the bankruptcy appellate panel shall notify the bankruptcy judge.

(b) Duty of clerk to transmit record; copies of record; docketing of appeal.—When the record is complete for purposes of appeal, the clerk shall transmit it forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel. If the record is to be retained by the clerk as provided in subdivision (c) of this rule, the clerk shall transmit the notice of appeal and the judgment, order, or decree appealed from, and any opinion, findings of fact and conclusions of law of the court. On receipt of the transmission the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter the appeal in the docket and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed. If the bankruptcy appellate panel directs that additional copies of the record be furnished, the clerk of the bankruptcy appellate panel shall notify the appellant and, if the appellant

fails to provide the copies, the clerk shall prepare the copies at the expense of the appellant.

(c) Retention of record by the clerk.—Any part of the record on appeal may be retained by the clerk if the parties to the appeal so stipulate, a rule of the bankruptcy appellate panel so provides, or the bankruptcy judge so orders. The record on appeal for all purposes shall nevertheless be the record as designated under Rule 8006. When the bankruptcy judge has ordered retention, the parties shall provide to the clerk copies of any papers retained and the clerk shall transmit those copies to the clerk of the district court or the bankruptcy appellate panel. If papers have been retained, pursuant to a stipulation of the parties, on request of a party to the stipulation the clerk shall transmit the papers so requested to the clerk of the district court or the clerk of the bankruptcy appellate panel. On order of the district court or the bankruptcy appellate panel the clerk shall transmit any retained papers to the clerk of the district court or the clerk of the bankruptcy appellate panel.

(d) Record for preliminary hearing.—If prior to the time the record is transmitted a party moves in the district court or before the bankruptcy appellate panel for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk at the request of any party to the appeal shall transmit to the clerk of the district court or the clerk of the bankruptcy appellate panel the parts of the original record as any party to the appeal shall designate.

Rule 8008. Filing and service.

(a) Filing.—Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; an original and three copies shall be filed when

an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished.

(b) Service of all papers required.—Copies of all papers filed by any party and not required by these rules to be served by the clerk of the district court or the clerk of the bankruptcy appellate panel shall, at or before the time of filing, be served by the party or a person acting for the party on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel.

(c) Manner of service.—Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service.—Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The clerk of the district court or the clerk of the bankruptcy appellate panel may permit papers to be filed without acknowledgment or proof of service but shall require the acknowledgment or proof of service to be filed promptly thereafter.

Rule 8009. Briefs and appendix; filing and service.

(a) Briefs.—Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file a brief within 15 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a

reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

(b) Appendix to brief.—If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following:

(1) The complaint and answer or other equivalent pleadings;

(2) Any pretrial order;

(3) The judgment, order, or decree from which the appeal is taken;

(4) Any other orders relevant to the appeal;

(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;

(6) Any motion and response on which the court rendered decision;

(7) The notice of appeal;

(8) The relevant entries in the bankruptcy docket; and

(9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel.

An appellee may also serve and file an appendix which contains material required to be included by the appellant but omitted by appellant.

Rule 8013. Disposition of appeal; weight accorded bankruptcy judge's findings of fact.

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Rule 8014. Costs.

Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court. Costs incurred in the production of copies of briefs, the appendices, and the record and in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal and the fee for filing the notice of appeal shall be taxed by the clerk as costs of the appeal in favor of the party entitled to costs under this rule.

Rule 8015. Motion for rehearing.

Unless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 10 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of a subsequent judgment.

Rule 8016. Duties of clerk of district court and bankruptcy appellate panel.

(a) Entry of judgment.—The clerk of the district court or the clerk of the bankruptcy appellate panel shall prepare, sign and enter the judgment following receipt of the opinion of the court or the appellate panel or, if there is no opinion, following the instruction of the court or the appellate panel. The notation of a judgment in the docket constitutes entry of judgment.

(b) Notice of orders or judgments; return of record.—Immediately on the entry of a judgment or order the clerk of the district court or the clerk of the bankruptcy appellate panel shall transmit a notice of the entry to each party to the appeal

and to the clerk, together with a copy of any opinion respecting the judgment or order, and shall make a note of the transmission in the docket. Original papers transmitted as the record on appeal shall be returned to the clerk on disposition of the appeal.

Rule 8018. Rules by circuit councils and district courts.

Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U. S. C. § 158(b) and the district courts may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court, not inconsistent with the rules of this Part VIII. Rule 83 F. R. Civ. P. governs the procedure for making and amending rules to govern appeals. In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner not inconsistent with these rules.

Rule 8019. Suspension of rules in Part VIII.

In the interest of expediting decision or for other cause, the district court or the bankruptcy appellate panel may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, and 8013, and may order proceedings in accordance with the direction.

PART IX. GENERAL PROVISIONS

Rule 9001. General definitions.

The definitions of words and phrases in § 101, § 902 and § 1101 and the rules of construction in § 102 of the Code govern their use in these rules. In addition, the following words and phrases used in these rules have the meanings indicated:

(1) "Bankruptcy clerk" means a clerk appointed pursuant to 28 U. S. C. § 156(b).

(2) "Bankruptcy Code" or "Code" means title 11 of the United States Code.

(3) "Clerk" means bankruptcy clerk, if one has been appointed, otherwise clerk of the district court.

(4) "Court" or "judge" means the judicial officer before whom a case or proceeding is pending.

(5) "Debtor." When any act is required by these rules to be performed by a debtor or when it is necessary to compel attendance of a debtor for examination and the debtor is not a natural person: (A) if the debtor is a corporation, "debtor" includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control; (B) if the debtor is a partnership, "debtor" includes any or all of its general partners or, if designated by the court, any other person in control.

(6) "Firm" includes a partnership or professional corporation of attorneys or accountants.

(7) "Judgment" means any appealable order.

(8) "Mail" means first class, postage prepaid.

(9) "Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual or firm.

(10) "Trustee" includes a debtor in possession in a chapter 11 case.

Rule 9002. Meanings of words in the federal rules of civil procedure when applicable to cases under the code.

The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meanings indicated unless they are inconsistent with the context:

(1) "Action" or "civil action" means an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter.

(2) "Appeal" means an appeal as provided by 28 U. S. C. § 158.

(3) "Clerk" or "clerk of the district court" means the court officer responsible for the bankruptcy records in the district.

(4) "District court," "trial court," "court," or "judge" means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge.

(5) "Judgment" includes any order appealable to an appellate court.

Rule 9003. Prohibition of ex parte contacts.

Except as otherwise permitted by applicable law, any party in interest and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

Rule 9006. Time.

(a) Computation.—In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default 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 a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 5001(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., 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 court is held.

(b) Enlargement.

(1) In general.—Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a

notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(2) Enlargement not permitted.—The court may not enlarge the time for taking action under Rule 1007(d), 1017(b)(3), 1019(2), 2003(a) and (d), 7052, 9015(f), 9023, and 9024.

(3) Enlargement limited.—The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

(c) Reduction.

(1) In general.—Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

(2) Reduction not permitted.—The court may not reduce the time for taking action under Rules 2002(a)(4) and (a)(8), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

(d) For motions—affidavits.—A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than five days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) Time of service.—Service of process and service of any paper other than process or of notice by mail is complete on mailing.

(f) Additional time after service by mail.—When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

(g) Grain storage facility cases.—This rule shall not limit the court's authority under § 557 of the Code to enter orders governing procedures in cases in which the debtor is an owner or operator of a grain storage facility.

Rule 9007. General authority to regulate notices.

When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the entities to whom, and the form and manner in which the notice shall be given. When feasible, the court may order any notices under these rules to be combined.

Rule 9010. Representation and appearances; powers of attorney.

(a) Authority to act personally or by attorney.—A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) Notice of appearance.—An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

(c) Power of attorney.—The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the

acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to Official Form No. 17 or Official Form No. 18. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U. S. C. § 459, § 953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.

Rule 9011. Signing and verification of papers.

(a) Signature.—Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, statement of intention, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(b) Verification.—Except as otherwise specifically provided by these rules, papers filed in a case under the Code

need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U. S. C. § 1746 satisfies the requirement of verification.

(c) Copies of signed or verified papers.—When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Rule 9012. Oaths and affirmations.

(a) Persons authorized to administer oaths.—The following persons may administer oaths and affirmations and take acknowledgments: a bankruptcy judge, clerk, deputy clerk, officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country.

(b) Affirmation in lieu of oath.—When in a case under the Code an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

Rule 9013. Motions: form and service.

A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.

Rule 9014. Contested matters.

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court or-

ders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

Rule 9015. [Abrogated].

Rule 9016. Subpoena.

Rule 45 F. R. Civ. P. applies in cases under the code.

Rule 9018. Secret, confidential, scandalous, or defamatory matter.

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

Rule 9019. Compromise and arbitration.

(a) Compromise.—On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture

trustees as provided in Rule 2002(a) and to such other entities as the court may designate, the court may approve a compromise or settlement.

(b) Authority to compromise or settle controversies within classes.—After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(c) Arbitration.—On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

Rule 9020. Contempt proceedings.

(a) Contempt committed in presence of bankruptcy judge.—Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(b) Other contempt.—Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(c) Service and effective date of order; review.—The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files with the clerk objections prepared in the

manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

(d) Right to jury trial.—Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Rule 9021. Entry of judgment.

Except as otherwise provided herein, Rule 58 F. R. Civ. P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

Rule 9022. Notice of judgment or order.

(a) Judgment or order of bankruptcy judge.—Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail in the manner provided by Rule 7005 on the contesting parties and on other entities as the court directs. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

(b) Judgment or order of district judge.—Notice of a judgment or order entered by a district judge is governed by Rule 77(d) F. R. Civ. P.

Rule 9027. Removal.

(a) Application.

(1) Where filed; form and content.—An application for removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The application shall be verified and contain a short and plain statement of the facts which entitle the applicant to remove and be accompanied by a copy of all process and pleadings.

(2) Time for filing; civil action initiated before commencement of the case under the code.—If the claim or cause of

action in a civil action is pending when a case under the Code is commenced, an application for removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) Time for filing; civil action initiated after commencement of the case under the code.—If a case under the Code is pending when a claim or cause of action is asserted in another court, an application for removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) Bond.—An application for removal, except when the applicant is the trustee, debtor, debtor in possession, or the United States shall be accompanied by a bond with good and sufficient surety conditioned that the party will pay all costs and disbursements incurred by reason of the removal should it be determined that the claim or cause of action was not removable or was improperly removed.

(c) Notice.—Promptly after filing the application and the bond, if required, the applicant shall serve a copy of the application on all parties to the removed claim or cause of action.

(d) Filing in non-bankruptcy court.—Promptly after filing the application and bond, if any, the applicant shall file a copy of the application with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the application. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(e) Remand.—A motion for remand of the removed claim or cause of action shall be filed with the clerk and served on

the parties to the removed claim or cause of action. Unless the district court orders otherwise, a motion for remand shall be heard by the bankruptcy judge, who shall file a report and recommendation for disposition of the motion. The clerk shall serve forthwith a copy of the report and recommendation on the parties. Within 10 days of being served with a copy of the report and recommendation, a party may serve and file with the clerk objections prepared in the manner provided in Rule 9033(b). Review by the district court of the report and recommendation shall be governed by Rule 9033.

(f) Procedure after removal.

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the applicant to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(g) Process after removal.—If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(h) Applicability of Part VII.—The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the

other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the application for removal, whichever period is longest.

(i) [Abrogated].

(j) Record supplied.—When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed.

(k) Attachment or sequestration; securities.—When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

Rule 9028. Disability of a judge.

Rule 63 F. R. Civ. P. applies in cases under the Code.

Rule 9029. Local bankruptcy rules.

Each district court by action of a majority of the judges thereof may make and amend rules governing practice and

procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are not inconsistent with these rules. Rule 83 F. R. Civ. P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F. R. Civ. P., to make rules of practice and procedure not inconsistent with these rules. In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with these rules or those of the district in which the court acts.

Rule 9030. Jurisdiction and venue unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein.

Rule 9033. Review of proposed findings of fact and conclusions of law in non-core proceedings.

(a) Service.—In non-core proceedings heard pursuant to 28 U. S. C. § 157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

(b) Objections: time for filing.—Within 10 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 10 days after being served with a copy thereof. A party objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs.

(c) Extension of time.—The bankruptcy judge may for cause extend the time for filing objections by any party for a

period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing objections must be made before the time for filing objections has expired, except that a request made no more than 20 days after the expiration of the time for filing objections may be granted upon a showing of excusable neglect.

(d) Standard of review.—The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

PART X. UNITED STATES TRUSTEES

Rule X–1002. Petitions, lists, schedules and statements.

(a) Petitions and accompanying materials.

(1) Number of copies.—In addition to the number of copies required to be filed by local rule, there shall be filed one copy of the petition, the list of creditors, the schedules of assets and liabilities, the schedule of current income and expenditures, the statement of financial affairs, the statement of executory contracts, the statement of intention, and the Chapter 13 Statement and any amendments thereto.

(2) Transmission to United States trustee.—The clerk shall forthwith transmit to the United States trustee the additional copies filed pursuant to this subdivision. Written notice of a hearing for an extension of time to file schedules, statements and lists pursuant to Rule 1007(a)(4) and (c) shall be given the United States trustee.

(b) Filing lists by debtor in Chapter 11 reorganization cases.—In chapter 11 cases, the debtor shall file an additional copy of the lists of creditors and of the 20 largest unsecured creditors required by Rule 1007(a) and (d). The lists shall contain additional information as the United States trustee

may require and one copy of each shall be transmitted forthwith by the clerk to the United States trustee.

Rule X–1004. Notification to trustee of selection; blanket bond.

(a) Notification.—The United States trustee shall immediately notify the person selected as the trustee how to qualify and, if applicable, the amount of the bond. A trustee that has filed a blanket bond pursuant to subdivision (b) of this rule and has been selected as trustee in a chapter 7 or chapter 13 case that does not notify the court in writing of rejection of the office within five days after receipt of notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall give written notification to the court and the United States trustee of acceptance of the office within five days after receipt of notice of selection.

(b) Blanket bond.—The United States trustee may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case.

Rule X–1006. Meetings of creditors or equity security holders.

(a) Date and place.—The United States trustee shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later time for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.

(b) Order of meeting.

(1) Meeting of creditors.—The United States trustee or a designee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a trustee or of a creditors' committee. The presiding officer shall have the authority to administer oaths.

(2) Meeting of equity security holders.—If the court orders a meeting of equity security holders pursuant to § 341(b) of the Code, the United States trustee shall fix a date for the meeting and the trustee or a designee shall preside.

(c) Report to the court.—The United States trustee shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing of the dispute. Pending disposition of the dispute by the court, the interim trustee shall continue in office. If no motion for the resolution of the election dispute is made to the court within ten days after the date of the creditors' meeting, the interim trustee shall serve as trustee in the case.

(d) Special meetings.—The United States trustee may call a special meeting of creditors on application or on the United States trustee's own initiative.

(e) Final meeting.—If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $250, the clerk shall mail a summary of the trustee's final account to the creditors with the notice of the meeting, together with a statement of the amount of the claims allowed. The trustee or a designee shall attend the final meeting and shall, if requested, report on the administration of the estate.

Rule X–1008. Notices to United States trustee.

(a) Notices to be furnished to United States trustees.—Unless the United States trustee otherwise requests, the United States trustee shall receive notice of and pleadings relating to:

(1) the matters described in Rule 2002(a)(2), (5), (7), 2002(b), and (f);

(2) applications for approval of the employment of professional persons under Rule 2014;

(3) applications for compensation of professional persons under Rule 2016;

(4) the hearing to consider a disclosure statement pursuant to Rule 3017;

(5) the hearing on the appointment of a trustee or examiner; and

(6) any other matter notice of which is requested by the United States trustee or ordered by the court.

(b) Time for notice to United States trustee.—Subject to Rule 2002, the United States trustee shall receive notice within sufficient time to permit the United States trustee to participate in the matter.

(c) United States trustee need not furnish notice.—The United States trustee shall not be required to give any notice provided for in Rule 2002(a) or (b).

Rule X–1009. Right to be heard; filing papers.

(a) Right to be heard.—The United States trustee may raise and appear and be heard on any issue relating to the United States trustee's responsibilities in a case under the Code.

(b) Filing of papers.—In the interest of effective administration, the court or the United States trustee may require a party in interest to file with the United States trustee a copy of any paper filed with the court.

Rule X–1010. Prohibition of ex parte contacts.

The United States trustee and assistants to and agents of the United States trustee shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communication with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1171 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

WESTERN AIRLINES, INC., ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL.

ON APPLICATION FOR STAY

No. A–716. Decided April 2, 1987

An application to stay the Court of Appeals' order—which, *inter alia*, enjoined the merger of applicants Delta Air Lines and Western Airlines—is granted pending the timely filing and subsequent disposition of a petition for certiorari. Respondent unions, which represented various of Western's employees, filed suits in the District Court, alleging that Western had violated the successorship provisions of the relevant collective-bargaining agreements by failing to secure Delta's agreement to be bound by the agreements, and seeking an order compelling System Board of Adjustment arbitration of the dispute as a "minor" dispute under the Railway Labor Act (RLA). Treating the dispute instead as a "representation" dispute subject to the exclusive jurisdiction of the National Mediation Board under the RLA, the District Court dismissed the complaints for lack of subject matter jurisdiction. However, little more than 12 hours before the merger was scheduled to take place, the Court of Appeals issued its order reversing the District Court's decisions, requiring the entry of orders compelling arbitration, and enjoining the merger pending completion of arbitration or until applicants filed with the Court of Appeals a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, would bind the successor corporation. The timing and substance of the order under the exigencies of this case make compliance with this Court's Rule 44.4 both virtually impossible and legally futile, and this situation presents one of those rare, extraordinary circumstances in which the Rule does not require a request for a stay before the Court of Appeals. Moreover, the order is not divested of its finality within the meaning of 28 U. S. C. § 2101(f) by its provision lifting the injunction upon the filing of the required stipulations, which, to have any significance, must bind applicants to a concession of their position on the only question before the Court of

Appeals. The application for a stay is granted because (1) the reasoning of every other Court of Appeals that has ruled on that issue casts grave doubt on the validity of the Ninth Circuit's action in this case; (2) it is therefore very likely that at least four Justices would vote to grant certiorari, and that applicants are likely to prevail on the merits; and (3) the balance of the equities clearly weighs in applicants' favor, since the cost of enjoining this huge and complicated merger only hours before its long awaited consummation is staggering in its magnitude, since respondents had no entitlement to the concession required by the stipulation, since preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, and since the employees themselves are protected by Delta's assumption of other labor protection provisions.

JUSTICE O'CONNOR, Circuit Justice.

Applicants request that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The underlying dispute in this case involves the division of responsibility for regulation of collective bargaining between airlines and their employees under the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* The Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the application or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U. S. C. § 184. While courts lack authority to interpret the terms of a collective-bargaining agreement, a court may compel arbitration of a minor dispute before the authorized System Board.

"Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by § 6 of the Act, 45 U. S. C. §§ 156, 181.

"Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under § 2, Ninth, of the Act, the National

Mediation Board has exclusive jurisdiction over representation disputes. 45 U. S. C. §§ 152, 181.

Applicants, Western Airlines and Delta Air Lines, entered into an agreement and plan of merger on September 9, 1986. The merger agreement was approved by the United States Department of Transportation on December 11, 1986. On December 16, 1986, shareholder approval of the merger was conferred and Western Airlines became a wholly owned subsidiary of Delta. On the morning of April 1, 1987, the merger of Western Airlines with Delta was scheduled to be completed. See *infra*, at 1308.

Respondents represented various crafts or classes of employees of Western Airlines. The Air Transport Employees (ATE) was designated by the National Mediation Board as the bargaining representative for a unit of Western employees consisting of clerical, office, fleet, and passenger service employees. The International Brotherhood of Teamsters Local 2707 was the certified representative of three crafts or classes employed by Western: mechanics and related employees, stock clerks, and flight instructors. Each union's collective-bargaining agreement has a provision stating that the agreement shall be binding upon successors of the company.

Delta has substantially more employees than Western in the crafts or classes represented by the unions, and these Delta employees had no bargaining representative. Respondents filed grievances alleging that Western violated the successorship provisions of the two collective-bargaining agreements by failing to secure Delta's agreement to be bound by the collective-bargaining agreements between Western and respondent unions. Western refused to arbitrate the grievances, asserting that they necessarily involved representation issues and therefore were within the exclusive jurisdiction of the National Mediation Board.

The unions filed separate complaints in the District Court for the Central District of California, each requesting the

District Court to treat the successor clause dispute as a minor dispute, and compel arbitration of the dispute by the System Adjustment Board. Both complaints were dismissed for lack of subject matter jurisdiction.

On March 17, 1987, the Court of Appeals for the Ninth Circuit entered an interim order directing arbitration of the grievances to proceed before the unions' respective System Adjustment Boards pending appeal.

At approximately 8 p.m., eastern time, March 31—little more than 12 hours before the merger was scheduled to take place—the Court of Appeals for the Ninth Circuit issued the following order:

> "1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.
>
> "2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.
>
> "3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by the court, the injunction of the merger shall terminate.
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> . . . . .
>
> "It is so ordered. A written opinion will be filed as soon as practicable." Application Exh. A.

The timing and substance of the Court of Appeal's order under the exigencies of this case made compliance with Rule 44.4 of this Court, requiring that a motion for a stay first be filed with the court below, both virtually impossible and legally futile. I conclude that this situation presents one of those rare, extraordinary circumstances in which request for

a stay before the Court of Appeals is not required under the Rule.

I also conclude that the judgment of the Court of Appeals, reversing the District Court decisions, requiring the entry of orders compelling arbitration, and enjoining the merger, is final within the meaning of 28 U. S. C. § 2101(f). The Court of Appeals' provision for lifting the injunction upon certain stipulations of applicants does not divest the judgment of finality when, as in this case, the required stipulations, to have any significance, must bind applicants to a concession of their position on the only question before the Court of Appeals: whether the successor clause dispute is within the jurisdiction of the System Adjustment Board or the National Mediation Board.

Moreover, regardless of the finality of the judgment below, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman* v. *Paccar, Inc.*, 424 U. S. 1301, 1304 (1976) (REHNQUIST, J., in chambers).

The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board. In *International Brotherhood of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F. 2d 157 (1983), the Court of Appeals for the Fifth Circuit held that "[t]he [Railway Labor] Act commits disputes involving a determination of who is to represent airline employ-

ees in collective bargaining to the exclusive jurisdiction of the National Mediation Board." The Fifth Circuit stated that "[a] court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims. . . . Moreover, a court may not grant injunctive relief maintaining the status quo if the underlying dispute is representational in nature, because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representation issue." *Id.*, at 161. "Given the Mediation Board's undeniable sole jurisdiction over representation matters," and the practical problems of divided jurisdiction among the other dispute-resolution fora, the Fifth Circuit inferred "a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.*, at 164. The Court of Appeals for the Seventh Circuit treated the question of National Mediation Board jurisdiction over alleged collective-bargaining violations implicating post-merger representation as one settled by "'the overwhelming and well-developed case law,'" and found "no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits." *Air Line Employees* v. *Republic Airlines, Inc.*, 798 F. 2d 967, 968 (quoting Order No. 86C5239 (ND Ill. July 28, 1986)), cert. denied, 479 U. S. 962 (1986). See also *Air Line Pilots Assn. Int'l* v. *Texas Int'l Airlines, Inc.*, 656 F. 2d 16 (CA2 1981); *International Assn. of Machinists* v. *Northeast Airlines, Inc.*, 536 F. 2d 975, 977 (CA1), cert. denied, 429 U. S. 961 (1976); *Brotherhood of Railway & S. S. Clerks* v. *United Air Lines, Inc.*, 325 F. 2d 576 (CA6 1963), cert. dism'd, 379 U. S. 26 (1964). It was upon this overwhelming body of case law that the District Court for the District of Columbia relied when it considered the complaint of the Association of Flight Attendants (AFA), also arising from the Western-Delta merger. AFA's complaint, seeking an order compelling Western to submit to arbitration by the System Board of Adjustment and enjoining

the merger pending completion of proceedings before the System Board, was dismissed. *Association of Flight Attendants, AFL–CIO* v. *Western Airlines, Inc.*, No. 87–0040 (Feb. 20, 1987). On March 31, 1987, the Court of Appeals for the District of Columbia Circuit denied AFA's motions to compel arbitration pending appeal, and its motion for expedited appeal and decision before April 1. *Association of Flight Attendants, AFL–CIO* v. *Western Airlines, Inc.*, No. 87–7040. The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

To appreciate the balance of the equities created by the Ninth Circuit's order, one must focus on the stipulation clause of that order. What was to be gained or lost by the applicants and respondents in this case was not the merger of Western and Delta Airlines alone but the substance of the stipulation on which that merger was conditioned by the Ninth Circuit.

The stipulation which the Ninth Circuit required from Western and Delta Airlines is subject to two interpretations. The first is a requirement that Delta and Western agree that if, after full judicial review of the *jurisdictional* as well as other issues raised, it is determined that the claims presented by respondents fall under the jurisdiction of the System Adjustment Boards, the successor corporation will be bound by the result of the completed arbitration process. Under this interpretation of the stipulation, the successor corporation was required to do no more than adhere to the obligations placed upon it by law, as those obligations are determined in the litigation. Those legal obligations, of course, would exist independent of any stipulation. If the stipulation would leave the applicants free to assert any of their arguments against the jurisdiction of the System Adjustment Boards, the applicants would have remained in the

same position after the stipulation as they were before, and the stipulation would have served no purpose.

The other interpretation of the clause is that, in order to avoid an eleventh hour injunction of the merger, Delta and Western were required to stipulate as to the correctness of respondents' argument that this dispute *did* in fact fall under the jurisdiction of the System Adjustment Boards. As to the balance of equities on this interpretation of the Ninth Circuit's order, they clearly weigh in favor of the applicants. The potential harm that would be suffered by the applicants as a result of the Court of Appeals' injunction of their merger is seriously aggravated by the fact that the order issued on the very eve of the merger's consummation. For several months, the applicants have been planning to combine their large-scale, complex, interrelated, and heavily regulated operations effective April 1, 1987. That planning included the transfer, modification, and cancellation of hundreds of Western's contracts for supplies and services and equipment leases. The approval of the Federal Aviation Administration (FAA) of changes in Western's operating certificates, specifications, and training programs have been sought and received. Maintenance schedules, flight schedules, and staffing schedules have been modified in order to effect a smooth transition to a merged operation on April 1. Large numbers of Western management personnel, without whom it cannot operate as an independent entity, are to be severed effective April 1; many have presumably arranged for new employment. Delta has negotiated for transfer of Western's Mexican and Canadian routes with the respective governments of those countries. It is doubtful that these arrangements can be undone if the merger does not take place as anticipated.

Because of the operational adjustments that are already in place, the FAA has expressed doubt whether Western will be permitted to continue operations should the merger not take place, potentially stranding thousands of travelers.

Employees, expecting to be transferred to new locations after April 1, have sold old homes and bought or leased new ones. Changes in pay, working conditions, and conditions of employment all have been planned for and relied upon in anticipation of the merger. Millions of dollars of advertising have been targeted toward the April 1, 1987, merger date. And the list of consequences goes on. See Application, Affidavit of Hollis Harris and Exhibit 1 thereof; Affidavit of Robert Oppenlander; Affidavit of Russell H. Heil; Affidavit of Whitley Hawkins; Affidavit of C. Julian May; Affidavit of Jason R. Archambeau. The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the "status quo," in the face of this upheaval, would be to blink at reality. Under the second interpretation of the stipulation clause—the only interpretation under which the required stipulations would have had meaning—applicants could prevent these losses only by conceding their argument, supported by the great weight of authority, that their dispute with respondents fell under the jurisdiction of the National Mediation Board. On the other side, respondents had no entitlement to such a concession, obtained under these circumstances, from parties that had otherwise indicated their intent to continue to assert the contrary position on the jurisdictional issue. Before the Court of Appeals the unions argued that completion of the merger would moot their claims under the collective-bargaining agreement to System Board arbitration. For the reasons stated above, I doubt that respondents' claims would ultimately prevail. Moreover, preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, rather than by the inequitable last-minute foisting of a Hobson's choice on the applicants. Finally, the employees themselves are protected by Delta's assumption of the Allegheny-Mohawk Labor Protec-

tive Provisions, requiring the continuation of certain fringe benefits, displacement and dismissal allowances for up to four to five years for employees who lose their jobs or get lesser paying jobs, moving and related costs for employees required to move, integration of seniority lists, and binding arbitration of any dispute relating to the labor protective provisions. See *Allegheny-Mohawk Merger Case*, 59 C. A. B. 22 (1972); Heil Affidavit, ¶ 6.

Because the stipulation upon which the lifting of the injunction was conditioned appears to be either unnecessary or extremely inequitable, depending upon its interpretation, and because it appears to me likely that at least four Justices would vote to grant certiorari and that the applicants are likely to prevail on the merits, I grant the requested stay of the Court of Appeals for the Ninth Circuit's injunction and order compelling arbitration before the System Boards, pending the timely filing and subsequent disposition of a writ of certiorari in this case.

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Indian tribal courts—Federal district court—Diversity jurisdiction.—A federal district court may not exercise diversity jurisdiction before an appropriate Indian tribal court system has first had an opportunity to determine its own jurisdiction over a dispute; where non-Indian petitioner, which was insurer of a ranch located on an Indian reservation and owned by Indians, was held by Tribal Court to be subject to its jurisdiction in an action to recover from ranch for injuries sustained on reservation by respondent ranch employee, an Indian, during course of his employment, and to recover from petitioner for its alleged bad-faith refusal to settle personal injury claim, Federal District Court should not exercise diversity jurisdiction to determine whether Tribal Court had subject-matter jurisdiction over claim against petitioner until tribal court system ultimately decided case. Iowa Mutual Ins. Co. v. LaPlante, p. 9.

JURY INSTRUCTIONS. See **Constitutional Law,** I, 3.

LABOR DISPUTES. See **Federal Employers' Liability Act; Stays.**

LEGISLATIVE VETO OF ADMINISTRATIVE RFGULATIONS. See **Airline Deregulation Act of 1978.**

MERGERS OF AIRLINES. See **Stays.**

MINING. See **Constitutional Law,** V, 2; **Pre-emption of State or Local Law by Federal Law,** 2.

MINING ACT OF 1872. See **Pre-emption of State or Local Law by Federal Law,** 2.

MOOTNESS. See **Pre-emption of State or Local Law by Federal Law,** 2.

MUNICIPALITY'S LIABILITY FOR INADEQUATELY TRAINING EMPLOYEES. See **Certiorari.**

NATIONAL FOREST MANAGEMENT ACT. See **Pre-emption of State or Local Law by Federal Law,** 2.

NAVIGATIONAL SERVITUDE OF FEDERAL GOVERNMENT. See **Constitutional Law,** V, 3.

OFFICE SEARCHES BY GOVERNMENT EMPLOYERS. See **Constitutional Law,** IV, 4.

OFFSHORE OIL AND GAS LEASES. See **Alaska National Interest Lands Conservation Act.**

OHIO. See **Constitutional Law,** I, 3.

OIL LEASES. See **Alaska National Interest Lands Conservation Act.**

"OPEN FIELDS" DOCTRINE. See **Constitutional Law,** IV, 3.

ORGANIZED CRIME CONTROL ACT OF 1970. See **Pre-emption of State or Local Law by Federal Law**, 1.

OUTER CONTINENTAL SHELF LANDS ACT. See **Alaska National Interest Lands Conservation Act.**

PARENT AND CHILD. See **Constitutional Law**, I, 1.

PARTIES. See **Appeals**, 1.

PENNSYLVANIA. See **Constitutional Law**, V, 2.

"PLAIN VIEW" DOCTRINE. See **Constitutional Law**, IV, 2.

POLE ATTACHMENTS ACT. See **Constitutional Law**, V, 1.

POLICE. See **Constitutional Law**, II.

PRE-EMPTION OF STATE OR LOCAL LAW BY FEDERAL LAW.

1. *Gambling on Indian reservations—Application of state or local laws.*—California state and local laws regulating or prohibiting various forms of gambling were pre-empted by federal laws and policies promoting and overseeing bingo and other gambling games conducted by Indian Tribes on reservations in California; Congress did not consent to application of California law either by Pub. L. 280, which relates to application of state "criminal" laws to conduct in Indian country, or by Organized Crime Control Act of 1970. California v. Cabazon Band of Mission Indians, p. 202.

2. *National forest—Mining on federal lands—State permit.*—Neither Forest Service regulations nor federal land use statutes pre-empted appellant California Coastal Commission's requiring appellee to obtain, pursuant to state law, a permit for mining limestone on unpatented federally owned lands in a national forest located in California; case was not moot even though appellee's federally approved 5-year plan for mining on such lands expired during course of litigation. California Coastal Comm'n v. Granite Rock Co., p. 572.

PRELIMINARY INJUNCTIONS. See **Alaska National Interest Lands Conservation Act.**

PRETRIAL DISCOVERY BY ACCUSED. See **Constitutional Law**, I, 1.

PROBATION. See **Criminal Law.**

PRODUCTS LIABILITY ACTIONS. See **Constitutional Law**, I, 2.

PROPERTY TAXES. See **Airport and Airway Improvement Act of 1982.**

PUBLIC EMPLOYEES. See **Certiorari; Civil Rights Act of 1964; Constitutional Law**, II; IV, 4; **Rehabilitation Act of 1973.**

PUBLIC LANDS. See **Alaska National Interest Lands Conservation Act; Pre-emption of State or Local Law by Federal Law**, 2.

QUOTAS TO REMEDY EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law**, II.

RACIAL DISCRIMINATION. See **Constitutional Law**, II.

RAILWAY LABOR ACT. See **Federal Employers' Liability Act; Stays.**

REFUGEES. See **Immigration and Nationality Act.**

REHABILITATION ACT OF 1973.

"Handicapped individual"—Persons with contagious diseases.—For purposes of § 504 of Act, prohibiting exclusion from participation in any federally assisted program of any "otherwise qualified handicapped individual," a person afflicted with contagious disease of tuberculosis—such as respondent schoolteacher, who was discharged from employment by petitioners—may be a "handicapped individual," but determination whether such a person is "otherwise qualified" requires an individualized inquiry by court and appropriate findings of fact. School Bd. of Nassau County v. Arline, p. 273.

RELEASE OF CIVIL RIGHTS CLAIM. See **Civil Rights Act of 1871.**

RELIGIOUS FREEDOM. See **Constitutional Law**, III.

RIPARIAN RIGHTS. See **Constitutional Law**, V, 3.

RULE ENABLING ACT. See **Appeals**, 2.

SCHOOLTEACHERS. See **Rehabilitation Act of 1973.**

SEARCHES AND SEIZURES. See **Constitutional Law**, IV.

SELF-DEFENSE. See **Constitutional Law**, I, 3.

SENTENCES. See **Criminal Law.**

SEVERABILITY OF STATUTE. See **Airline Deregulation Act of 1978.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964.**

SIXTH AMENDMENT. See **Constitutional Law**, I, 1.

SOUTH DAKOTA. See **Airport and Airway Improvement Act of 1982.**

STANDARD OF PROOF IN DEPORTATION PROCEEDINGS. See **Immigration and Nationality Act.**

STATE COURTS' JURISDICTION OVER FOREIGN MANUFACTURERS. See **Constitutional Law**, I, 2.

STATE PROPERTY TAXES. See **Airport and Airway Improvement Act of 1982.**

STAYS. See also **Appeals,** 2.

Airline merger.—Application to stay Court of Appeals' order—which, *inter alia,* enjoined applicant airlines' merger—is granted pending filing and disposition of a certiorari petition. Western Airines, Inc. v. Teamsters (O'CONNOR, J., in chambers), p. 1301.

SUPREME COURT. See also **Constitutional Law,** I, 1.

1. Amendments to Bankruptcy Rules, p. 1077.
2. Amendments to Federal Rules of Civil Procedure, p. 953.
3. Amendments to Federal Rules of Criminal Procedure, p. 1041.
4. Amendments to Federal Rules of Evidence, p. 1023.

SUSPENSION OF SENTENCES. See **Criminal Law.**

TAKING OF PRIVATE PROPERTY. See **Constitutional Law,** V.

TAMPERING WITH WITNESSES. See **Civil Rights Act of 1871.**

TAXES. See **Airport and Airway Improvement Act of 1982; Internal Revenue Code.**

TELEVISION. See **Constitutional Law,** V, 1.

TRIBAL COURTS. See **Jurisdiction.**

TUBERCULOSIS AS HANDICAP. See **Rehabilitation Act of 1973.**

UNEMPLOYMENT COMPENSATION. See **Constitutional Law,** III.

UNITED STATES' NAVIGATIONAL SERVITUDE. See **Constitutional Law,** V, 3.

UTILITY POLES USED BY CABLE TELEVISION SYSTEM. See **Constitutional Law,** V, 1.

VETO BY CONGRESS OF ADMINISTRATIVE REGULATIONS. See **Airline Deregulation Act of 1978.**

WAIVER OF CIVIL RIGHTS CLAIM. See **Civil Rights Act of 1871.**

WARRANT FOR APARTMENT SEARCH. See **Constitutional Law,** IV, 5.

WASTE DUMPSITES. See **Appeals,** 1.

WATERS. See **Constitutional Law,** V, 3.

WELFARE BENEFITS. See **Constitutional Law,** III.

WITNESSES. See **Civil Rights Act of 1871; Constitutional Law,** I, 1.

WORDS AND PHRASES.

1. *"Otherwise qualified handicapped individual."* § 504, Rehabilitation Act of 1973, 29 U. S. C. § 794. School Bd. of Nassau County v. Arline, p. 273.

2. *"Trade or business."* Internal Revenue Code of 1954, 26 U. S. C. § § 62(1), 162(a). Commissioner v. Groetzinger, p. 23.

WRECKING YARD SEARCHES. See **Constitutional Law,** IV, 1.

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